DECISION

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

Application by CoreStaff NSW Pty Ltd T/A CoreStaff NSW
(AG2018/5111)

CORESTAFF NSW BLACK COAL ENTERPRISE AGREEMENT 2018

Coal industry

DEPUTY PRESIDENT SAUNDERS NEWCASTLE, 25 JUNE 2019

Application for approval of an enterprise agreement – BOOT – NES – explanation of terms of the enterprise agreement and their effect – genuine agreement – undertakings – enterprise agreement approved.

Introduction and background

[1] On 12 September 2018, CoreStaff NSW Pty Ltd (***CoreStaff***) applied for approval of the CoreStaff NSW Black Coal Mining Industry Enterprise Agreement 2018 (***Enterprise Agreement***), which covers employees of CoreStaff who are deployed to work in production or engineering roles on a CoreStaff client site in New South Wales that would otherwise be covered by the Black Coal Mining Industry Award 2010 (***BC Award***).

[2] The CFMMEU accepts that it is not, and was not at any time, a bargaining representative for the Enterprise Agreement. I exercised my discretion under s 590 of the *Fair Work Act* 2009 (Cth) (***Act***) to permit the CFMMEU to be heard in relation to CoreStaff's application for approval of the Agreement. CoreStaff did not object to this course.

[3] I heard the application for approval of the Agreement on 24 May 2019. CoreStaff adduced evidence from Mr Adrian Button, CoreStaff Business Manager – Newcastle & Hunter, and made submissions in support of its application for approval of the Agreement. The CFMMEU did not call any witnesses to give evidence at the hearing, but did tender documents and make submissions.

Outline of CFMMEU's concerns

[4] The CFMMEU contends that the Agreement should not be approved for the following reasons:

(a) First, the Fair Work Commission (***Commission***) could not be satisfied that the Enterprise Agreement does not contravene s 55 of the Act, by excluding provisions of the National Employment Standards (***NES***);

(b) Secondly, the Commission could not be satisfied that the Enterprise Agreement passes the better off overall test (***BOOT***) as required by s 186(2)(d) of the Act;

(c) Thirdly, the Commission could not be satisfied that the Enterprise Agreement has been genuinely agreed to in accordance with s 186(2)(a) and s 188 of the Act; and

(d) Fourthly, the Commission should exercise its discretion under s 192 of the Act to refuse to approve the Enterprise Agreement on the basis that compliance with its terms would make CoreStaff liable to a civil penalty provision of the Act.

Undertakings

[5] Mr Martin Rodgers, CoreStaff General Manager – NSW, has provided the following undertakings to address a number of concerns raised by the Commission and the CFMMEU (***Undertakings***):

1. I have the authority given to me by CoreStaff to provide this undertaking in relation to this application before the Fair Work Commission.

2. The Agreement will be read and interpreted subject to the National Employment Standards (**NES**) and, where any term of the Agreement is inconsistent with the NES and provides a lesser entitlement than that provided by the NES, the NES will apply to the extent of that inconsistency.

3. For the purposes of consultation with employees in the case of a change referred to in cl.9.1(a) of the Agreement, CoreStaff will:

    a. as soon as practicable after a definite decision has been made by CoreStaff to make the change(s), discuss with the employees and their representatives, if any, the introduction of the changes, effects the changes are likely to have on employees and measures to avert or mitigate the adverse effects of such changes;

    b. subject to clause 9.6, provide in writing to employees (and their representatives, if any) all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees; and

    c. give prompt consideration to matters raised by the employees and/or their representatives about the changes.

4. CoreStaff undertakes that clause 10.5 of the Agreement will be applied as if the subclause reads "Where the matter in dispute remains unresolved, the Fair Work Commission may exercise any method of dispute resolution permitted by the Act it considers appropriate to ensure the settlement of the dispute" only.

5. CoreStaff will, at the time of engagement of a part – time employee, agree in writing on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and

finishing times each day. Any agreed variation to the regular pattern of work will be recorded in writing. All time worked in excess of the hours as mutually arranged will be overtime.

6. With respect to clause 12.1(b) of the Agreement:

    a. The calculation referred to at cl.12.1(b)(iii) of the Agreement will also be provided to a flat rate employee prior to any change to that employee's assignment or change to their designated work cycle and/or rostered hours of work in a particular assignment. The calculation referred to at cl.12.1(b)(iii) of the Agreement will also be provided to a base rate employee before any change is made to pay that employee a flat rate of pay in accordance with clause 12.1(b) of the Agreement;

    b. Where a flat rate employee's employment ends or they cease to be paid a flat rate part-way through a designated work cycle, CoreStaff will calculate the amount that would have been payable to the employee (for that of the part designated work cycle) if the employee was a base rate employee and paid in accordance with cl.12.1(a) of the Agreement. Where that amount is higher than the amount the employee was actually paid for that part of the designated work cycle, CoreStaff will pay the difference to the employee, with timing of payment to be within 72 hours of the employment ceasing or, for an on-going employee, the employee ceasing to be paid a flat rate.

    c. Any hours worked by a flat rate employee in addition to the hours required in their specific roster will be paid in accordance with cl.26.2(b) of the Agreement.

    d. Employees who are not required to work a designated work cycle or specific roster must be engaged as base rate employees and paid in accordance with cl.12.1(a) of the Agreement.

    e. An employee's designated work cycle must not exceed 12 weeks.

7. Clause 16 of the Agreement will not be applied by CoreStaff and will be of no effect.

8. The meal allowance paid under cl.17.2 of the Agreement will be $15.32 for each meal.

9. For the purposes of cl.32.1 of the Agreement, the starting and finishing place of a shift will be in the designated pre-start meeting room or crib room (located away from the pit and in or near the administrative building compound on site) or at any other place specifically agreed between CoreStaff and the majority of the affected employees. Any time spent travelling between that place and work equipment will be considered time worked.

10. Where personal leave provided by cl.34 of the Agreement is taken:

a. no deduction from the employee's personal leave entitlement will be made if the absence is for fewer than half the ordinary hours component of the employees shift; and

b. in all other cases, the full ordinary hours component of the shift will be deducted for each absence.

11. Employees will only be permitted to take accrued personal leave entitlements under cl.41(d) of the Agreement where the employee's circumstances would entitle them to personal leave under cl.34 of the Agreement and the NES.

12. Subject to cl.44.2(b) and 44.5 of the Agreement, where an employee's employment is terminated because:

    a. CoreStaff no longer requires the employee's job done by anyone due to reasons other than those specified in cl.44.2(a)(i) of the Agreement; or

    b. of the insolvency or bankruptcy of CoreStaff

    the employee will be provided with severance pay equal to one ordinary week's pay for each completed year of employment. For the avoidance of doubt, cl.44.4 of the Agreement will not apply in this circumstance.

13. CoreStaff will not employ 'maximum term' employees under the Agreement and will not apply the terms of cl.43.7(d) of the Agreement.

14. The words 'in excess of 70 hours' at cl.44.7 of the Agreement will be applied by CoreStaff as meaning '70 or more hours'.

[6] The CFMMEU is not opposed to Undertakings 3, 5, 8, 10, 12 and 14. I accept that those Undertakings resolve the concerns raised in relation to those matters. I address Undertakings 2, 4, 6, 7, 9, 11 and 13 below.

[7] Although the CFMMEU does not oppose Undertakings 3, 5, 8, 10, 12 and 14, it submits that, if accepted, the Undertakings would be of a quantity and nature to constitute a substantial change to the Enterprise Agreement in a manner not allowed for by s 190(3) of the Act. I address these arguments below.

NES

General principles

[8] One of the general requirements about which the Commission must be satisfied in order to approve an enterprise agreement is that the terms of the enterprise agreement do not contravene s 55 of the Act (s 186(2)(c) of the Act).

[9] Pursuant to s 55 of the Act, an enterprise agreement must not exclude the NES or any provision of the NES, but it is permissible for an enterprise agreement to include terms that:

- are ancillary or incidental to the operation of an entitlement under the NES or terms that supplement the NES, but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the NES (s 55(4) of the Act); or

- have the same (or substantially the same) effect as provisions of the NES, whether or not ancillary or supplementary terms are included (s 55(5) of the Act).

[10] A term of an enterprise agreement has no effect to the extent that it contravenes s 55 of the Act.

Submissions

[11] The CFMMEU contends that the Enterprise Agreement either excludes a provision of the NES or is detrimental to employees as compared to the NES in the following ways:

(a) Clause 43.8 of the Enterprise Agreement excludes an employee's entitlement to notice or payment in lieu of notice in relation to the termination of their employment if they are dismissed for "serious misconduct". Clause 43.8 goes on to provide what are said to be examples of serious misconduct, but those examples extend the meaning of the term beyond the meaning of serious misconduct as it is used in s 123 of the Act (see the definition in s 12 of the Act and regulation 1.07 of the *Fair Work Regulations 2009*). In particular, the CFMMEU submits that a breach of company policy, discrimination or harassment of "any kind", or participating in illegal activities (in so far as such activity occurs outside the workplace), would clearly not fall into the category of serious misconduct contemplated by s 123 of the Act unless, in doing so, the employee could be characterised as exhibiting conduct that is wilful or deliberate and that is inconsistent with the continuation of the employment contract;

(b) Clause 43.8 of the Enterprise Agreement appears to limit, so the CFMMEU contends, the entitlements paid to an employee if they are dismissed for serious misconduct to wages earned up until the time of termination, whereas s 90 of the Act provides that where employment ends, an employer must pay the employee the amount that would have been payable to the employee had the employee taken a period of untaken accrued leave;

(c) Clause 37.1 of the Enterprise Agreement refers to an employee being "required to work on public holiday". The CFMMEU contends that an enterprise agreement which requires an employee to work on a public holiday is contrary to the NES because it excludes an employee's ability to refuse to work on public holiday on reasonable grounds in accordance with s 114(3) and (4) of the Act;

(d) Clause 33.3 of the Enterprise Agreement provides that an employee "must endeavour to provide CoreStaff at least 4 weeks' notice of intention to take annual leave". The CFMMEU submits that this clause is detrimental as compared to the right under the NES to request to take leave and not have it unreasonably refused (s 88 of the Act); and

(e) Clause 41 of the Enterprise Agreement provides that an employee may take "any accrued personal leave entitlements during a shutdown". The CFMMEU submits that this clause is inconsistent with the NES because, in effect:

(i) it allows for the cashing out of personal leave in a manner contrary to s 101 of the Act and if it was utilised would be contrary to s 100 of the Act; and/or

(ii) if utilised and leave is deducted for such a person, would be contrary to the accumulation of leave as it is required by s 96 of the Act.

[12] CoreStaff disputes the veracity of the CFMMEU's concerns with respect to some of the provisions of the Enterprise Agreement which it alleges are contrary to s 55 of the Act and submits that, in some cases, these appear to derive from an overly technical or pedantic approach to the interpretation of the relevant provisions of the Enterprise Agreement. Notwithstanding these matters, CoreStaff has provided Undertaking 2 to reinforce the precedence of the NES with respect to the Enterprise Agreement.

[13] The CFMMEU is not opposed to Undertaking 2, but submits that it is flawed to the extent that it is relied upon for the approval of the Enterprise Agreement. The CFMMEU submits that Undertaking 2 provides a bare statement that, in effect, the NES will have primacy over matters otherwise dealt with in the Enterprise Agreement. In this way, the CFMMEU contends that Undertaking 2 appears intended to do little more than that restate the effect of s 56 of the Act. Notably, Undertaking 2 does not identify in what way(s) the Enterprise Agreement is inconsistent with the NES, nor which clauses of the Enterprise Agreement may be impacted by Undertaking 2. The CFMMEU submits that it cannot have been the intention of the Parliament in enacting the relevant provisions that s 186(2)(c) could be satisfied simply by an applicant providing a generic undertaking to the effect of the Act. If undertakings are to be accepted to address contraventions of s 55 of the Act, the CFMMEU submits that the undertaking should deal expressly with the substantive entitlements in the enterprise agreement to which they apply.

[14] The CFMMEU also submits that Undertaking 2 does not purport to vary the substantive terms of the Enterprise Agreement, whether by way of incorporating the NES or introducing a new entitlement into the Enterprise Agreement. Rather, Undertaking 2 states that if any term of the Enterprise Agreement is inconsistent with the NES and provides a lesser entitlement than that provided by the NES, it is the NES (not the term of the Enterprise Agreement) that applies to the extent of any inconsistency. The CFMMEU contends that Undertaking 2 does no more work than s 56 of the Act, and possibly less. The CFMMEU goes on to submit that, should Undertaking 2 be accepted, the contravening terms of the Enterprise Agreement would remain in the Enterprise Agreement, with Undertaking 2 providing little more than a declaratory note in the published decision of the Commission that the NES applies. This would mean, so the CFMMEU contends, that, for example, if an employee were to bring legal action because the employer was providing benefits less than the NES, the alleged contravention would be a contravention of the NES, actionable under s 44 of the Act, not under s 50 of the Act as a breach of a term of the Enterprise Agreement, because the Enterprise Agreement would continue to include terms that are less beneficial or inconsistent with the NES. The CFMMEU further submits that although s 191 of the Act provides that an undertaking is taken to be a term of the Enterprise Agreement, Undertaking 2 brings no substantive or actionable entitlement.

[15] The CFMMEU submits that the Commission should not accept undertakings with respect to the NES unless:

(a) the Commission has identified the relevant provision(s) of the Enterprise Agreement about which it has concerns in relation to a contravention of the NES;

(b) the undertakings, if accepted, would have the effect of varying the Enterprise Agreement so that the Commission's concerns were met and the Enterprise Agreement did not contain terms that were detrimental as compared to the NES;

(c) the undertakings meet the requirements of s 190(3), that is, they are not likely to cause financial detriment or result in substantial changes to the Enterprise Agreement (the CFMMEU contends that in order to meet this requirement, the Commission would need to assess in what manner the Enterprise Agreement's particular terms would be affected by the undertaking); and

(d) the applicant has met the procedural requirements in s 190(4) and (5) of the Act.

[16] The CFMMEU submits that on the material lodged by CoreStaff, the Commission could not be satisfied of these matters.

Conclusion re whether terms of the Enterprise Agreement contravene s 55 of the Act

First NES concern – serious misconduct

[17] Clause 43.8 of the Enterprise Agreement provides that no notice is required to be given to an employee who is dismissed for serious misconduct. The clause then states that "examples of serious misconduct *may* include but are not limited to" and lists a series of examples. Some of the examples are, by definition, serious matters, such as "participating in illegal activities including possession of drugs or weapons", while the seriousness of other examples will depend on the circumstances, such as "breaching CoreStaff's company policies". Construed in context, the word "may" in the phrase "examples of serious misconduct may include but are not limited to" expresses uncertainty as to whether the particular example will satisfy what is meant by "serious misconduct". That is, whether or not any particular conduct is serious misconduct will depend on the circumstances. The words "but are not limited to" in the phrase "examples of serious misconduct may include but are not limited to" means that the examples provided are non-exhaustive. Consequently, in my view, clause 43.8 of the Enterprise Agreement does not, on its proper construction, extend the meaning of the term "serious misconduct" beyond its meaning in s 123 of the Act, which picks up the definition in regulation 1.07 of the *Fair Work Regulations 2009*. Accordingly, I am of the opinion that clause 43.8 of the Enterprise Agreement, insofar as it deals with "serious misconduct", does not exclude the NES or any provision of the NES, nor is it detrimental to employees. In any event, I am satisfied for the reasons given below that Undertaking 2 adequately addresses the concern identified by the CFMMEU.

Second NES concern – entitlements on termination for serious misconduct

[18] I do not accept the CFMMEU's argument that clause 43.8 of the Enterprise Agreement gives CoreStaff the right to withhold entitlements such as accrued annual leave from an employee who is dismissed for serious misconduct. Clause 43.8 provides that "no notice is

required to be given and employees [who are dismissed for serious misconduct] are only entitled to wages earned up to the time of termination". Read in context, the expression "only entitled" is limited to the entitlement to wages. That is, an employee who is dismissed for serious misconduct is only entitled to be paid wages insofar as they have been "earned up to the time of termination". This part of the clause follows immediately after the statement "no notice is required to be given". This context suggests that what is being addressed by the clause is the impact of a dismissal for serious misconduct on an employee's entitlement to notice of termination or a payment in lieu of such notice. In other words, an employee who has been dismissed for serious misconduct has no entitlement to notice of termination or payment in lieu of notice, whereas an employee who is dismissed on other grounds is entitled to notice of termination or "payment in lieu of notice which will comprise of the time the employee would have ordinarily worked during the notice period" (clause 43.5 of the Enterprise Agreement). Further, clear words would be required to extinguish an accrued entitlement, such as to annual leave. Clause 43.8, construed in context, does not contain any such clear words. Accordingly, I am of the opinion that clause 43.8 of the Enterprise Agreement, insofar as it deals with entitlements on termination for "serious misconduct", does not exclude the NES or any provision of the NES, nor is it detrimental to employees. In any event, I am satisfied for the reasons given below that Undertaking 2 adequately addresses the concern identified by the CFMMEU.

Third NES concern – requirement to work on public holidays

[19] Clause 37.1 of the Enterprise Agreement states that "Base rate employees required to work on a public holiday will be paid treble time …" The clause does not expressly state that employees, or base rate employees, are required to work on a public holiday. It confers the entitlement of payment at treble time to any base rate employee who is required to work on a public holiday. The NES permits an employee to refuse to work a public holiday if the request for them to work on the applicable public holiday is not reasonable or the refusal is reasonable. Otherwise, the effect of the relevant NES provisions is that the employee is required to work on the applicable public holiday.[1]

[20] Clauses 37.2 and 37.3 of the Enterprise Agreement govern the payments which must be made to a flat rate employee who works on a public holiday. The focus of these provisions on payments, rather than an obligation to work on a public holiday, supports clause 37.1 being interpreted as a payment provision.

[21] For the reasons given, I do not accept the CFMMEU's argument that clause 37.1, on its proper construction, is contrary to the NES because it excludes an employee's ability to refuse to work on public holiday on reasonable grounds in accordance with s 114(3) and (4) of the Act. Clause 37.1 of the Enterprise Agreement confers on an employee to whom a base rate is paid the right to receive payment at treble time if they are required to work on a public holiday. The obligation to work on a public holiday is governed by the NES. In any event, I am satisfied for the reasons given below that Undertaking 2 adequately addresses the concern identified by the CFMMEU.

[1] Section 114 of the Act

Fourth NES concern – notice of intention to take annual leave

[22] Clauses 33.3 and 33.4 of the Enterprise Agreement govern the taking of annual leave by employees:

> "33.3 Employees must endeavour to provide CoreStaff at least 4 weeks' notice of intention to take annual leave to allow for operational requirements of our clients sites.
>
> 33.4 Annual leave will be granted pending the operational requirements of each client's site at the time of the application but will not unreasonably be refused."

[23] Clause 33.3 of the Enterprise Agreement deals with the giving of notice by an employee to take annual leave. It requires an employee to *endeavour* to provide CoreStaff with at least 4 weeks' notice of their *intention* to take annual leave. Clause 33.3 does not give CoreStaff a right to refuse an employee's request to take annual leave if they have not provided at least 4 weeks' notice. The right to refuse a request to take annual leave is governed by clause 33.4; a request to take annual leave must not be unreasonably refused. In that way, clause 33.4 has the same effect as s 88(2) of the Act. In my view, clause 33.3 of the Enterprise Agreement is a provision which deals with the taking of paid annual leave, otherwise than in accordance with s 93(3) of the Act. Section 93(4) of the Act permits enterprise agreements to include such terms.[2] It follows that clause 33.3, construed in context, does not exclude the NES or any provision of the NES, nor is it detrimental to employees. In any event, I am satisfied for the reasons given below that Undertaking 2 adequately addresses the concern identified by the CFMMEU.

Fifth NES concern – taking personal leave during a shut down

[24] Clause 41 of the Enterprise Agreement permits employees to "take any accrued personal leave entitlements" during a shut down. The text of clause 41 does not suggest that an employee needs to be sick or otherwise entitled to take personal leave in order to take such leave during a shut down. Additional words would need to be added to, or read into, clause 41 to give it such a construction. I agree with the CFMMEU's submission that this part of clause 41 of the Enterprise Agreement is inconsistent with and therefore excludes provisions of the NES because, in effect, it allows for the cashing out of personal leave in a manner contrary to s 101 of the Act and if it was utilised would result in a contravention of s 100 of the Act.

[25] CoreStaff submits that Undertakings 2 and 11 adequately addresses the concerns identified by the CFMMEU. I address Undertaking 2 further below. As to Undertaking 11, the CFMMEU contends that it should not be accepted by the Commission on the basis that it is capable of satisfying a concern that clause 41 is inconsistent with the NES. The CFMMEU submits it is unclear how personal leave can be taken for a period where an employee is not otherwise required to work; for example, paid personal leave cannot be granted on a Sunday for a Monday to Friday employee who is not rostered to work weekends on a Sunday. The CFMMEU submits that if paid personal leave is to be used at all in relation to a situation where the employer has notified employees that they are not required because of a shut down, it would appear that that leave could only be utilised by using the cashing out mechanism

[2] Four yearly review of modern awards [2015] FWCFB 5771 at [121]-[128]

allowed for in the Act. Undertaking 11 does not purport to use such a mechanism. The effect of Undertaking 11, so the CFMMEU contends, would therefore appear to be removing an employee's purported ability to use personal leave in the situation of a shut down. While this would make the clause consistent with the Act, and therefore no longer contravening s 55 of the Act, the CFMMEU submits that Undertaking 11 is not an insignificant change to the Agreement and, if applied, would be detrimental for employees who may have excess to accrued personal leave. In those circumstances, the CFMMEU submits that Undertaking 11 should not be accepted because of the terms of s 190(3) of the Act.

[26] During a period when CoreStaff has shut down its operations, clause 41 of the Enterprise Agreement permits employees to take annual leave (whether accrued or in-advance of an accrued entitlement), leave without pay, or accrued personal leave. The effect of Undertaking 11 is that an employee cannot take accrued personal leave during a shut down unless they have such leave accrued and their circumstances entitle them to take personal leave. For example, the employee may be ill and therefore unfit to attend work. It follows, in my view, that Undertaking 11, if accepted, would mean there would be no cashing out of an entitlement to personal leave. Instead, personal leave could be taken where an employee had an entitlement to take such leave.

[27] As to the CFMMEU's contention that it is unclear how personal leave can be taken for a period where an employee is not otherwise required to work, the NES permits that to occur in particular circumstances. For example, the effect of s 89(2) of the Act is that if an employee becomes ill whilst on annual leave in circumstances where they would be entitled to paid personal leave if they were at work, then the days concerned do not count as days of paid annual leave and instead will be taken from the employee's accrued entitlement to personal leave. Clause 41 of the Enterprise Agreement, read together with Undertaking 11, operates in a similar manner. That is, if an employee becomes ill during a shut down whilst on annual leave or leave without pay in circumstances where they would be entitled to paid personal leave if they were at work, then the days concerned do not count as days of paid annual leave or leave without pay and instead will be taken from the employee's accrued entitlement to personal leave and paid as such. Having regard to that analysis, I do not agree that accepting Undertaking 11 is likely to cause financial detriment to any employee or result in substantial changes to the Enterprise Agreement, nor do I accept the CFMMEU's other criticisms of Undertaking 11. Further and in the alternative, I am satisfied that Undertaking 2 resolves any NES related concern in relation to clause 41(d) of the Enterprise Agreement.

General concern with Undertaking 2 (NES precedence)

[28] The Commission may accept an undertaking in relation to an enterprise agreement in respect of which an application for approval has been made if the Commission has a concern that the enterprise agreement does not meet the requirements set out in sections 186 and 187 of the Act,[3] and the remaining requirements of s 190 are met. One of the requirements of s 186 is that the terms of the enterprise agreement do not contravene section 55 of the Act.[4] As set out above, s 55(1) of the Act provides that an enterprise agreement must not exclude the NES or any provision of the NES. Accordingly, if the Commission has a concern that the terms of an enterprise agreement exclude any provision of the NES, the Commission may

[3] Section 190(1) of the Act

[4] Section 186(2)(c) of the Act

accept an undertaking if it is satisfied that the undertaking meets the concern and the remaining requirements of s 190 are met.

[29] I do not accept the general submissions made by the CFMMEU in relation to Undertaking 2. There is no requirement in the Act for an undertaking to identify in what way(s) the enterprise agreement is inconsistent with the NES, nor is there a requirement to identify which clauses of the enterprise agreement may be impacted by the undertaking. There is no requirement in the Act for an undertaking to purport to vary the substantive terms of an enterprise agreement. If an undertaking which meets the requirements of s 190 is given and accepted by the Commission, it is taken to be a term of the enterprise agreement.[5] It follows that if Undertaking 2 is accepted by the Commission and the Enterprise Agreement is approved, an employee to whom the Enterprise Agreement applies would be able to enforce the obligation imposed by Undertaking 2 as a term of the Enterprise Agreement, in the event that CoreStaff failed to comply with that obligation.

[30] For the reasons stated above, I am concerned that the terms of the Enterprise Agreement exclude provisions of the NES. I am satisfied that if I accept Undertakings 2 (and 11), my concerns will be met and the Enterprise Agreement will not exclude the NES or any provision of the NES.

BOOT

General principles

[31] I must be satisfied that the Enterprise Agreement passes the BOOT before I can approve it.[6] Section 193(1) of the Act provides that an enterprise agreement passes the BOOT if the Commission is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the enterprise agreement would be better off overall if the enterprise agreement applied to the employee than if the relevant modern award applied to the employee. The "test time" is when the application for approval of the enterprise agreement is made.[7]

[32] In *Armacell Australia Pty and Others* the application of the BOOT was explained by the Full Bench in the following manner:[8]

> "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."

[33] The BOOT is not applied as a line by line analysis. It is a global test requiring consideration of advantages and disadvantages to award covered employees and prospective award covered employees.[9] An enterprise agreement may pass the test even if some award

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[5] Section 191(1) of the Act

[6] s.186(2)(d) of the Act

[7] s.193(6) of the Act

[8] [2010] FWAFB 9985 at [41]

[9] *SDA v Beechworth Bakery Employee Co Pty Ltd* [2017] FWCFB 1664 at [12]

benefits have been reduced, as long as overall, those reductions are more than offset by the benefits of the enterprise agreement.[10]

[34] Ultimately the application of the BOOT is a matter that involves the exercise of discretion, and it involves a degree of subjectivity or value judgement.[11]

[35] It is clear from the references to "each … employee" in section 193(1) of the Act that every employee to whom the enterprise agreement will apply, if approved, must be better off overall than if the relevant modern award applied to the employee. It is not enough that a majority or most of the employees to whom the enterprise agreement will apply, if approved, will be better off overall than if the relevant modern award applied.[12]

[36] Section 193(7) of the Act is a facultative provision which permits the Commission to be satisfied, in particular circumstances, that all employees in a class of employees will be better off if the agreement applied to that class than if the relevant modern award applied to that class. Section 193(7) provides as follows:

> "For the purposes of determining whether an enterprise agreement passes the better off overall test, if a class of employees to which a particular employee belongs would be better off if the agreement applied to that class than if the relevant modern award applied to that class, the FWC is entitled to assume, in the absence of evidence to the contrary, that the employee would be better off overall if the agreement applied to the employee."

[37] Section 193(7) was explained in the Explanatory Memorandum to the *Fair Work Bill 2008* as follows:

> "818. Although the better off overall test requires FWA to be satisfied that each award covered employee and each prospective award covered employee will be better off overall, it is intended that FWA will generally be able to apply the better off overall test to classes of employees. In the context of the approval of enterprise agreements, the better off overall test does not require FWA to enquire into each employee's individual circumstances."

[38] The selection of a class for the purpose of s 193(7) of the Act will only be of utility if the enterprise agreement affects the members of the class in the same way such that there is likely to be a common BOOT outcome.[13]

[39] It is also important to recognise that the BOOT is hypothetical, because it requires an assessment of whether each employee, and each "prospective award covered employee", *would* be better off overall if the enterprise agreement applied to him or her than if the relevant award did.[14]

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[10] *Re Australia Western Railroad Pty Ltd T/A ARG – A QR Company* [2011] FWAA 8555 at [8]; *NTEIU v University of New South Wales* [2011] FWAFB 5163 at [47]

[11] *TWU v Jarman Ace Pty Ltd* [2014] FWCFB 7097 at [28]

[12] *Loaded Rates Agreements* [2018] FWCFB 3610 at [100]

[13] *Loaded Rates Agreements* [2018] FWCFB 3610 at [115(2)]

[14] *SDA v Aldi Foods Pty Ltd* [2016] FCAFC 161 at [33] per Jessup J, who was in the minority but no issue was taken by the majority with this part of Jessup J's reasons.

More beneficial terms

[40] The hourly base rates of pay under the Enterprise Agreement are between 1% and 15.8% higher than the BC Award, depending on the particular classification. Clause 12.4 of the Enterprise Agreement requires CoreStaff to ensure ordinary rates of pay under the Enterprise Agreement "are at least 1% greater than the [BC Award], as adjusted annually". Further, ordinary rates of pay under the Enterprise Agreement will increase each year at the rate of 3% or any increase determined by the Commission to minimum award rates of pay, whichever is greater.[15]

[41] Clause 14 of the Enterprise Agreement provides that, on the first full pay period after approval of the Enterprise Agreement, "CoreStaff employees working under this Agreement will be paid a one-off bonus of $500". This benefit is not provided under the BC Award. It should be noted, however, that the benefit will not apply to prospective employees who are employed by CoreStaff after the first full pay period following approval of the Enterprise Agreement.

[42] Clause 27.5 of the Enterprise Agreement provides for permanent day shift employees changing to afternoon or night shift to be paid the first three shifts at overtime rates, whereas the BC Award provides for such payment for one shift only.

[43] Both clause 44 of the Enterprise Agreement and clause 14 of the BC Award effectively provide for redundancy payments at the rate of 3 weeks per year of service, with a minimum of two weeks' ordinary pay. The BC Award imposes a cap of 30 weeks' redundancy pay, save for employees with more than 15 years of completed years of employment as at 20 March 2017, in which case there is no cap. The Enterprise Agreement does not impose a cap on redundancy payments. In that respect, it is more beneficial to employees than the BC Award, but it is a contingent benefit (which only arises after 10 years' service) and does not apply to casual employees. In all the circumstances, this benefit only weighs to a very small extent in favour of satisfaction of the BOOT.

Less beneficial terms

Clause 7 - no extra claims

[44] Clause 7 of the Enterprise Agreement provides that "neither party will pursue any further claims about any permitted matter during the term of this Agreement". The BC Award contains no such restriction and, so the CFMMEU contends, would allow employees to seek to negotiate and/or request better terms and conditions of employment of the next four years. CoreStaff submits that, consistently with the decision in *Toyota Motor Corporation Australia Ltd v Marmara*,[16] clause 7 of the Enterprise Agreement cannot be relied on by CoreStaff to prevent employees from proposing amendments to the Enterprise Agreement in the manner contemplated by Subdivision A of Division 7 of Part 2-4 of the Act. In that circumstance, CoreStaff submits that the detrimental effect on employees (if any) is minimal.

[15] Clause 12.3 of the Enterprise Agreement

[16] [2014] FCAFC 84

[45] I agree that clause 7 of the Enterprise Agreement is less beneficial for employees than the BC Award, which contains no such limitation or prohibition and would enable employees to take protected industrial action in support of better terms and conditions of employment. However, I accept that clause 7 will not prevent employees from proposing amendments to the Enterprise Agreement in the manner contemplated by Subdivision A of Division 7 of Part 2-4 of the Act. On balance, I consider that clause 7 of the Enterprise Agreement weighs to a small extent against the BOOT being satisfied.

Clause 33.3 – notice of annual leave

[46] As set out above, clauses 33.3 and 33.4 of the Enterprise Agreement govern the taking of annual leave by employees:

> "33.3 Employees must endeavour to provide CoreStaff at least 4 weeks' notice of intention to take annual leave to allow for operational requirements of our clients sites.
>
> 33.4 Annual leave will be granted pending the operational requirements of each client's site at the time of the application but will not unreasonably be refused."

[47] The BC Award provides that annual leave entitlements are provided for in the NES. Clause 25 of the BC Award supplements the NES entitlements and "provides industry specific detail", but is silent on the question of notice by an employee of an intention to take annual leave.

[48] The CFMMEU contends that the BC Award provides no set period of notice for the taking of annual leave, with the result that clause 33.3 of the Enterprise Agreement is less beneficial for employees than the BC Award.

[49] CoreStaff contends that although clause 33.3 of the Enterprise Agreement requires employees to endeavour to provide CoreStaff at least 4 weeks' notice of their intention to take annual leave, any failure to provide such notice does not impact on whether leave will be granted. CoreStaff must not unreasonably refuse a request to take annual leave (see clause 33.4 of the Enterprise Agreement, together with Undertaking 2 and s 88(2) of the Act).

[50] Undertaking 2 only applies where, *inter alia*, any term of the Enterprise Agreement "provides a lesser entitlement than that provided by the NES". The Enterprise Agreement does not provide a lesser entitlement to annual leave than the NES. Accordingly, Undertaking 2 is not relevant to the issue raised by the CFMMEU in relation to notice of an intention to take annual leave.

[51] In my view, clause 33.3 of the Enterprise Agreement is slightly less beneficial than the BC Award for employees in two respects. First, clause 33.3 gives rise to an obligation on the part of employees to "endeavour to provide CoreStaff at least 4 weeks' notice of intention to take annual leave". There is no corresponding obligation in the BC Award. If an employee does not endeavour to provide such notice to CoreStaff, they will be in breach of the Enterprise Agreement and legal proceedings may be taken against them in respect of their breach of the Enterprise Agreement. Secondly, although the obligation on CoreStaff not to unreasonably refuse a request for annual leave is the same under the Enterprise Agreement as

it would be if the BC Award applied to the employee (in which case s 88(2) of the Act would impose the obligation), under the Enterprise Agreement one factor which is likely to be relevant to the reasonableness of any decision by CoreStaff to refuse a request for annual leave is whether the employee has complied with their obligation to "endeavour to provide CoreStaff at least 4 weeks' notice of intention to take annual leave". That consideration would not be relevant in the case of an employee to whom the BC Award applies.

Clause 35 – evidence for absence

[52] Clause 35 of the Enterprise Agreement provides:

> "**35. Managing absenteeism**
>
> 35.1 An employee absent from duty due to personal illness or personal incapacity must as soon as practicable (which to the extent possible should be before the employee's shift commences):
> - inform CoreStaff and the supervisor of CoreStaff's client of their inability to attend for duty by telephone;
> - state the estimated duration of the absence
>
> 35.2 CoreStaff may request evidence in cases of personal illness or injury, provided that a certificate from a registered medical practitioner or, where that is not reasonably practicable, a statutory declaration is provided as evidence."

[53] Clause 26 of the BC Award relevantly provides:

> "**26. Personal/carer's leave**
>
> 26.1 Personal/carer's leave entitlements are provided for in the NES. This clause supplements those entitlements and deals with evidence required to be provided by an employee when taking paid personal/carer's leave.
>
> …
>
> **26.3 Evidence required**
>
> (a) If requested by the employer, the employee must provide a medical certificate or such other evidence as will prove to the employer's reasonable satisfaction that the absence from work was for the reasons set out in the NES.
>
> (b) If the proof is disputed, such a dispute may be dealt with in accordance with the dispute resolution procedure."

[54] The CFMMEU submits that clause 35 of the Enterprise Agreement is more prescriptive and slightly less beneficial than clause 26.3 of the BC Award, because the Enterprise Agreement provides that the employer may require evidence of an absence for personal illness or injury to be in the form of a certificate from a registered medical practitioner or, where that is not reasonably practicable, a statutory declaration, whereas the BC Award provides that an employer may require an employee to provide a medical

certificate or such other evidence as will prove to the employer's reasonable satisfaction that the absence from work was for the requisite reason.

[55] The primary method of proving an absence from work due to personal illness or injury, by means of a medical certificate, is the same under the Enterprise Agreement and the BC Award. The difference between the two industrial instruments relates to the secondary method of proving an absence from work due to personal illness or injury. In my view, although there may be some circumstances in which it may be simpler and less time consuming for the employee to obtain a statutory declaration to prove their absence from work than would have been the case had the employee been required to provide such "other evidence" to prove to their employer's reasonable satisfaction that their absence from work was for the requisite reason, the reverse is more likely to be the case. Consider, for example, a circumstance in which an employee has obtained a certificate from a registered health provider other than a medical practitioner (such as a dentist, physiotherapist or psychologist) whilst absent from work or a primary record such as a letter confirming the employee's admission to hospital for a particular period of time. Under the BC Award, the certificate or letter from the hospital may prove to the employer's reasonable satisfaction that the employee's absence from work was due to personal illness or injury. However, under the Enterprise Agreement, the employer would be entitled not to accept the certificate or letter as evidence and instead require that the employee make or obtain a statutory declaration. This will be far more complex and time consuming for the employee, particularly if they are unfamiliar with the process of making a statutory declaration. Accordingly, on balance, I consider clause 35.2 of the Enterprise Agreement to be slightly less beneficial than the BC Award for employees in my consideration of the BOOT.

Neutral terms – where contested or in question

[56] It is uncontroversial that there are a number of terms of the Enterprise Agreement which are the same as, or materially the same as, provisions in the BC Award. I will not address those terms in this decision.

[57] There are some terms of the Enterprise Agreement in respect of which there is a contest or question as to whether they are less beneficial to employees than the BC Award, but I have concluded they are neutral in my assessment of the BOOT. I address those terms below.

Family and domestic violence leave

[58] Clause 28 of the BC Award provides for unpaid leave to deal with family and domestic violence. Clause 28 was inserted into the BC Award on 1 August 2018, which is prior to CoreStaff's filing of its application for approval of the Enterprise Agreement on 12 September 2018. Accordingly, clause 28 of the BC Award was in operation as at the "test time" for the Enterprise Agreement.

[59] The Enterprise Agreement is silent on the question of family and domestic violence leave. The family and domestic violence provisions in the Act[17] commenced operation on 12 December 2018. They are in materially the same terms as those in the BC Award. The Enterprise Agreement does not exclude those provisions of the NES. In addition, Undertaking

[17] Sections 106A to 106E of the Act

2 will ensure that employees to whom the Enterprise Agreement applies are entitled to the benefits of the family and domestic violence provisions in the Act. In all the circumstances, I am satisfied that this is a neutral matter in my consideration of the BOOT.

Clause 10 – dispute resolution term

[60] Clause 10.5 of the Enterprise Agreement provides that the Commission will cease dealing with a dispute "immediately upon the separation of an employee for any reason". The BC Award has no such limitation. Under the BC Award, if a dispute has been raised and is being dealt with by the Commission, the fact that the employee ceases to be employed by their employer does not result in the Commission no longer having jurisdiction to deal with the dispute.[18] It follows that in this respect the Enterprise Agreement is less beneficial to employees than the BC Award.

[61] Further, both the Enterprise Agreement and the BC Award permit "consent arbitration" of a dispute by the Commission. The BC Award does not limit the relief that may be granted by the Commission when dealing with a dispute, whereas clause 10.5 of the Enterprise Agreement provides that "relief is limited to by way of declaration only". However, in my view, this part of clause 10.5 is invalid and unenforceable because it purports to confer judicial power on the Commission.[19] As the High Court explained in *Re Cram; Ex Parte the Newcastle Wallsend Coal Company Proprietary Limited*:[20]

> "The making of a binding declaration of right is an instance of the exercise of judicial power. It stands outside the arbitral function".

[62] Because that part of clause 10.5 of the Enterprise Agreement which seeks to limit the relief which may be granted by the Commission to "declaration only" is, in my view, invalid, both the Enterprise Agreement and the BC Award provide for "consent arbitration" without any limitation on the relief which may be granted in such an arbitration. Accordingly, the only way in which clause 10 of the Enterprise Agreement is less beneficial to employees than the BC Award is the requirement in clause 10.5 for the Commission to cease dealing with a dispute "immediately upon the separation of an employee for any reason".

[63] Undertaking 4 resolves my concerns in relation to clause 10.5 of the Enterprise Agreement. It will ensure that there is no impediment to the Commission continuing to deal with a dispute if an employee ceases to be employed with CoreStaff after their s 739 application has been lodged in the Commission. It will also avoid any issue in relation to the power of the Commission to make a declaration. The CFMMEU agrees that Undertaking 4 would be a substantial benefit for employees.

[64] For the reasons given, I am satisfied that clause 10.5 of the Enterprise Agreement, read together with Undertaking 4, is a neutral matter in my consideration of the BOOT.

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[18] *ING Administration Pty Ltd v Jajoo* PR974301 at [58]-[59]

[19] *CFMEU v Wagstaff Piling Pty Ltd* [2012] FCAFC at [31], are [61] & [67]

[20] (1987) 163 CLR 140 at 148-9

Clause 44.2(b) – redundancy entitlements for fixed term and maximum term employees

[65] The CFMMEU initially submitted that clause 44.2(b) of the Enterprise Agreement excludes redundancy entitlements for fixed term and maximum term employees. Although clause 14.2(b) of the BC Award also excludes fixed term employees from redundancy entitlements, the CFMMEU submitted that the Enterprise Agreement at clause 43.7 provides that a fixed term employee may be dismissed with notice in the same manner as permanent employees and thus, it is unclear how this is different from 'maximum term' employment which is also allowed under the Enterprise Agreement, or indeed how such employees are "fixed term". The CFMMEU submitted that the concept of "fixed term" under the Enterprise Agreement appears to be different to the concept of "fixed term" under the BC Award, where "fixed term" is not defined, but would not, on its face, involve an ability to terminate before the fixed duration with notice. In short, the CFMMEU initially submitted that, unlike the Enterprise Agreement, there is nothing in the BC Award to exclude employees who may be terminated with notice from the redundancy provisions.

[66] CoreStaff provided Undertaking 13 in response to these concerns. It provides:

> "CoreStaff will not employ 'maximum term' employees under the Agreement and will not apply the terms of cl.43.7(d) of the Agreement."

[67] The CFMMEU submits that it is unclear what is intended to be the effect of Undertaking 13. An undertaking that clause 43.7(d) will not apply does not provide any guidance as to how clause 43.1 is to be applied. The CFMMEU submits that, presumably, irrespective of Undertaking 13, "fixed term" employees could continue to be dismissed in accordance with clause 43.1, unless that circumstance is to be prohibited by the undertaking about "maximum term" employment. Indeed, the undertaking would make unclear, so the CFMMEU contends, what capacity the Enterprise Agreement had to apply to fixed term employment, or at least what role that had under the Enterprise Agreement.

[68] Contrary to the CFMMEU's submissions, I am satisfied that Undertaking 13 meets the concerns identified by the CFMMEU in relation to fixed term and maximum term employees, and that this issue is a neutral consideration in relation to my assessment of the BOOT. My reasons for so concluding are as follows:

(a) First, under both the Enterprise Agreement and the BC Award, fixed term employees are not entitled to redundancy pay;

(b) Secondly, the effect of Undertaking 13 is that fixed term employees under the Enterprise Agreement cannot be dismissed by giving them notice in accordance with clause 43.1 of the Enterprise Agreement. So much is clear from the words "CoreStaff … will not apply the terms of cl.43.7(d)". Accordingly, under both the Enterprise Agreement (read together with Undertaking 13) and the BC Award, fixed term employees cannot be dismissed with notice prior to the end of their fixed term; and

(c) Thirdly, CoreStaff has undertaken not to employ maximum term employees under the Enterprise Agreement. Accordingly, there is no reason for concern as to the differences between fixed term employees and maximum term employees.

NES uncertainty

[69] The CFMMEU submits that there is a substantive benefit in an employee being covered by an industrial instrument where such an employee can have some confidence about which clauses are intended to apply. In this respect, the CFMMEU submits that the terms of the Enterprise Agreement, as amended by Undertaking 2, would be less beneficial than the terms of the BC Award. I do not agree. Having regard to my conclusions set out above, Undertaking 2 (NES precedence) will not have a great deal of work to do and does not give rise to a concern on the ground of uncertainty. I consider Undertaking 2 to be neutral in my consideration of the BOOT.

Clause 32 – start and finish place of work

[70] Clause 32.2 relates to the starting and finishing place of work at an underground mine. It is in the same terms as the equivalent provision in the BC Award. However, the provision in the Enterprise Agreement in relation to the start and finishing place of work in a workplace other than an underground mine, such an open cut mine, is materially different from the corresponding provision in the BC Award.

[71] Clause 32.1 of the Enterprise Agreement provides:

> "The starting and finishing place and time of a shift will be in line with the operations of the specific client sites and will be communicated to employees prior to the beginning of any assignment."

[72] Clause 23.4(a) of the BC Award provides:

> "The starting and finishing place of a shift are to be agreed between the employer and the majority of affected employees or, in the absence of agreement, as determined in accordance with the dispute resolution procedure."

[73] At the hearing, I expressed concern that clause 32.1 of the Enterprise Agreement may be less beneficial than clause 23.4(a) of the BC Award because the former provision takes the issue out of the hands of the majority of employees and would permit, for example, the operations of a specific client site to determine the starting and finishing place of a shift to be on the equipment operated in the open cut mine. In those circumstances, the time taken for CoreStaff's employees to travel to and from the administration buildings near the entry to an open cut mine, down into the equipment in the mine, would not be paid time. This time could be substantial. CoreStaff has addressed these concerns to my satisfaction by providing Undertaking 9.

[74] The CFMMEU submits that while there would remain some ambiguity about where a "designated pre-start meeting room" may be, Undertaking 9 would be of significant benefit to employees covered by the Enterprise Agreement as compared to the current clause if it prevents the employer determining that the starting or ending place of a shift was the pit. In my view, the words in brackets in Undertaking 9 apply to both the pre-start meeting room and crib room. That is, Undertaking 9 requires that the shift commences and concludes in the designated pre-start meeting room or crib room and that room must be located away from the pit and in or near the administrative building compound on site, unless CoreStaff and the majority of affected employees agree on some other starting and finishing place. That will

ensure the shift will not commence or conclude at the location of equipment in the open cut mine, unless there is an agreement to that effect between CoreStaff and the majority of affected employees, which is both unlikely and equally possible under clause 23.4(a) of the BC Award.

[75] For the reasons given, I am satisfied that clause 32.1 of the Enterprise Agreement, read together with Undertaking 9, is a neutral matter in my consideration of the BOOT.

Clause 16 – deductions

[76] The CFMMEU contends that clause 16 of the Enterprise Agreement is a detriment as compared to the BC Award because the BC Award does not contain a deductions clause.

[77] Undertaking 7 addresses this issue to my satisfaction. It will ensure that deductions will only be made if they are permitted by the Act.[21] Accordingly, clause 16 of the Enterprise Agreement, read together with Undertaking 7, is a neutral matter in my consideration of the BOOT.

Clause 12(b) – flat rates of pay

[78] Clause 12.1 of the Enterprise Agreement provides:

> "Employees will either be paid the base rates as set out in clause 12.1(a), or CoreStaff may implement flat rates of pay subject to the requirements of clause 12.1(b).
>
> (a) Base Rates
>
> Where an employee is engaged to work as a base rate employee they will be paid penalty rates, allowances and overtime as provided by this Agreement.
>
> A casual loading of 25% is included in the Casual Base Rate in the table below.
>
> The following ordinary rates apply from approval;

Position	Permanent Base Rate	Casual Base Rate
Mineworker Production Level 1	$24.00	$30.00
Mineworker Production Level 2A	$24.24	$30.30
Mineworker Production Level 2B	$24.42	$30.53
Mineworker Production Level 3	$25.91	$32.39
Mineworker Production Level 4	$27.16	$33.95
Mineworker Production Level 5	$29.95	$37.44
Mineworker Engineering Level 1	$24.24	$30.30
Mineworker Engineering Level 2	$25.66	$32.08
Mineworker Engineering Level 3	$27.96	$34.95
Mineworker Engineering Level 4	$30.83	$38.54

[21] See sections 323, 324 and 326 of the Act

(b) Flat Rates

(i) CoreStaff may implement flat rates of pay. Where flat rates are paid to an employee, the flat rate is received by the employee in satisfaction of and in compensation for any and/or all entitlements to penalty rates, shift loadings, overtime rates, other loadings and allowances which might otherwise apply to the employee (except as provided under the NES or in any mandatory terms of this enterprise agreement under the Act).

(ii) Flat rates of pay will be calculated taking into account the specific roster pattern that an employee works. The total payments made to the employee for the same designated work cycle and rostered hours of work must be not less than that which the employee would have received if they were a base rate employee and paid in accordance with clause 12.1 (a).

(iii) Prior to beginning an assignment, employees engaged as a flat rate employee will be provided with a detailed calculation demonstrating how their flat rate has been calculated. Examples of the calculation can be found in Schedule 1 of this Agreement.

(iv) Any shifts worked by an employee in addition to the shifts required in the specific roster will be paid in accordance with clause 26.2(b) of this Agreement."

[79] The CFMMEU submits that the first difficulty with clause 12.1(b) of the Enterprise Agreement is the Commission could not be satisfied that a flat rate can be arrived at for casual employees capable of passing the BOOT. The CFMMEU relies on the *Loaded Rates Agreements* decision,[22] where the Full Bench expressed the view (at [121]) that where a casual employee's hours are not constrained or guaranteed (as is the case in the Enterprise Agreement) it would appear to be impossible for the Commission to be satisfied that the BOOT was met unless the casual employee's loaded rate was the highest penalty rate.

[80] The second difficulty, so the CFMMEU submits, is that the Enterprise Agreement in effect delegates the exercise of the BOOT to the parties. Although examples are provided of how the loaded rate may be arrived at, the CFMMEU contends that neither the examples nor the Enterprise Agreement provide guidance or any limitation on how rates will actually be arrived at. Further, whilst there is a commitment to providing employees with a breakdown of the calculation, the CFMMEU submits that simply leaves employees in a situation in which they must, in effect, perform the BOOT themselves. In this way, the CFMMEU submits that the clause is less beneficial than the BC Award and a significant question is raised over whether the Commission has enough information before it to meaningfully be satisfied that the Enterprise Agreement passes the BOOT.

[81] The CFMMEU also submits that there is nothing in the Enterprise Agreement that prohibits casual employees being engaged for irregular work on a "truly casual basis". If employees are engaged by CoreStaff to work on such a basis under the Enterprise Agreement, the CFMMEU contends that the Commission could not be satisfied that a flat rate could be arrived at for such employees that would pass the BOOT.

[22] [2018] FWCFB 3610

[82] The Full Bench made the following relevant observations in the *Loaded Rates Agreements* case (references omitted):

> "**[121]** The position becomes more difficult with respect to casual employees. As discussed in the *Casual and Part-time Employment Case*, the contractual and practical incidents of casual employment under the FW Act may vary greatly. Casual employment may consist of engagement under hourly or daily fixed term contracts, and be used for the performance of short-term and/or intermittent work on an "on-call" basis. It may also consist of longer-term contracts or an ongoing contract of indefinite duration (terminable in either case on short notice), and be used for the performance of long term work with regular, rostered hours. In the former case, the casual employee is not guaranteed work on any specified days or for any specified duration. In an enterprise agreement which provides or permits casual employment of this nature, it is difficult to envisage how it would be possible to provide for a loaded rate for casual employees that was capable of passing the BOOT. This is because it would always be possible for the casual employee, in a given pay period, to be engaged to work on a day or at a time which would attract the payment of penalty rates under the relevant award and not to be engaged on any other hours or at any other times. In that circumstance, if the agreement provided for a loaded rate which was less than the highest penalty rate provided for in the relevant award, the employee would necessarily be disadvantaged as compared to the award. This result could only be avoided if the agreement provided for some other benefit to the casual employee which offset the disadvantage, and/or or imposed some restriction on when a casual employee could be engaged to work, and/or required the hours of work of a casual employee to be balanced over time between hours which would attract the payment of penalty rates under the relevant award and hours which would not. Any such additional provisions would amount to a significant departure from the concept of the "on-call" casual.
>
> **[122]** For an enterprise which utilises casual employees to perform regular and ongoing work (so that casual employment is simply used as an alternative payment and entitlement system rather than to describe engagement on a truly casual basis), an enterprise agreement might provide casual employees with an entitlement to guaranteed hours and rosters. In that circumstance it may be possible to construct a loaded rate for them, in the same way as for full-time and part-time employees above, which is capable of passing the BOOT based on particular prescribed rosters…"

[83] Clause 12.1(b) of the Enterprise Agreement requires a flat rate of pay to be "calculated taking into account the specific roster pattern that an employee works". If an employee does not have a "specific roster pattern", it would not be possible to calculate a flat rate for the employee. Further, Undertaking 6(d) provides that "employees who are not required to work a designated work cycle or specific roster must be engaged as base rate employees and paid in accordance with cl.12.1(a) of the Agreement". It follows that the Enterprise Agreement, read together with Undertaking 6, does not permit a flat rate to be paid to a casual employee who does not have a "specific roster pattern" or a designated work cycle. On the other hand, if a casual employee has a "specific roster pattern" or a designated work cycle, then I am satisfied that it would be possible to construct a loaded rate for the employee which is capable of passing the BOOT, particularly in circumstances where clause 12.1(b)(iv), read together with

Undertaking 6(c), requires that any shifts or hours worked by an employee in addition to the shifts or hours required in their specific roster will be paid at overtime rates.

[84] As to the second difficulty identified by the CFMMEU, clause 12.1(b)(ii) of the Enterprise Agreement requires that the total payments to be made to the employee to whom a flat rate is paid "must not be less than that which the employee would have received if they were a base rate employee". I do not accept the CFMMEU's submission that employees will be left in a situation in which they must, in effect, perform the BOOT themselves. First, clause 12.1(b)(ii) requires a comparison between the payment of a flat rate to an employee and a base rate under the Enterprise Agreement, unlike the BOOT, which requires a comparison between the Enterprise Agreement and the relevant modern award. Secondly, the employee to whom a flat rate is paid does not have to undertake a BOOT type analysis; it is CoreStaff which is obliged by clause 12.1(b)(ii) to ensure that an employee to whom a flat rate is paid receives at least as much pay as they would have received if they had been paid base rate under the Enterprise Agreement. Further, CoreStaff is obliged by clause 12.1(b)(iii) of the Enterprise Agreement and Undertaking 6(a) to provide the employee with a "detailed calculation demonstrating how their flat rate has been calculated". It follows, in my view, that if the Enterprise Agreement passes the BOOT for employees who receive a base rate of pay under clause 12.1(a) of the Enterprise Agreement, it must also pass the BOOT for employees who receive a flat rate of pay under clause 12.1(b) of the Enterprise Agreement, subject to consideration of the issue I address in paragraph [86] below.

[85] I am satisfied that Undertaking 6 addresses other concerns raised by the CFMMEU and the Commission in relation to clause 12.1(b) of the Enterprise Agreement. Paragraphs (b) and (e) of Undertaking 6 will ensure that if an employee to whom a flat rate is paid does not work an entire designated work cycle, they will be paid any detrimental difference between what they were paid as a flat rate employee for the part of the designated work cycle they worked and what they would have been paid had they received a base rate of pay for the same period. Limiting the length of a designated work cycle to 12 weeks will ensure that any such payments are made within a reasonably short period of time after the work is performed.

[86] For the reasons given, I am satisfied that clause 12.1(b) of the Enterprise Agreement, read together with Undertaking 6, is neutral in my consideration as to whether the Enterprise Agreement passes the BOOT, save for in the following limited circumstances. If an employee to whom a flat rate is paid does not work an entire designated work cycle and the amount they were paid as a flat rate employee for the part of the designated work cycle they worked is less than what they would have been paid had they received a base rate of pay for the same period, then they will receive an additional payment to ensure they receive the same amount as they would have received if they were a base rate employee. This may, for example, occur where a flat rate employee works two public holidays in the first two weeks of a designated work cycle and then ceases being paid a flat rate of pay. The payments they would have received if they were a base rate employee for those two public days would, as a flat rate employee, be spread evenly over the period of the designated roster cycle, which could be up to twelve weeks. However, because in this example the employee ceases being paid a flat rate after two weeks, they may need to be paid an additional amount after they cease being paid a flat rate of pay to take them up to the amount they would have been paid had they received a base rate of pay during that 2 week period. In pure dollar terms, the employee will be in the same position as if they had received a base rate of pay at all times. Notwithstanding this, the employee may be worse off as a flat rate employee than if they were a base rate employee because there will be a time lag between the payment of the additional amount to the employee and when they

would have received the earnings as a base rate employee. Using the example referred to above, the hypothetical base rate employee would have received the relevant payments fairly close to the time when the work was undertaken,[23] whereas the flat rate employee would not receive the additional payment until shortly after they ceased to be a flat rate employee.[24] In this example, the time lag could be about a week. The time lag in other examples could be up to about eleven weeks, given the twelve week limit on designated work cycles[25] and the requirement to pay wages on a weekly basis.[26] However, the longer an employee works through a designated work cycle, the lower any additional payment is likely to be. That is, because flat rates of pay, by their very nature, spread 'lumpy' entitlements evenly over the period of the designated work cycle. This analysis demonstrates that the time lag associated with the making of an additional payment to an employee who ceases to be paid a flat rate of pay during a designated work cycle may, in some circumstances, give rise to some detriment to a flat rate employee compared to a base rate employee. But the protections afforded to flat rate employees by the terms of clause 12.1(b), read together with Undertaking 6, will ensure the detriment is not significant. Further, I am satisfied that any such detriment is offset by the over-award benefits provided for in the Enterprise Agreement, such that all employees will remain better off overall under the Enterprise Agreement compared to the BC Award.

Casual employees

[87] The BC Award does not permit the engagement of casual employees in a production or engineering classification.[27] The Enterprise Agreement does. As was the case in *CFMEU v SESLS*,[28] I was not addressed on the question of how a casual employee in a production or engineering classification should be compared to an employee under the BC Award for the purpose of the BOOT. Like the Full Bench in *CFMEU v SESLS*,[29] I have assumed that the BOOT for casual employees in a production or engineering classification requires a comparison between casual employment under the Enterprise Agreement and part-time or full-time employment under the BC Award.

[88] The Enterprise Agreement entitles casual employees to be paid a 25% casual loading and the right, in particular circumstances, to request to be converted from a casual employee to a permanent employee.[30] This right to request a conversion to that of a permanent employee will assist casual employees to overcome the detriments associated with a lower level of job security.[31] The 25% loading is paid on a base rate which is already at least 1% higher than the rate under the BC Award for the same classification. This weighs in favour of CoreStaff's contention that casual employees are better off overall under the Enterprise Agreement compared to the BC Award.

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[23] Clause 15.1 of the Enterprise Agreement requires employees to be paid on a weekly basis

[24] Within 72 hours of the employee ceasing to be paid a flat rate (Undertaking 6(b))

[25] Undertaking 6(e)

[26] Clause 15.1 of the Enterprise Agreement

[27] *CFMEU v SESL Industrial Pty Ltd* [2017] FWCFB 3659 (***CFMEU v SESL***) at [28]-[30] & [51]

[28] At [27]-[39]

[29] At [39]

[30] Clause 11.4 of the Enterprise Agreement

[31] *CFMEU v SESLS* at [40]-[46]

Conclusion on BOOT

[89] I have had regard and given due weight to the terms of the Enterprise Agreement which are more beneficial for employees covered by the Enterprise Agreement and the terms which are less beneficial for such employees compared to the BC Award. Many of those more beneficial and less beneficial terms are specifically addressed in this decision, while others are identified in the F17 and the submissions made by CoreStaff and the CFMMEU in this matter. Having regard to all those matters, together with the Undertakings, my overall assessment is that, as at the test time, each award covered employee, and each prospective award covered employee, would be better off overall if the Enterprise Agreement applied to them than if the BC Award applied to them. I am particularly persuaded by my assessment that although the rates of pay under the Enterprise Agreement are only 1% higher than the rates of pay under the BC Award for some classifications of employees, both the Enterprise Agreement and the BC Award provide the same, or materially similar, benefits in many respects and the higher rates of pay and other over-award benefits under the Enterprise Agreement outweigh the few less beneficial terms (which are not particularly significant) in the Enterprise Agreement compared to the BC Award.

Genuinely agreed

General principles

[90] Section 180(5) requires an employer to take all reasonable steps to ensure that the terms of the enterprise agreement, and the effect of those terms, are explained to the relevant employees. Further, the explanation must be provided in an appropriate manner taking into account the particular circumstances and needs of the relevant employees.

[91] The purpose of the requirement in s 180(5) is to ensure that employees are as fully informed as is practicable about the terms and effect of the terms of a proposed enterprise agreement before voting on it.[32]

[92] There is no legislative or other requirement that in every case an employer must explain to its employees the differences between the terms of a proposed enterprise agreement and an existing enterprise agreement or underlying award. Whether such an explanation is required for an employer to satisfy its obligation under s 180(5) of the Act to take all reasonable steps to ensure that the terms of the proposed enterprise agreement, and the effect of those terms, are explained to relevant employees, will depend on the circumstances.[33] The focus of the enquiry is on the steps actually taken to comply and to consider whether the steps taken were reasonable in the circumstances and whether these were all the reasonable steps that should have been taken in the circumstances.[34] This directs attention to the content of the explanation given to employees.[35]

[93] It is also necessary to consider the content of the explanation given to employees about the terms of the enterprise agreement and the effect of those terms, in order to be satisfied that the enterprise agreement was "genuinely agreed to" within the meaning of s 188(1)(c) of the

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[32] *CFMMEU v LS Precast Pty Ltd* [2019] FWCFB 1431 at [52]

[33] Ibid at [53]; *Diamond Offshore General Company v Baldwin & Ors* [2018] FWCFB 6907 at [28]-[37]

[34] *CFMMEU v LS Precast Pty Ltd* [2019] FWCFB 1431 at [53]

[35] Ibid; *One Key Workforce Pty Ltd v CFMEU* [2018] FCAFC 77 at [112]

Act.[36] The agreement of the relevant employees may not be genuine where, for example, misleading information was provided or the explanation was otherwise deficient in a material way.[37]

Explanation re casual employees

[94] Before turning to the evidence concerning the explanation given to the employees who voted on the Enterprise Agreement, I will address an issue which the CFMMEU describes in its submissions as a, or perhaps the, "key issue" in this case.

[95] There is no doubt that during bargaining, and in the lead up to the vote for the Enterprise Agreement, Corestaff advised the 11 employees who were asked to approve the Enterprise Agreement that their employment status was "casual" and that the enterprise agreement which currently applied to them, the CoreStaff NSW Enterprise Agreement 2014 (***2014 Agreement***), allowed for them to be employed on a casual basis. The CFMMEU submits that this was a fundamental mischaracterisation of the employment status of these employees and/or their employment entitlements.

[96] As to the employment status of the 11 employees, the CFMMEU did not seek to adduce sufficient evidence of the kind I would need in order to make a finding as to whether the 11 employees, or any of them, were casual employees at law at the time the terms of the Enterprise Agreement were explained to them and they voted on the Enterprise Agreement.[38] Such evidence would include the hours of work, rosters, work patterns, contractual arrangements and the like for the 11 employees in question.

[97] The CFMMEU contends that, even assuming the 11 employees were engaged under a contract in a manner that has been described by the parties as "casual" employees, they are entitled under the 2014 Agreement to all the benefits afforded to permanent ongoing employees under the BC Award as it stood at the time the 2014 Agreement was entered into.[39] The CFMMEU contends that it was imperative to understanding their position and providing genuine agreement that the employees understood this aspect of their entitlements, but they could not have done so because CoreStaff did not tell them that they were entitled under the 2014 Agreement to all the benefits afforded to permanent ongoing employees under the BC Award as it stood at the time the 2014 Agreement was entered into.

[98] The CFMMEU's contention that the "casual" employees covered by the Enterprise Agreement are currently entitled to all the benefits afforded to permanent ongoing employees under the BC Award (as it stood at the time the 2014 Agreement was entered into) is premised on its arguments as to the proper construction of the 2014 Agreement. In particular, the CFMMEU points to clauses 5.1 and 5.2 of the 2014 Agreement, which make clear that all relevant award terms are incorporated into the 2014 Agreement, and clause 5.3, which states that where there is any inconsistency between a term of the 2014 Agreement and the relevant award that the term of the 2014 Agreement "shall prevail to the extent of the inconsistency". The CFMMEU also points to the main body of the 2014 Agreement, which does not contain a "Types of Employment" clause. Further, it has no clauses providing for specific employment

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[36] *One Key Workforce Pty Ltd v CFMEU* [2018] FCAFC 77 at [142]

[37] Ibid

[38] *WorkPac Pty Ltd v Skene* [2018] FCAFC 131

[39] CFMMEU outline of submissions dated 21 May 2019 at [32]

conditions in relation to casual employees, no casual loading, no minimum hours and indeed few conditions of employment at all for any employees. The reference to casual employment in the main body of the 2014 Agreement is only in relation to coverage in clause 3. The vast and overwhelming majority of entitlements provided for by the 2014 Agreement are obtained through a mechanism of incorporation of 122 industry awards. In this way, the CFMMEU submits that the reference to casual employees in the coverage clause of the 2014 Agreement can only be construed as intended to be a reference to casual employees where the incorporated award made provision for casual employees.

[99] Because the BC Award does not permit the employment of casual employees in a production or engineering classification,[40] the CFMMEU submits that there is no provision in the 2014 Agreement for casual employment of employees in a production or engineering classification in the black coal mining industry.

[100] The CFMMEU also submits that the application of the terms of the incorporated awards in relation to the 2014 Agreement was made express in correspondence in support of the approval of the 2014 Agreement filed on CoreStaff's behalf by the Australian Industry Group on 31 October 2014. The letter to the Commission dated 31 October 2014 states:

> "The agreement is better off overall when compared to the 122 modern awards which are incorporated into the Agreement by virtue of Schedule A of the Agreement. CoreStaff did thoroughly consider the terms of the Agreement as compared to these reference instruments and is of the view that every employee and prospective employees better off overall under the Agreement when compared to any of the modern awards, due to the 0.5% per hour above award wage entitlement. No other term of the modern awards are intended to be circumvented by the Agreement. As such, an employee covered by the Agreement will be entitled to all applicable modern award terms plus the 0.5% above award payment per hour that is payable under the Agreement."

[101] It follows, so the CFMMEU contends, that the employees who are described by CoreStaff as "casual" and who comprised the entire cohort of employees who voted on the Enterprise Agreement are presently, and have been during the life of the 2014 Agreement, entitled to all of the benefits that apply to permanent production and engineering employees under the BC Award. That allows no exclusion of leave etc. on the basis that those employees were "casual". The CFMMEU submits that employees voting on the Enterprise Agreement, which will introduce casual employment and remove the rights of permanent employees for those employees, must have had that explained to them for a finding to be made that (a) all reasonable steps were taken to explain the Enterprise Agreement and (b) the Enterprise Agreement was genuinely agreed to by the employees who voted on it.

[102] I do not agree with these submissions by the CFMMEU in relation to casual employees and the operation of the 2014 Agreement. Clause 3.2 of the 2014 Agreement states that it "binds… all casual, fixed term or permanent (full-time or part-time) employees employed by CoreStaff and who are supplied as labour on an on-hire basis to CoreStaff's clients in New South Wales". Clause 5.1 of the 2014 Agreement provides that 122 modern awards, including the BC Award, are incorporated into the 2014 Agreement. Clause 5.3 provides that the 2014 Agreement prevails over a term of an incorporated award to the extent

[40] Clause 10 of the BC Award

of any inconsistency. Clause 7 of the 2014 Agreement provides that employees will be paid the applicable rate of pay for their classification derived from the applicable modern award.

[103] Construing the terms of the 2014 Agreement in context and having regard to their purpose, I am of the opinion that the 2014 Agreement covers all casual (as well as permanent) employees employed by CoreStaff and who are supplied as labour on an on-hire basis to CoreStaff's clients in New South Wales, regardless of which award, if any, they are covered by. That is the ordinary meaning of clause 3.2 of the 2014 Agreement.

[104] Clause 5 has the effect of incorporating many awards, including the BC Award, into the 2014 Agreement. The incorporation of the BC Award into the 2014 Agreement has important implications for any part-time or full-time employees employed by CoreStaff in a production or engineering classification in the black coal mining industry, because the BC Award contains many benefits for such employees. However, because there is no capacity to engage a casual employee in a production or engineering classification under the BC Award,[41] the incorporation of the terms of the BC Award into the 2014 Agreement did not result in any entitlements particular to casual employees in the BC Award being conferred on any person employed by CoreStaff as a casual in a production or engineering classification in the black coal mining industry.

[105] My conclusions in the previous two paragraphs are supported by the Full Bench's decision in *CFMEU v SESL*. In that case, the relevant enterprise agreement covered "Production and Engineering staff covered by the Black Coal Mining Industry Award 2010 employed by SESLS Industrial Pty Ltd" and expressly incorporated the BC Award. Clause 9.2(b) of the enterprise agreement in that case stated that "a casual Employee will be paid the hourly rate for the Modern Award classification in addition to a loading of 25% calculated on the base rate of pay under the Modern Award". The Full Bench observed as follows in relation to the impact of the incorporation of the BC Award on the BOOT analysis [emphasis added]:

> "**[43]** The union also contended that full-time and part-time employees receive various benefits under the Award that exceed those in the National Employment Standards in the Act. Such benefits include enhanced notice of termination, redundancy pay, annual leave and personal leave entitlements. Of course, as the Award is incorporated into the Agreement, permanent full and part-time employees covered by the Agreement receive these benefits too. <u>However, casual employees would not receive them, by virtue of their casual status</u>."

[106] Importantly, the fact that there is no capacity under the BC Award to engage a casual employee in a production or engineering classification does not mean, as the CFMMEU contends, that casual employees engaged by CoreStaff in a production or engineering classification are entitled to all of the benefits that apply to part-time or full-time production and engineering employees under the BC Award. The rights and obligations conferred and imposed by the 2014 Agreement on a casual employee in a production or engineering classification arise from the terms of the 2014 Agreement. For example, the effect of clause 7 of the 2014 Agreement is that employees (including casual employees) are entitled to the rate

[41] Clause 10 of the BC Award; *CFMEU v SESL* at [26] & [51]

of pay for their classification derived from the applicable modern award plus 0.5%.[42] The classifications in Schedule A of the BC Award include, amongst others, various levels of "mineworker", which would cover the types of employees employed by CoreStaff to work in the black coal mining industry. Accordingly, an employee (including a casual employee) of CoreStaff would be able to determine their correct classification under Schedule A of the BC Award and then work out the applicable pay rate for that classification under the BC Award. They could then add 0.5% to that pay rate to calculate their pay rate under the 2014 Agreement.

[107] Although a casual employee in a production or engineering classification in the black coal mining industry does not appear to have an entitlement to a casual loading under the terms of the 2014 Agreement,[43] that is a matter which may have been relevant to the BOOT at the time the 2014 Agreement was being considered for approval, but it does not have any particular significance in the context of the current application for approval of the Enterprise Agreement. The fact that the 2014 Agreement does not appear to confer particular entitlements on a casual employee in a production or engineering classification in the black coal mining industry such as casual loading or minimum periods of engagement does not, in my view, mean that such casual employees are entitled to all of the benefits that apply to part-time or full-time production and engineering employees under the BC Award.

[108] Further, if the CFMMEU were correct in its argument that the reference to casual employees in the coverage clause of the 2014 Agreement can only be construed as intended to be a reference to casual employees where the incorporated award made provision for casual employees,[44] it would follow that CoreStaff's casual employees working in a production or engineering classification in the black coal mining industry would not be covered by the 2014 Agreement. Such a construction would, in my view, be contrary to the objective intention of the makers of the 2014 Agreement, as is evident from the provisions of the 2014 Agreement discussed above.

[109] For the reasons given and on the evidence adduced in these proceedings, I reject the contentions that:

(a) there has been a fundamental mischaracterisation of the employment status of CoreStaff's casual employees and/or their employment entitlements;

(b) CoreStaff's casual employees were misled about their status or their entitlements when the terms of the Enterprise Agreement and their effect were explained to them;

(c) CoreStaff failed to take a reasonable step by not informing their casual employees in the period leading up to the vote for the Enterprise Agreement that they were entitled to all of the benefits that apply to part-time or full-time production and engineering employees under the BC Award; or

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[42] Similarly, the enterprise agreement in *CFMEU v SESL* provided for rates of pay "at least 1% more" than modern award rates

[43] Compare the enterprise agreement in *CFMEU v SESL*, which provided for a 25% casual loading to be paid to casual employees.

[44] CFMMEU's submissions dated 21 May 2019 at [35]

(d) the Enterprise Agreement was not genuinely agreed to by CoreStaff's employees as a result of misleading or incorrect information being provided to them in connection with their employment status and/or their employment entitlements.

Evidence in relation to explanation provided to employees

[110] Mr Button gave detailed evidence in his witness statement[45] in relation to the explanation given to CoreStaff's employees about the terms of the Enterprise Agreement and the effect of those terms. His evidence in that regard was not seriously challenged by the CFMMEU, and I accept it as reliable and truthful, including the hearsay evidence which Mr Button gave in relation to what he was told by Mr Torran James, CoreStaff's Client Relationship Manager - New South Wales, about his communications with CoreStaff employees placed at the Ravensworth mine. The relevant parts of Mr Button's witness statement, including the annexures thereto, are in the following terms:

> "3. CoreStaff is a provider of specialist labour hire and recruitment services to large mining and energy, manufacturing, transport and construction organisations across New South Wales. Our employees that will be covered by the *CoreStaff NSW Black Coal Mining Industry Enterprise Agreement 2018* (**the Agreement**) are placed at CoreStaff client sites across the Hunter Region, including at Liddell Coal (**Liddell**) and the Ravensworth Open Cut mine (**Ravensworth**).
>
> **Commencement of Bargaining**
>
> 4. I, along with Torran James, CoreStaff's Client Relationship Manager- New South Wales, represented CoreStaff in the negotiations with our employees for the Agreement. At the time of commencement of bargaining, CoreStaff employed 12 employees (**the Employees**) who would be covered by the Agreement.
>
> 5. On 8 August 2018, I telephoned the seven of these Employees who were placed at Liddell. I explained to each of the Employees that CoreStaff was commencing bargaining for the Agreement and that, as they would be covered by the Agreement, I would be sending them an email with a Notice of Employee Representational Rights (**NERR**) which set out information about bargaining and also how they could appoint a bargaining representative. I am informed by Mr James that on that day he telephoned the five Employees who were placed at Ravensworth and provided them with the same information. Later that day I emailed a copy of the Notice of Employee Representational Rights to each of the Employees.
>
> 6. On 11 August 2018, I emailed a proposed draft Agreement to the Employees, along with a copy of the Black Coal Mining Industry Award (**the Award**), a letter about the Agreement and another letter summarising the key differences between the Agreement and the Award and a flat rate calculator relevant to each Employee's rate of pay which demonstrated how the flat rate would be built up.
>
> Attached and marked **AB-1** is a copy of the EA Summary Letter.

[45] Exhibit A1

Attached and marked **AB-2** is a copy of the letter summarising the differences between the Agreement and the Award.

Attached and marked **AB-3** is an example of the flat rate calculator provided to each of the Employees.

On-Site Meetings

7. On 14 August 2018, I telephoned the Employees placed at Liddell to confirm that I would be on site on 15 and 17 August 2018 to discuss the Agreement and that we would also be holding an off-site information session on the Agreement on 23 August 2018, prior to the vote. I asked each of the Employees if they had any initial questions about the Agreement so I could prepare for the meeting, but none of the Employees raised any questions.

8. I am informed by Mr James that he had a similar conversation with the Employees placed at Ravensworth confirming his attendance on site there on 16 August 2018 and the details for the offsite meeting on 23 August 2018 and that he also did not receive any questions.

9. On 15 August 2018, I attended at Liddell and met with 5 of the Employees placed there from around 5.30am. Although I refer to these meetings as 'pre-start meetings' in the Form F17 filed with the application for the approval of the Agreement, the meeting on 15 August 2018 was not a short 'toolbox' type meetings as the use of that term might imply but rather longer conversations with each of the Employees as they came into the crib room before work. The Employees' actual 'toolbox' pre-start before their shift took place from 6.45am to 7.00am and I then had additional discussions with the Employees before they were allocated to their truck for that day's work. I was on site until around 8.30 am.

10. One of the Employees placed at Liddell who had been issued the NERR, Cody Boan, had resigned to care for his sick mother and so he did not attend the information session. The other Employee placed at Liddell, Dave Ball, was not rostered that day. I spoke to Mr Ball on 17 August 2018 as I detail further below.

11. During these meetings I used the EA Summary letter, attached as **AB-1**, as my opening script to explain the purpose of the Agreement, the Employees' current coverage under the 2014 Agreement, the need to demonstrate and prove to the Commission that all of our Employees would be better off under the Agreement than the Award. I explained to Employees that by voting 'yes' for the Agreement they would be agreeing that they thought the Agreement was a better deal for them than the Award. I then went through the letter comparing the Agreement to the Award, as attached as **AB-2**.

12. I noticed that three of the Employees, Josh Davis, Anthony Pascoe and Lyssa Siderius, had marked-up their copy of the Agreement with notes and highlighting and so I offered an opportunity for the Employees to ask questions about the Agreement. I recall that Mr Davis, Mr Pascoe and Ms Siderius asked questions about the following matters (although I do not specifically recall who asked what question):

a. the calculation of the Flat Rate in the Agreement and I ran through the calculations at the back of the Agreement to demonstrate how the rate was calculated;

b. when their rate of pay was likely to increase, and I referred to clause 12.3 of the Agreement and explained the wage increases;

c. the different classifications in the Agreement and what level they were currently on and I explained the levels in the Agreement and what competencies were required to progress;
d. maintenance of existing overtime rates and I explained and referred to clause 26.2 of the Agreement to confirm that these would not change;

e. conversion of casual to permanent employment and the circumstances in which CoreStaff might refuse that conversion; and

f. conversion to permanent employment with CoreStaff's client at Liddell, Glencore, and I confirmed that this was a process that was between Glencore and CoreStaff but did not form part of the Agreement.

g. The Employees also asked me about the voting process and I confirmed that the vote was to be on 31 August 2018 and that there would be an email voting option as well as hard copy voting slips and a locked box on site for those Employees who did not have access to email. I explained that prior to the vote there was a 7 day access period in which the Employees would have an opportunity to review the final draft of the Agreement and have any outstanding matters explained to them. I reminded the Employees of the further off-site meeting on 23 August 2018.

14. I am informed by Mr James that he attended Ravensworth on 16 August 2018 from 5.30am to 8.00am and that he met with four Employees before their scheduled 6.45am pre-start meeting. Mr James has informed me that he provided hard copies of the emailed materials to these Employees and used the EA Summary letter as an introduction and then also explained the differences between the Agreement and the Award document. I am also informed by Mr James that he offered an opportunity for the Employees to ask questions and the Employees asked about conversion from casual to permanent employment and the entitlements to annual leave and sick leave that would be provided on that conversion.

15. There was another Employee who was to be placed at Ravensworth from 16 August 2018, Lisa Lambkin, and who was provided with the NERR and other material as I refer to above in anticipation of her being involved in the bargaining. However Ms Lambkin ultimately found fulltime employment elsewhere and did not end up starting at Ravensworth…

AB-1

Dear CoreStaff Employees

As you consider our proposed Black Coal Mining Industry Agreement we would like to provide you every opportunity to discuss any questions directly with us. I will be available for face-to-face meetings during the next 7 days, as well as available any time via phone.

The purpose of this agreement is far broader than wages. It is to provide certainty to our employees that we will provide minimum conditions of employment including a safe working environment and pathways to permanent employment. As you're currently paid above agreement rates that will be protected, there are a number of other potential benefits to this agreement for you.

Some of the key areas of the agreement include;

- 11.4 provides a casual conversion to pathway for CoreStaff casual employees to get into permanent roles

- 12.1 and 12.3 provides the minimum rates and annual increases. As you are aware market rates are often higher than these rates and vary from job to job. This agreement does not mean that you be paid the rates in the agreement, they are just a minimum

- 12.5 ensures that your current rate of pay will not go down when the is agreement is ratified. You will continue at your current rate, however we are negotiating with our client to get the rates at Liddell increased

- 14 is a site bonus for employees once the agreement is ratified

- 19 outlines our PPE requirements ensuring that you will be provided with the right clothing

- 26 and 35 provides for unrostered overtime and unrostered public holidays. If you work unrostered time you will get higher rates…

AB-2

Dear CoreStaff Employees

As you consider our proposed Black Coal Mining Industry Agreement we would like to provide you every opportunity to discuss the agreement directly with us so we can explain its effect on you and give you an opportunity to raise any questions you might have.

I will be conducting face-to-face meetings on during the next 7- 14 days. I am also available any time via phone to discuss the agreement.

The purpose of this agreement is far broader than wages. It is to provide certainty to our employees that we will provide minimum conditions of employment including a safe working environment and pathways to permanent employment.

Before voting on this agreement there are a number of key issues that we need you to consider about the agreement and the effect it will have on you in your employment with CoreStaff.

1. Currently the CoreStaff NSW Enterprise Agreement 2014 applies to your employment. That Agreement will continue to apply to you until it expires and, after expiry, until we have a new one in place.

   However, the existing agreement is not a black coal industry specific one and we believe that an industry specific agreement better serves our requirements as well as provide better certainty and protection for you, our employees, by providing conditions of employment that are directly relevant to your industry.

   For this reason, we will apply the terms of the Black Coal Mining Industry Agreement to you from 7 days after its approval by the Fair Work Commission.

2. The Black Coal Mining Industry Award (BCMIA) covers your employment with CoreStaff and would apply to you if there was no enterprise agreement. Unlike every other Modern Award, the BCMIA does not have any provision for production and engineering employees to be engaged on a casual basis, though it does allow staff employees to be engaged as casuals. Hence the requirement for employers who want to engage production and engineering employees engaged on a casual basis to have an Enterprise Agreement, whose purpose is to alter the terms of the Award to better suit the needs of employers and employees in a particular enterprise.

   There are a number of differences between our proposed Agreement and the BCMIA. The major difference is the inclusion of casual employment.

   For the Agreement to be approved, CoreStaff needs to demonstrate that our employees would be better off under it than they would be if they were engaged under the BCMIA. Given the BCMIA doesn't provide for casuals, we need to demonstrate our casuals will be better off than if they were engaged as permanent part time employees under the BCMIA. The steps we've taken to ensure this are outlined below.

3. When you vote on the Agreement you need to consider that the Agreement does not just cover you as an existing employee, but will also cover all other current and any future employee of CoreStaff who are deployed to work in Production or Engineering roles on a CoreStaff client site in NSW that would otherwise be covered by the BCMIA.

   By voting yes you are approving the Agreement and effectively agreeing that it is a better deal for you than you would have if employed under the BCMIA, but you should carefully consider whether you feel that other people would also be better off in the future, based on your knowledge of the industry.

You should feel free to seek any advice you might need to assist you in making your decision. Also, as above, if you have any questions at all, please don't hesitate to raise them with me.

In order to assist you, the following table illustrates how our proposed Agreement is different from the BMCIA, and how that will benefit or otherwise effect you.

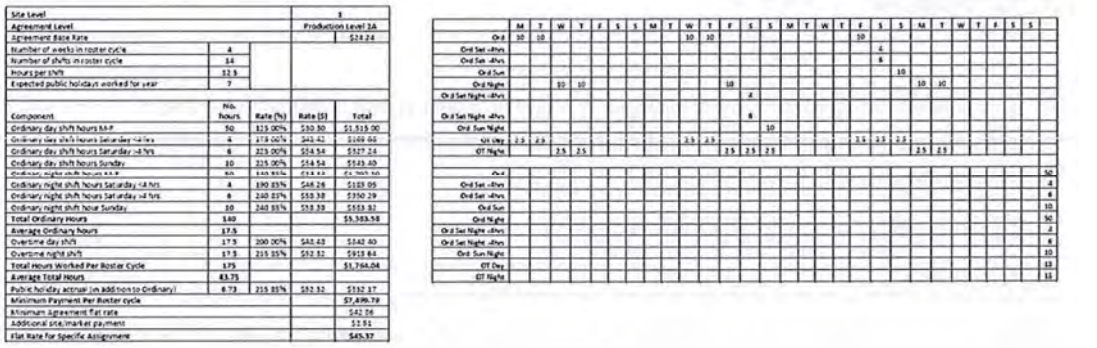
Clause No	Difference from BCMIA	Benefit to You
11.1(c)	The BCMIA makes no provision for casual employment	Casual employment allows CoreStaff to provide employment opportunities in the black coal industry
11.4(c)	Conversion from casual to permanent employment	The BCMIA makes no provision for casual (staff only) employees to be offered permanent jobs. The Agreement provides a commitment to you after 6 months.
12	Our rates range from 1% above BCMIA for new-to-industry hires up to 5% above the BCMIA for experienced tradespeople	As these are minimum rates they ensure that you will always be paid above Award wages
12.1(b)	Provides for the ability to pay flat rates as is an industry standard	The detail in this clause ensures that prior to accepting a job with a flat rate, you will be provided a build-up demonstrating how that rate was arrived at, and will be no worse off than if you were engaged on a base rate.
12.3	Ensures that you will get at least a 3% increase or whatever the FWC decides if that is greater	While the last 2 FWC increases have been greater than 3%, the previous 2 years were less than 3%. This ensures that even if FWC provided a 2% increase you would receive a minimum of 3% each year
13.3	We have separate production and engineering classifications whereas the BCMIA groups all	This provides a more detailed description of each classification for employees to more easily understand

	employees under the same classifications	what classification they are. By separating engineering roles we are also ensuring that the minimum rates for tradespeople reflects the effort required to obtain a trade qualification which the BCMIA does not.
14	The BMCIA makes no provision for bonuses	All existing employees will receive a bonus in the first pay period after approval of the agreement by the FWC.
19	The BMCIA does not contain any minimum provision of clothing	The Agreement guarantees a minimum clothing provision
27.5	When day employees are required to work more than 3 consecutive afternoon or night shifts the BCMIA requires overtime rates to be paid for the first shift	The Agreement provides that any day shift employee changing to afternoon or night shift will be paid for the first 3 shifts at overtime rates instead of only their first shift
42	The BMCIA makes no provision for casual employees to be paid in wet weather events	The Agreement ensures casual employees will be paid a minimum of 4 hours

Attached to this communication you will also find a rate build up as outlined in clause 12.1 of the Agreement, demonstrating how the flat rate of pay you are currently being paid is calculated for the roster you currently work, and how you are no worse off compared to being a base rate employee. You can also find an example calculation in Schedule 1 of the Agreement. This is designed to help you understand how we would calculate flat rates for you, and for future employees, if work is performed on a different roster to your current one.

Unfortunately, without an Enterprise Agreement, employers are unable to offer casual opportunities in the black coal industry. We are fortunate that you will be able to continue employment under our existing Agreement, however we believe that the proposed industry specific Agreement will provide a greater benefit to you and better suit our needs and yours…

AB-3



Site Level				3
Agreement Level				Production Level 3A
Agreement Base Rate				$24.24
Number of weeks in roster cycle	4			
Number of shifts in roster cycle	14			
Hours per shift	12.5			
Expected public holidays worked for year	7			
Component	No. hours	Rate (%)	Rate ($)	Total
Ordinary day shift hours M-F	50	125.00%	$30.30	$1,515.00
Ordinary day shift hours Saturday <8 hrs	4	175.00%	$42.42	$169.68
Ordinary day shift hours Saturday >8 hrs	8	225.00%	$54.54	$327.24
Ordinary day shift hours Sunday	10	225.00%	$54.54	$545.40
Ordinary night shift hours M-F	50	140.83%	$34.14	$1,707.10
Ordinary night shift hours Saturday <8 hrs	4	190.83%	$46.26	$185.05
Ordinary night shift hours Saturday >8 hrs	8	240.83%	$58.38	$350.29
Ordinary night shift hour Sunday	10	240.83%	$58.38	$583.82
Total Ordinary Hours	140			$5,383.58
Average Ordinary hours	17.5			
Overtime day shift	17.5	200.00%	$48.48	$848.40
Overtime night shift	17.5	215.83%	$52.32	$915.64
Total Hours Worked Per Roster Cycle	175			$7,764.04
Average Total Hours	43.75			
Pubic holiday accrual (in addition to Ordinary)	6.73	215.83%	$52.32	$352.17
Minimum Payment Per Roster cycle				$7,899.79
Minimum Agreement flat rate				$42.76
Additional site/market payment				$2.51
Flat Rate for Specific Assignment				$45.27

	M	T	W	T	F	S	S	M	T	W	T	F	S	S	M	T	W	T	F	S	S	M	T	W	T	F	S	S	
Ord	10	10								10	10									10										
Ord Sat >8hrs																					4									
Ord Sun >8hrs																					8									
Ord Sun																						10								
Ord Night			10	10								10												10	10					
Ord Sat Night >8hrs													4																	
Ord Sun Night														10																
Ord Sat Night >8hrs													8																	
OT 1hr	2.5	2.5								2.5	2.5	2.5	2.5	2.5						2.5	2.5	2.5				2.5	2.5			
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Ord Sat >8hrs																														4
Ord Sun >8hrs																														8
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Ord Night																														50
Ord Sat Night >8hrs																														4
Ord Sat Night >8hrs																														8
Ord Sun Night																														10
OT Day																														13
OT Night																														11

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[111] I also accept the oral evidence given by Mr Button in relation to the explanation provided to CoreStaff's employees about the terms of the Enterprise Agreement and the effect of those terms. Again, his evidence in that regard was not seriously challenged by the CFMMEU. Mr Button's oral evidence included that:

(a) the terms of the Enterprise Agreement did not change from when the draft Enterprise Agreement was first provided to employees on about 11 August 2018 and when the vote took place on 31 August 2018;

(b) Mr Button emailed the relevant documents to all 11 employees who voted on the Enterprise Agreement.[46] Each of those employees responded to Mr Button's email to inform him that they had received the documents;

(c) Mr Button was primarily responsible for explaining the terms of the Enterprise Agreement to the six CoreStaff employees who were placed to work at the Liddell mine. Mr James was primarily responsible for explaining the terms of the Enterprise Agreement to the five CoreStaff employees who were placed to work at the Ravensworth mine. However, Mr Button had telephone conversations with some of the CoreStaff employees who were placed to work at the Ravensworth mine in relation to the terms of the Enterprise Agreement;

(d) at the meeting Mr Button held with employees at the Liddell mine on 15 August 2018, Mr Button started discussions at 5:30am and was on site until about 8:30am. Some employees attended the meeting at 5:30am, while others arrived between 5:30am and 6:30am. During that meeting, the employees were present to discuss the Enterprise Agreement with Mr Button; they were not preparing for their shift on that day;

(e) the Liddell mine and the Ravensworth mine are owned by Glencore. CoreStaff supplies labour to those two mines for Glencore. A requirement imposed by Glencore is that any employees supplied by CoreStaff to work at those mines must have a minimum of 18 months mining experience in the past two years and relevant competencies. Accordingly, each of the employees who voted on the Enterprise Agreement was experienced in the black coal mining industry, although many of them have in the past been covered by enterprise agreements and have not had the BC Award applied to them for some period or at all;

[46] Ex A1 at [6]

(f) four of the six employees placed by CoreStaff at the Liddell mine at the time of the vote had between 8 and 15 years' experience in the black coal mining industry; and

(g) most of the employees who voted on the Enterprise Agreement are in the age range of late 30's to 55.

CFMMEU's submissions re explanation given to employees

[112] The CFMMEU submits that Mr Button's evidence does not contain information in sufficient detail for the Commission to find that all reasonable steps were taken to explain the terms of the Enterprise Agreement and the effect of those terms to employees.

[113] The CFMMEU also submits that the three-page explanatory document attached to Mr Button's Form F17 statutory declaration is highly problematic for the following reasons.

[114] First, the explanation in the document appears to contain a reference to only 10 clauses or sub–clauses of the Enterprise Agreement. There is no reference to any of the entitlements in the Enterprise Agreement that are less beneficial than under the BC Award. Nor is there any reference to other differences between the two documents, such as the BC Award provisions dealing with the excess accrual of annual leave, the cashing out of annual leave and personal leave and the availability of time off in lieu, whereas the Enterprise Agreement contains no such provisions. The CFMMEU relies on a number of decisions of Full Benches of the Commission where a failure to explain less beneficial terms has been found to be decisive in the Commission's decision to refuse an application for approval of an enterprise agreement, including *AWU v Professional Traffic Solutions Pty Ltd*[47] and *CFMMEU v Dawsons Maintenance Contractors Pty Ltd*.[48]

[115] Secondly, the explanatory document does not deal with the conditions contained in the currently applying industrial instrument, namely the 2014 Agreement, apart from what the CFMMEU contends is a misleading suggestion that under the 2014 Agreement, the employees asked to approve the Enterprise Agreement could be treated as casuals. Further, the explanatory document describes as "benefits" of the Enterprise Agreement over the BC Award the conversion from casual to permanent employment and casuals being paid a minimum four hours for wet weather events.

[116] Thirdly, the five meetings held with employees appears to be a reference to meetings held during bargaining. Each of the meetings were not attended, and could not be attended, by all employees. The CFMMEU contends there is insufficient detail of what explanation was provided at those meetings.

[117] Fourthly, the CFMMEU contends that CoreStaff managers "making themselves available" to answer questions at off-site sessions, in the employees' own time, does not discharge an obligation to take all reasonable steps to explain the Enterprise Agreement. The two meetings, scheduled for 23 August 2018 and 27 August 2018, appear to be the only meetings scheduled following the end of the "bargaining" period and the formal request to approve the Enterprise Agreement. The evidence in the Form F17 statutory declaration is that one employee attended on 23 August 2018 and none on 27 August 2018.

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[47] [2018] FWCFB 6333

[48] [2018] FWCFB 2992

[118] Fifthly, the contact by "a representative of CoreStaff Management" by telephone over the period 8 August to 30 August 2018 includes contacts during the bargaining period when the document distributed was described as a draft. The CFMMEU contends that little, if any, information has been lodged regarding the content of any discussions purportedly held.

[119] Sixthly, as to CoreStaff's contention that the employees are "experienced in the Black Coal Mining Industry", the CFMMEU submits there is little material lodged by CoreStaff to support such a contention and nothing that the Commission could rely on to make an assessment of the familiarity of the employees with either the 2014 Agreement or the BC Award.

[120] Seventhly, the explanation in the document does not contain any reference to those parts of the Enterprise Agreement that are detrimental as compared to the NES.

[121] Eighthly, the three-page explanation document, on its third page, incorrectly explains that the BC Award "does not contain any minimum provision of clothing" whereas the Enterprise Agreement does. The CFMMEU contends that this is clearly contrary to the "Work Clothing and Safety Boots" allowance provided in clause A.8 of the BC Award. Indeed, that allowance provides reimbursement for a new pair of safety Boots each 12 months, which the CFMMEU submits is potentially of greater benefit than the Enterprise Agreement's provision concerning boots.

[122] The CFMMEU also contends that the matters the subject of the other Undertakings were never explained to the employees and the giving of those undertakings cannot remedy the earlier failure to explain relevant matters.

CoreStaff's submissions re explanation to employees

[123] CoreStaff submits that Mr Button's evidence makes clear that:

(a) an explanatory document was provided to employees which contains, amongst other things, a comparison between the Enterprise Agreement and terms of the BC Award;

(b) five meetings were held with the employees covered by the Enterprise Agreement to explain to the employees the terms of the proposed Enterprise Agreement and they were attended by all 11 employees covered by the Enterprise Agreement;

(c) CoreStaff managers also made themselves available at off-site sessions on 23 August and 27 August 2018 to allow employees to ask additional questions about the Enterprise Agreement;

(d) a representative of CoreStaff management contacted all employees covered by the proposed Enterprise Agreement individually by telephone over the period 8 August to 30 August 2018 to discuss questions raised and further explain the terms of the Enterprise Agreement to employees; and

(e) the employees covered by the Enterprise Agreement are experienced in the black coal mining industry and have had explained to them that they would be voting on the

Enterprise Agreement as a current employee but should also consider that it would cover future employees.

[124] CoreStaff accepts that the explanatory document did not identify all differences between the BC Award and the Enterprise Agreement. CoreStaff also accepts that the explanatory document did not specifically address the NES issues identified by the CFMMEU.

[125] CoreStaff submits that any deficiency in its explanation of the terms of the Enterprise Agreement and their effect to employees is a minor procedural error of the type contemplated by s 188(2)(a) of the Act. CoreStaff also contends that the omissions identified by the CFMMEU will, in many cases, only impact on employees in very limited circumstances and/or arise from an overly technical and pedantic interpretation of the relevant provisions.

[126] CoreStaff further submits that, in all the circumstances, the employees covered by the Enterprise Agreement were not likely to have been disadvantaged by any such minor procedural error. The underlying purpose of s 180(5) of the Act was identified in *Huntsman Chemical Company Australia Pty Ltd T/A RMAX Rigid Cellular Plastics & Others*[49] to be ensuring that employees understood the effect of the Enterprise Agreement, enabling them to make an informed decision, and ensuring that particular classes of employees are able to understand the Enterprise Agreement notwithstanding any particular circumstances or needs.[50] All the employees in the present case are experienced in the black coal mining industry and were provided with a copy of the BC Award for their consideration, along with the Enterprise Agreement. In such circumstances, CoreStaff submits it is not likely that these employees were disadvantaged by the error.

Consideration re explanation given to employees and genuinely agreed

[127] On the basis of Mr Button's evidence, I am aware of a substantial part of the content of the explanation provided by CoreStaff to its employees in relation to the Enterprise Agreement and the effect of its terms.

[128] In light of Mr Button's evidence that the terms of the Enterprise Agreement did not change from when the draft Enterprise Agreement was first provided to employees on about 11 August 2018 and when the vote took place on 31 August 2018, the discussions Mr Button and Mr James had with employees about the terms of the Enterprise Agreement, and the effect of those terms, during the whole of that period are relevant to the question of whether CoreStaff took all reasonable steps to ensure that the terms of the Enterprise Agreement, and the effect of those terms, were explained to employees.

[129] Notwithstanding the fact that CoreStaff did not provide employees who voted on the Enterprise Agreement with an explanation of all the differences between the Enterprise Agreement and either the BC Award or, more relevantly, the 2014 Agreement, and did not explain the ways in which the Enterprise Agreement is less beneficial than the BC Award or the NES, I am satisfied that CoreStaff complied with its obligation under s 180(5) of the Act to take all reasonable steps to ensure that the terms of the Enterprise Agreement, and the effect of those terms, were explained to the employees, and the explanation was provided in

[49] [2019] FWCFB 318

[50] Ibid at [74]

an appropriate manner taking into account the particular circumstances and needs of the employees. My reasons for reaching this state of satisfaction may be summarised as follows:

(a) CoreStaff explained the terms of the Enterprise Agreement, and the effect of its main terms, to employees in writing and orally. Some of the oral discussions took place in person, while others took place by telephone. The discussions took place across a range of days and times of the day. Although employees were not paid to attend meetings in which these discussions took place, they were held outside the hours they were required to work to enable employees to attend;

(b) CoreStaff provided the employees with a copy of the BC Award, together with the Enterprise Agreement, the flat rate calculator, and a letter summarising the key differences between the Enterprise Agreement and the BC Award, prior to discussing the Enterprise Agreement with the employees;

(c) CoreStaff answered the questions asked by the employees about the Enterprise Agreement and the effect of its terms;

(d) Mr Button went through the flat rate calculations in the examples at the end of the Enterprise Agreement with employees to demonstrate how the rate was calculated;

(e) each of the employees is experienced in the black coal mining industry and comes from an English speaking background;[51]

(f) none of the employees are under 21 years of age, four of them are over 45 years of age,[52] and most of them are in the age range of late 30's to 55;[53]

(g) for the reasons set out above, the terms of the Enterprise Agreement which are less beneficial for employees than the BC Award are not, in my assessment, particularly significant, whether considered in isolation or collectively;

(h) for the reasons set out above, the Enterprise Agreement does not contain many terms that are less beneficial than the NES and where they are less beneficial, the difference is not significant; and

(i) the 2014 Agreement applied to the employees at the time they voted on the Enterprise Agreement and would have continued to apply to them had the Enterprise Agreement not been voted up and approved. Accordingly, in order for those employees to understand the impact of voting in favour of the Enterprise Agreement, the differences between the Enterprise Agreement and the 2014 Agreement were more important than the differences between the Enterprise Agreement and the BC Award. The Enterprise Agreement is more beneficial than the 2014 Agreement in many respects for casual employees in a production or engineering classification in the black coal mining industry. For example, the Enterprise Agreement requires the payment of a 25% loading to casual employees in a production or engineering classification in the black coal mining industry whereas the 2014 Agreement does not and the Enterprise

[51] Ex A3 at [2.7] and [4.3]

[52] Ex A3 at [4.3]

[53] Oral evidence given by Mr Button

> Agreement includes a casual conversion clause for casual employees in a production or engineering classification in the black coal mining industry whereas the 2014 Agreement does not for such employees.

[130] In expressing the opinions contained in the subparagraphs [129(g) and (h)], I am cognisant of the fact that an undertaking given during the enterprise agreement approval process to address a potential BOOT or NES issue cannot be relied on to overcome a deficiency in an explanation, or lack thereof, given to employees in the period leading up to a vote on an enterprise agreement.

[131] Also relevant to the question of whether the Enterprise Agreement was genuinely agreed to by the employees, is that on 23 August 2018, CoreStaff notified its employees of relevant voting information in relation to the Enterprise Agreement[54] and the notice stated, *inter alia*, that a "copy of the Agreement and incorporated modern award has already been provided to you". The Enterprise Agreement does not incorporate the BC Award or any other modern award. Accordingly, to the extent that the notice referred to an "incorporated modern award" it was misleading. However, earlier correspondence from CoreStaff to the employees made clear to employees that the BC Award would not apply to them if the Enterprise Agreement was made.[55] That is also apparent from clause 5 of the Enterprise Agreement. In all the circumstances, I do not consider the reference to an "incorporated modern award" in the notice dated 23 August 2018 provides reasonable grounds for believing that the Enterprise Agreement has not been genuinely agreed to by the employees. Further, I am satisfied that there are no other reasonable grounds for believing that the Enterprise Agreement has not been genuinely agreed to by the employees.

[132] In light of my conclusion that CoreStaff took all reasonable steps to ensure that the terms of the Enterprise Agreement, and the effect of those terms, were explained to employees, I do not need to address CoreStaff's alternative argument that any deficiency in its explanation was a minor procedural error within the meaning of s 188(2) of the Act.

Liability to civil penalty

[133] The CFMMEU submits that clause 16 of the Enterprise Agreement purports to allow CoreStaff to make deductions from wages, including "any amount for unauthorised absences, unpaid leave or monies owing to CoreStaff". CFMMEU contends that the clause appears to allow CoreStaff to make deductions contrary to s 323 in a manner not provided for in s 324 of the Act, which is a civil penalty provision.

[134] Section 192 of the Act provides the Commission with a discretion to refuse to approve an enterprise agreement where compliance with its terms would lead to "a person being liable to pay a pecuniary penalty in relation to a contravention of a law of the Commonwealth". The CFMMEU submits that it would be consistent with the objects of the Act for the Commission to exercise its discretion not to approve an Enterprise Agreement which on its face purports to allow deductions to be made which are prohibited by the Act.

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[54] Ex A1 at AB-4

[55] Ex A1 at AB-2

[135] I am satisfied that Undertaking 7 addresses the concern raised by the CFMMEU. It will ensure that CoreStaff cannot use clause 16 of the Enterprise Agreement to make deductions contrary to s 323 in a manner not provided for in s 324 of the Act.

Undertakings

[136] In accordance with s.190(3) of the Act, I may only accept the Undertakings if I am satisfied that the effect of accepting the Undertakings is not likely to:

(a) cause financial detriment to any employee covered by the Enterprise Agreement; or

(b) result in substantial changes to the Enterprise Agreement.

[137] The Undertakings have been provided to address various issues identified by the Commission and the CFMMEU. The purpose of the Undertakings is to provide additional protection and/or benefits to employees. I am satisfied that accepting the Undertakings would not be likely to cause financial detriment to any employee covered by the Enterprise Agreement.

[138] As to whether the effect of accepting the Undertakings would be likely to result in substantial changes to the Enterprise Agreement, it is necessary to consider the number and breadth of the Undertakings.[56]

[139] CoreStaff has provided 14 separate Undertakings to the Commission. They have been provided to address concerns raised about the NES, differences between the Enterprise Agreement and the BC Award to address BOOT issues, and to afford additional protections to employees in circumstances where the provision(s) in the Enterprise Agreement to which the protections relate are either ambiguous or give rise to the possibility that, in some circumstances, employees could be subjected to a detriment as compared with the BC Award or NES. Having carefully considered each of the 14 Undertakings individually and collectively, I am satisfied that the effect of accepting them would not be likely to result in substantial changes to the Enterprise Agreement.

[140] In accordance with section 190(2) of the Act, I am satisfied that the Undertakings will meet the concerns I have identified above in relation to whether the Enterprise Agreement meets the requirements set out in sections 186 and 187 of the Act.

[141] I am not aware of any person who is a bargaining representative for the Enterprise Agreement. Notwithstanding this, I have sought, received and considered the CFMMEU's comments in relation to the Undertakings.

[142] Pursuant to subsection 190 of the Act, I accept the Undertakings.

Satisfaction of other requirements

[143] Subject to the Undertakings, I am satisfied that each of the requirements of ss 186, 187, 188 and 190 as are relevant to this application for approval have been met.

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[56] *ALDI Foods Pty Ltd v TWU* [2012] FWCFB 9298 at [54]

[144] The Enterprise Agreement is approved and, in accordance with s.54 of the Act, will operate from 2 July 2019. The nominal expiry date of the Enterprise Agreement is 24 June 2023.

DEPUTY PRESIDENT

Appearances:

C Brown, solicitor, for the applicant

A Kentish, for the CFMMEU

Hearing:

2019.

Newcastle:

24 May.

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Annexure A

IN THE FAIR WORK COMMISSION

FWC Matter No.: AG2018/5111

Applicant: CoreStaff NSW Pty Ltd

APPLICATION FOR APPROVAL OF THE *CORESTAFF NSW BLACK COAL MINING INDUSTRY ENTERPRISE AGREEMENT 2018*
Fair Work Act 2009—s.185

I, Martin Rodgers, General Manager - NSW, give the following undertakings with respect to the CoreStaff NSW Black Coal Mining Industry Enterprise Agreement (the **Agreement**):

1. I have the authority given to me by CoreStaff NSW Pty Ltd (**CoreStaff**) to provide this undertaking in relation to this application before the Fair Work Commission.

2. The Agreement will be read and interpreted subject to the National Employment Standards (**NES**) and, where any term of the Agreement is inconsistent with the NES and provides a lesser entitlement than that provided by the NES, the NES will apply to the extent of that inconsistency.

3. For the purposes of consultation with employees in the case of a change referred to in cl.9.1(a) of the Agreement, CoreStaff will:
   a. as soon as practicable after a definite decision has been made by CoreStaff to make the change(s), discuss with the employees and their representatives, if any, the introduction of the changes, effects the changes are likely to have on employees and measures to avert or mitigate the adverse effects of such changes;
   b. subject to clause 9.6, provide in writing to employees (and their representatives, if any) all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees; and
   c. give prompt to consideration to matters raised by the employees and/or their representatives about the changes.

4. CoreStaff undertakes that clause 10.5 of the Agreement will be applied as if the subclause reads "Where the matter in dispute remains unresolved, the Fair Work Commission may exercise any method of dispute resolution permitted by the Act it considers appropriate to ensure the settlement of the dispute." only.

5. CoreStaff will, at the time of engagement of a part-time employee, agree in writing on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day. Any agreed variation to the regular pattern of work will be recorded in writing. All time worked in excess of the hours as mutually arranged will be overtime.

6. With respect to clause 12.1(b) of the Agreement:
   a. The calculation referred to at cl.12.1(b)(iii) of the Agreement will also be provided to a flat rate employee prior to any change to that employee's assignment or change to their designated work cycle and/or rostered hours of work in a particular assignment. The calculation referred to at cl.12.1(b)(iii) of the Agreement will also be provided to a base rate

employee before any change is made to pay that employee a flat rate of pay in accordance with clause 12.1(b) of the Agreement.

b. Where a flat rate employee's employment ends or they cease to be paid a flat rate part-way through a designated work cycle, CoreStaff will calculate the amount that would have been payable to the employee (for that part of the designated work cycle) if the employee was a base rate employee and paid in accordance with cl.12.1(a) of the Agreement. Where that amount is higher than the amount the employee was actually paid for that part of the designated work cycle, CoreStaff will pay the difference to the employee, with timing of payment to be within 72 hours of the employment ceasing or, for an on-going employee, the employee ceasing to be paid a flat rate.
c. Any hours worked by a flat rate employee in addition to the hours required in their specific roster will be paid in accordance with cl.26.2(b) of the Agreement.
d. Employees who are not required to work a designated work cycle or specific roster must be engaged as base rate employees and paid in accordance with cl.12.1(a) of the Agreement.
e. An employee's designated work cycle must not exceed 12 weeks.

7. Clause 16 of the Agreement will not be applied by CoreStaff and will be of no effect.

8. The meal allowance paid under cl.17.2 of the Agreement will be $15.32 for each meal.

9. For the purposes of cl.32.1 of the Agreement, the starting and finishing place of a shift will be in the designated pre-start meeting room or crib room (located away from the pit and in or near the administrative building compound on site) or at any other place specifically agreed between CoreStaff and the majority of the affected employees. Any time spent traveling between that place and work equipment will be considered time worked.

10. Where personal leave provided by cl.34 of the Agreement is taken:

    a. no deduction from the employee's personal leave entitlement will be made if the absence is for fewer than half the ordinary hours component of the employee's shift; and
    b. in all other cases, the full ordinary hours component of the shift will be deducted for each absence.

11. Employees will only be permitted to take accrued personal leave entitlements under cl.41(d) o the Agreement where the employee's circumstances would entitle them to personal leave under cl.34 of the Agreement and the NES.

12. Subject to cl.44.2(b) and 44.5 of the Agreement, where an employee's employment is terminated because:

    a. CoreStaff no longer requires the employee's job done by anyone due to reasons other than those specified in cl.44.2(a)(i) of the Agreement; or
    b. of the insolvency or bankruptcy of CoreStaff

    the employee will be provided with severance pay equal to one ordinary week's pay for each completed year of employment. For the avoidance of doubt, cl.44.4 of the Agreement will not apply in this circumstance.

13. CoreStaff will not employ 'maximum term' employees under the Agreement and will not apply the terms of cl.43.7(d) of the Agreement.

14. The words 'in excess of 70 hours' at cl.44.7 of the Agreement will be applied by CoreStaff as meaning '70 or more hours'.

Martin Rodgers
General Manager NSW
5 June 2019

Note - this agreement is to be read together with an undertaking given by the employer. The undertaking is taken to be a term of the agreement. A copy of it can be found at the end of the agreement.

CoreStaff NSW
Black Coal Mining Industry
Enterprise Agreement
2018

1. Arrangement

The Agreement is arranged as follows:

PART 1 – OPERATION OF THE AGREEMENT

2. Title

This Agreement is known as the CoreStaff NSW Black Coal Enterprise Agreement 2018 ("**Agreement**").

3. Application

This Agreement binds:

3.1. CoreStaff NSW Pty Ltd (ABN 77 167 062 606) ("**CoreStaff**"); and

3.2. Employees employed by CoreStaff (as defined above) who are deployed to work in Production or Engineering roles on a CoreStaff client site in NSW that would otherwise be covered by the *Black Coal Mining Industry Award 2010* ("**Employee**").

4. Date and period of operation

This Agreement will commence operating seven days after its approval by the Fair Work Commission and will remain in force until 4 years from the date of the commencement of the Agreement ("**Term**").

5. Relationship to the modern award and the national employment standards

This Agreement sets out the provisions and entitlements of employees engaged by CoreStaff to perform work in the black coal mining industry covered by this Agreement. To the extent allowed under the Fair Work Act 2009 or as otherwise expressly provided in this Agreement, this Agreement applies to the exclusion of any other Award or Agreement.

6. Definitions

Company shall mean CoreStaff NSW Pty Ltd
Employee shall mean an employee of the Company covered by this Agreement
Base Rate shall mean the base rate of pay before any loadings or penalties
Flat Rate shall mean a rate of pay inclusive of all loadings and penalties
Ordinary Hours of Work shall mean a maximum of 35 hours per week averaged over a roster cycle in accordance with this Agreement.
FWA or **FW Act** means the Fair Work Act 2009
BCMIA means the Black Coal Mining Award 2010
NES means National Employment Standards

7. No Extra Claims

Neither party will pursue any further claims about any permitted matter during the term of this Agreement.

PART 2 – FLEXIBILITY, CONSULTATION AND DISPUTE RESOLUTION

8. Flexible arrangements

8.1. CoreStaff and an Employee covered by this Agreement may agree to make an individual flexibility arrangement to vary the effect of terms of the Agreement if the Agreement deals with one or more of the following matters:

(a) arrangements about when work is performed;
(b) overtime rates;
(c) penalty rates;
(d) allowances;
(e) leave loading; and

The arrangement meets the genuine needs of the employer and employee in relation to one or more of the matters mentioned in paragraph (a); and

The arrangement is genuinely agreed to by the employer and employee.

8.2. CoreStaff will ensure that the terms of the individual flexibility arrangement:

(a) are about permitted matters under section 172 of the FW Act; and
(b) are not unlawful terms under section 194 of the FW Act; and
(c) result in the employee being better off overall than the employee would be if no arrangement was made.

8.3. CoreStaff will ensure that the individual flexibility arrangement:

(a) is in writing; and
(b) includes the name of the employer and employee; and
(c) is signed by the employer and employee and if the employee is under 18 years of age, signed by a parent or guardian of the employee; and
(d) includes details of:
    (i) the terms of the Agreement that will be varied by the arrangement; and
    (ii) how the arrangement will vary the effect of the terms; and
    (iii) how the employee will be better off overall in relation to the terms and conditions of his or her employment as a result of the arrangement; and
    (iv) the day on which the arrangement commences.

8.4. CoreStaff will give the employee a copy of the individual flexibility arrangement within 14 days after it is agreed to.

8.5. CoreStaff or the employee may terminate the individual flexibility arrangement:

(a) by giving no more than 28 days written notice to the other party to the arrangement; or
(b) if the employer and employee agree in writing — at any time.

9. Consultation

9.1. CoreStaff will consult with affected employees to whom the Agreement applies about:

(a) A major workplace change that is likely to have a significant effect on the employees; or
(b) A change to their regular roster or ordinary hours of work

9.2 The employee may appoint a representative for the purposes of that consultation.

9.3 For a change to the employees' regular roster or ordinary hours of work, the employer is required to:

(a) Provide information to the employees about the change; and
(b) 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) consider any views given by the employees about the impact of the change.

9.4. In this clause, 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 CoreStaff'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.

9.5. If a term in this Agreement provides for a major change to production, program, organisation, structure or technology in relation to the enterprise of the employer, the change will not be deemed to be one which is "likely to have a significant effect on employees".

9.6. Nothing in this clause can be taken to mean that CoreStaff is obliged to provide any information that is commercially sensitive or confidential.

10. Dispute resolution

10.1. The following steps will apply to the resolution of issues about a matter under this Agreement or in relation to the NES:

10.2. In the first instance, the parties must attempt to resolve the matter at the workplace by discussions between CoreStaff or the employees concerned and the relevant supervisor. If such discussions do not resolve the dispute, the parties will endeavour to resolve the dispute in a timely manner by discussions between the employee or employees concerned and more senior levels of management as appropriate.

10.3. If all appropriate steps under clause 10.2 have been taken, a party to the dispute may refer the dispute to the Fair Work Commission.

10.4. The parties may agree on the process to be utilised by the Fair Work Commission including mediation, conciliation and consent arbitration.

10.5. Where the matter in dispute remains unresolved, the Fair Work Commission may exercise any method of dispute resolution permitted by the Act that it considers appropriate to ensure the settlement of the dispute but will cease dealing with the matter immediately upon the separation of an employee for any reason. Relief is limited to by way of declaration only.

10.6. CoreStaff or the employee may appoint another person, organisation or association to accompany and/or represent them for the purposes of this clause.

10.7. While the dispute resolution procedure is being conducted, work must continue in accordance with this Agreement and the Act. Subject to applicable occupational health and safety legislation, an employee must not unreasonably fail to comply with a direction by the employer to perform work, whether at the same or another workplace, that is safe and appropriate for the employee to perform.

10.8. Appeal to the Federal Court lies for any party on a question of law.

Employees must perform work as reasonably required, and must undertake training that CoreStaff reasonably requires (which may include training to maintain their classification or acquire new competencies).

Where an employee does not perform work or undertake training in accordance with this clause the employee is not entitled to payment for that period.

An employer may direct an employee to carry out such duties as are within the limits of the employee's skills, competence and training consistent with the respective classification structures of this Agreement provided that such duties are not designed to promote deskilling and provided that the duties are within safe working practices and statutory requirements.

11. Types of Employment

11.1. CoreStaff may employ an employee in any classification included in this Agreement in one or more of the following types of employment:

(a) Full time
(b) Part time
(c) Casual
(d) Fixed or maximum term
(e) Trainees

11.2. Full time means an employee who is engaged as such, works an average of 35 ordinary hours per week and accrues leave entitlements outlined in this Agreement.

11.3. Part time means an employee who is engaged as such, works less than an average of 35 ordinary hours per week but works a regular pattern of work and accrues leave entitlements outlined in this Agreement. The terms of the Agreement will apply for the agreed amount and arrangement of ordinary hours.

11.4. Casual means an employee who is engaged and paid as such. For Casual Employees:

(a) Employees will be paid a 25% loading on the ordinary rate of pay in lieu of
    (i) Leave entitlements
    (ii) Notice of termination
    (iii) Redundancy entitlements

(b) Casual loading is not payable on overtime hours

(c) Casual employees who achieve 6 months continuous service with CoreStaff that is at least equal to the ordinary hours of work over that period shall have the right to request to be converted from a casual employee to a permanent employee.

For avoidance of doubt the ordinary hours over that period are 910 (26 weeks multiplied by 35 ordinary hours).

Requests under this clause are subject to the employee having a satisfactory record of service. CoreStaff cannot unreasonably refuse a request, however if a request is refused CoreStaff must detail the reasons fully in writing to the employee.

Casual employees are not required to convert to permanent employees and retain the right to choose to remain casual employees.

Any disagreement regarding the operation of this clause will be dealt with in accordance with Clause 10 of this Agreement.

11.5. Fixed or Maximum Term means an employee engaged for a specific task or duration not longer than 12 months at a time.

11.6. Trainee means an employee engaged under a nationally recognised traineeship program employed on a full time or part time basis under an indentured traineeship.

Trainees completing a Certificate II	Trainees completing a Certificate III
80% of the Mineworker Level 1 rate	90% of the Mineworker Level 1 rate

12. Wage rates

12.1. Employees will either be paid the base rates as set out in clause 12.1(a), or CoreStaff may implement flat rates of pay subject to the requirements of clause 12.1(b).

(a) Base Rates

Where an employee is engaged to work as a base rate employee they will be paid penalty rates, allowances and overtime as provided by this Agreement.

A casual loading of 25% is included in the Casual Base Rate in the table below.

The following ordinary rates apply from approval;

Position	Permanent Base Rate	Casual Base Rate
Mineworker Production Level 1	$24.00	$30.00
Mineworker Production Level 2A	$24.24	$30.30
Mineworker Production Level 2B	$24.42	$30.53
Mineworker Production Level 3	$25.91	$32.39
Mineworker Production Level 4	$27.16	$33.95
Mineworker Production Level 5	$29.95	$37.44
Mineworker Engineering Level 1	$24.24	$30.30
Mineworker Engineering Level 2	$25.66	$32.08
Mineworker Engineering Level 3	$27.96	$34.95
Mineworker Engineering Level 4	$30.83	$38.54

(b) Flat Rates

(i) CoreStaff may implement flat rates of pay. Where flat rates are paid to an employee, the flat rate is received by the employee in satisfaction of and in compensation for any and/or all entitlements to penalty rates, shift loadings, overtime rates, other loadings and allowances which might otherwise apply to the employee (except as provided under the NES or in any mandatory terms of this enterprise agreement under the Act).

(ii) Flat rates of pay will be calculated taking into account the specific roster pattern that an employee works. The total payments made to the employee for the same designated work cycle and rostered hours of work must be not less than that which the employee would have received if they were a base rate employee and paid in accordance with clause 12.1(a).

(iii) Prior to beginning an assignment, employees engaged as a flat rate employee will be provided with a detailed calculation demonstrating how their flat rate has been calculated. Examples of the calculation can be found in Schedule 1 of this Agreement.

(iv) Any shifts worked by an employee in addition to the shifts required in the specific roster will be paid in accordance with clause 26.2(b) of this Agreement.

12.2. At the time of their employment, CoreStaff will inform an employee of the status and terms of their employment.

12.3. Ordinary rates in this Agreement will increase in line with the following table

Date	Increase
First pay period after July 1, 2019	3% or FWC increase whichever is greater
First pay period after July 1, 2020	3% or FWC increase whichever is greater
First pay period after July 1, 2021	3% or FWC increase whichever is greater
First pay period after July 1, 2022	3% or FWC increase whichever is greater

12.4. CoreStaff will ensure that the ordinary rates of pay are at least 1% greater than the BCMIA, as adjusted annually.

12.5. At the time of this Agreement being approved by the Fair Work Commission, each employee will continue to be paid the terms and conditions of the current assignment being worked for the duration of that relevant assignment. In the event that those rates are lower than those which are contained within the Agreement, the higher rate will be paid.

12.6. The rates of pay contained within Schedule 1 are minimum rates of pay and CoreStaff may elect at its discretion to pay rates greater than those contained in Schedule 1 during the life of this Agreement.

13. Classifications

13.1. At the commencement of each assignment, an employee will be assigned to a classification level based on skills, qualifications and experience and in consideration of the substance of the duties to be carried out on the client site.

13.2. The classifications in which employees may be employed are set out in the table below and will be determined by the skills required for the particular role and not skills held by the employee

13.3. An employee required to carry out work at a higher level for any part of a shift will be paid at the higher level for the entire shift

Classification	Description
Mineworker Production Level 1	A production employee with no mining industry experience who is able to demonstrate relevant competencies in another industry, for example a civil construction plant operator. Employees will remain at this level for a maximum of 6 months
Mineworker Production Level 2A	A production employee required to operate and is competent on a single piece of plant, who trains in and performs the required tasks under direct supervision.
Mineworker Production Level 2B	A production employee required to operate and is competent on 1-3 pieces of plant who performs the required tasks in a variety of operating circumstances and under supervision. An employee continues in this classification until assessed for advancement to Mineworker Level 3.
Mineworker Production Level 3	A production employee required to operate and is competent on up to 4 pieces of machinery who is competent to perform the required tasks in all relevant operating circumstances under limited supervision A production employee required to operate less than 4 competencies but has been assessed by the relevant site as being a higher level than Mineworker Level 2B
Mineworker Production Level 4	An employee who is assessed against the available criteria as competent to perform the required tasks in all relevant circumstances at a level above that of a Mineworker Level 3. A Mineworker Level 4 may be required to supervise the work of other employees.
Mineworker Production Level 5	An employee appointed to this classification will undertake a specialised role, which requires them to exercise independent discretion in undertaking functions within the bounds set by our clients. The performance of this role may require the employee to supervise the work of other employees.
Mineworker Engineering Level 1	An engineering employee who is non-trade qualified and has no mining industry experience.

Mineworker Engineering Level 2	An engineering employee who is non-trade qualified with mining industry experience. An engineering employee who is a trade qualified with no mining industry experience.
Mineworker Engineering Level 3	An engineering employee who is a trade qualified with mining industry experience.
Mineworker Engineering Level 4	An engineering employee who holds dual trade qualifications or holds advanced qualifications allowing them to work at a level above that of a Mineworker Engineering Level 3 A Mineworker Engineering Level 4 may be required to supervise the work of other employees.

14. Site Bonus

On the first full pay period after approval of this Agreement, employees who are CoreStaff employees working under this Agreement will be paid a one-off bonus of $500.

15. Method of payment

15.1. Employees will be paid weekly by direct payment into the bank or financial institution account of their choosing.

16. Deductions

16.1. Employees authorise CoreStaff to deduct from their wages including leave and termination payments:

(a) All taxes payable by law
(b) Any amount for unauthorised absences, unpaid leave or monies owing to CoreStaff
(c) Deductions authorised by the employee by completing a Payroll Deduction Form

17. Allowances

17.1. The following table contains wage related allowances and reimbursements payable under this Agreement

Allowance	**Percentage of standard rate (Level 3 – Mineworker)**	**Application**
Washery allowance	0.63% per day or per shift; minimum payment of 0.32%	Where an employee is employed in or about a washery This allowance is in substitution of all other disability allowances except water money

Water money	0.49% per shift	Where, through no fault of the employee, and in the course of duties, an employee's clothing becomes wet The employee is to notify the supervisor of the intention to claim water money and the reasons for making it as soon as is possible An employee regularly receiving water money must not have the payment discontinued without notice
Shaft work (Electrical/ Mechanical)	0.59% per shift. Minimum payment of 0.3% Minimum payment of 4 hours at the above rate for employees required to carry out work in connection with the release of blockages in sewerage lines and connections thereto (including pumps) A minimum payment of one hour for work on pumps after removal from a pumping station or treatment works for cleaning or stripping	An employee is engaged on shaft work
Dirty work	0.23% per shift	Where an employee has to handle machinery, equipment, appliances or gear of any description which is covered with oil or grease
Confined spaces allowance (Electrical/ Mechanical)	0.08% per hour	Employees working in a space, the dimensions of which necessitate working in a stooped or otherwise cramped position or without proper ventilation, or where confinement within a limited space is unusually discomforting
Height money (Electrical/ Mechanical)	0.23% per shift	Where an employee is engaged on work at a height of 7.5 metres or more above the nearest horizontal plane
First Aid Officer allowance (does not apply to employees employed under the open cut or underground work models)	0.76% per day or shift or attendance at or paid absence from work	Where an employee is appointed as a first aid officer
First Aid Attendant allowance (does not apply to employees employed under the open cut or underground work models)	0.45% per day or shift	Where an employee is appointed as a first aid attendant

Boom Welding allowance (does not apply to employees employed under the open cut work model)	0.095% per hour	Where an employee carries out pressure or x-ray standard welding on booms
Underground allowance (Electrical/ Mechanical)	0.23% per day or shift	An adult employee who works underground on any shift
Additional shift allowance—Open cut employees	0.43% per afternoon shift and 0.85% per night shift (additional to the shiftwork rates)	Where an employee is engaged on afternoon shift and/or night shift at open cut workings and who is in receipt of the 15% shift allowance
Working clothes and safety boots	Reimbursement by the employer each year for one pair of safety boots and two sets of industrial outer clothing; the articles are to be at a standard normally issued by the Company	Employees required to provide and wear industrial outer clothing and safety boots This provision does not apply where such footwear and clothing are supplied to the employee at the employer's expense
Damage to clothing and tools (Electrical/ Mechanical)	Compensation to the extent of damage sustained will be made Provided that the employer's liability for such tools will be limited to such tools of trade as are ordinarily required for the performance of the employee's duties	Where in the course of the work clothing or tools are damaged or destroyed by fire or molten metal or through the use of corrosive substances
Transport	1. Reimbursement of any expense reasonably incurred in excess of expenses usually incurred travelling between home and normal place of work	When employee is required to work during annual leave shutdown and the normal means of transport is unavailable and provided the employee attends for work and performs such work as the employer reasonably requires
	2. Payment at ordinary rates for all time reasonably spent outside ordinary hours of work travelling between home and the temporary location beyond the time usually spent in travelling between home and the ordinary location and/or reimbursement of any expense reasonably incurred in such travelling in excess of the expense usually incurred travelling	When an employee is required to temporarily work away from their ordinary location

	between home and the employee's ordinary location	
	3. Payment for one hour at ordinary rates or the provision of transport at the employer's cost	When an employee works shiftwork, overtime or pre-shift overtime and the employee's normal means of transport is unavailable

17.2. The following table contains expense related allowances payable under this Agreement. CoreStaff will ensure that expense related allowances will be adjusted in line with any adjustments to expense related allowances in the BCMIA.

Allowance	**Rate**	**Application**
Tool allowance	Employees required to provide necessary tools must be paid an additional $11.55 per week	Employers will continue to supply tools customarily supplied by them
Meal allowance	$15.01 for each meal	When an employee is entitled to a meal allowance in accordance with the provisions of this Agreement

18. Superannuation

18.1. Payments will be made by CoreStaff on the employees' behalf in accordance with current legislation. Employees have the right of choice of a superannuation fund and if requested to do so by the employee, CoreStaff will comply with the individual's choice.

18.2. In default of an election by an Employee the superannuation fund will be paid to a MySuper product of Mine Wealth & Wellbeing.

19. Personal Protective Equipment (PPE)

Consumable PPE such as safety glasses, hard hats and gloves will be provided as required by employees for the specific role at no cost and will be replaced on a fair wear and tear basis.

The following protective clothing will be provided as required by employees on commencement and replaced on a fair wear and tear basis;

- 3 long sleeve shirts
- 3 pairs of work trousers
- 1 pair work boots
- 1 waterproof/winter jacket

20. Payment for inductions

(a) Employees undertaking site specific re-induction for the purposes of continuation of work at that client site will be paid at the relevant required rate depending on the time of the induction. Inductions completed during ordinary time will be paid at the ordinary time rates set out in clause 12.1(a) of this Agreement for the duration of the induction. Inductions completed during overtime will be paid at the relevant overtime rates set out in clause 26 of this Agreement.

21. Payment for medicals

(a) Employees undertaking medicals to commence work on a new site will not be paid for required medical examinations including the cost of the examination.

(b) Employees undertaking medicals outside of working hours for the purposes of continuation of work required under the Coal Industry Act 2001 will be paid at the ordinary time rates set out in clause 12.1(a) of this Agreement for the duration of the medical and the cost of the medical examination will be met by CoreStaff.

22. Accident pay

An employee in receipt of weekly payments under the provisions of applicable workers compensation legislation will be entitled to receive accident pay from the employer subject to the following conditions and limitations:

22.1. An employer must pay, or cause to be paid, accident pay during the incapacity of the employee, within the meaning of the applicable workers compensation legislation:
(a) until such incapacity ceases; or
(b) until the expiration of a period of 78 weeks from the date of injury;

whichever event will first occur, even if the employer terminates the employee's employment within the period.

22.2. For the purposes of this clause accident pay means:

(a) For the initial period of 39 weeks from the date of injury, a weekly payment representing the difference between the weekly amount of compensation paid to the employee under the applicable workers compensation legislation and the weekly amount that would have been received by virtue of this Agreement had the employee been on paid personal leave at the date of the injury (provided the latter amount is greater than the former amount).

(b) For a further period of 39 weeks a weekly payment representing the difference between the weekly amount of compensation paid to the employee under the applicable workers compensation legislation and the rate prescribed from time to time for the classification of the incapacitated employee at the date of the injury (provided the latter amount is greater than the former amount).

22.3. Pro rata payments In respect of incapacity for part of a week the amount payable to the employee as accident pay will be a direct pro rata.

22.4. An employee will not be entitled to any payment under this clause in respect of any period of paid annual leave or long service leave, or for any paid public holiday.

22.5. In the event that an employee receives a lump sum in redemption of weekly payments under the applicable workers compensation legislation, the liability of the employer to pay accident pay as herein provided will cease from the date of such redemption.

22.6. Where the employee recovers damages from the employer or from a third party in respect of the said injury independently of the applicable workers compensation legislation, such employee will be liable to repay to the employer the amount of accident pay which the employer has paid under this clause and the employee will not be entitled to any further accident pay thereafter.

22.7. The 78 week period commences from the first day of incapacity for work, which may be subsequent to the date of injury. Intermittent absences arising from the one injury are to be cumulative in the assessment of the 78 week limitation.

PART 4 – HOURS OF WORK

23. Ordinary hours

22.8. The ordinary hours of work are an average of 35 hours per week which may be averaged over the roster cycle.

22.9. The maximum ordinary hours worked on any day will be 10 hours.

22.10. Ordinary hours may be worked on any day including Saturday and Sunday provided that;

(a) Ordinary hours worked on Saturday will be paid at time and a half for the first four (4) hours and double time after four (4) hours
(b) Ordinary hours worked on Sunday will be paid at double time

24. Rostering

Shifts may be up to 12.5 hours in duration including changeover time. Shift length, start and finish times and roster pattern will depend on the type of work employee has been engaged for and will reflect the operational needs of the client site the employee is being placed at.

25. Rostered Days Off (RDO's)

25.1. Where RDO's are provided as part of the operational requirements of our clients sites the following terms apply;

(a) Subject to this clause, if an employee is entitled to a rostered day off (RDO) then the employee must be advised by the employer:
(i) at least four weeks before the day the employee is to take off; or
(ii) a lesser period of notice as agreed by the employer and the majority of employees in the mine or sections affected.

(b) An employee will only be required to work on an RDO after attempts by the employer to cover the casual vacancy by other means have failed.

(b) An employee will be paid for working ordinary hours on an RDO at either:
(i) ordinary rates for time worked during ordinary hours on an RDO, and will receive a day in lieu, or
(ii) overtime rates for the time worked during ordinary hours on the RDO, without any day off in lieu.

(d) An employee will be paid overtime rates for all time worked outside or in excess of the ordinary hours for that day or shift.

(f) An employee who is entitled to an RDO which falls on a public holiday is, at the discretion of the employer, to be either:
(i) paid at the employee's classification rate; or
(ii) credited with one day for each such public holiday (payable at ordinary rates).

26. Overtime

26.1. Base Rate Employees

(a) All time worked in excess of or outside of the ordinary hours of any shift on the following days will be paid for at the following rates

Day of week	Rate of pay
Monday to Friday	First 3 hours at time and a half
	After 3 hours at double time
Saturday	First 3 hours at time and a half
	After 3 hours at double time
Sunday	Double time

(b) All time worked in excess of or outside the ordinary hours of any shift by employees:

(i) who are six day roster employees or seven day roster employees;
(ii) who work a roster which requires ordinary shifts on public holidays and not less than 272 ordinary hours per year on Sundays; or
(iii) who work a roster which requires ordinary shifts on Saturday and Sunday where the majority of the rostered hours on the Saturday or Sunday shifts fall between midnight Friday and midnight Sunday;

will be paid for at the rate of double time.

(c) An employee called on to work overtime on a Saturday or Sunday (that is not continuous with work started on the previous day) will be paid for at least three hours at the appropriate rate.

26.2. Flat Rate Employees

(a) Flat rates are calculated to include rostered overtime and employees will be paid the flat rate of pay for rostered overtime

(b) Flat rate employees who are required to work unrostered overtime shifts will be paid at the rate of double time of the applicable base rate for all overtime hours worked, or at treble time if the overtime shift falls on a public holiday.

27. Shift Work

27.1. Afternoon shift means any shift, the ordinary hours of which finish after 6.00 pm and at or before midnight.

27.2. Night shift means any shift, the ordinary hours of which finish after midnight and at or before 8.00 am.

27.3. Permanent night shift employee is an employee who:

(a) works night shift only; or
(b) stays on night shift for a longer period than four consecutive weeks; or
(c) works on a roster that does not give at least one-third of the employee's working time off night shift in each roster cycle.

27.4. Rates payable for shiftwork are contained in the following table;

Type of shift	**Shift rates**
Day shift	Ordinary time
Afternoon and rotating night shifts	
(a) Ordinary hours	(a) 115% of the ordinary time rate
(b) Overtime hours 6 or 7 day roster	(b) Overtime penalty rate plus 15% of the ordinary time rate for time worked
(c) All others	(c) Overtime penalty rate
Permanent night shift	
(a) Ordinary hours	(a) 125% of the ordinary time rate
(b) Overtime hours 6 or 7 day roster	(b) Overtime penalty rate plus 25% of the ordinary time rate for time worked
(c) All others	(c) Overtime penalty rate

27.5. Change of shift for permanent day shift employees

If an employee normally works on day shift is required to work afternoon or night shift they will be paid at overtime rates for up to 3 consecutive shifts. If they are required to more than 3 consecutive shifts they will be paid the shift rates in clause 27.4 from the 4th shift

28. Roster Changes

28.1. An employee who is required to change rosters will be provided at least 1 weeks notice of the change.

28.2. Where less than 1 weeks notice is provided the employee will be paid overtime rates for any time worked during the normal notice period

29. Meal Breaks

29.1. Employees working up to 10 hour shifts will be entitled to paid breaks totalling 30 minutes per shift.

29.2. Employees working shifts greater than 10 hours in length will be entitled to paid breaks totalling 60 minutes per shift.

29.3. Meal breaks are counted as time worked and will be taken times that suit the operational requirements of the client's site provided that employees work no more than 5 hours without a break.

29.4. Meal breaks during non-rostered overtime

(a) If an employee is required to work more than one and a half hours past their rostered shift (exclusive of crib time) then the employee will, unless agreed otherwise, before starting this overtime be allowed at least 30 minutes for a meal without deduction of pay.
(b) The employee will also, unless notified the previous day of the requirement to work overtime, be supplied with a meal or paid a meal allowance
(c) After each four hours of overtime worked after a crib break the employee will have a further crib break and either be supplied with a meal or be paid a meal allowance.
(d) Where the overtime worked is not continuous with an employee's rostered hours, the employee is entitled to a meal break of 30 minutes without deduction from pay after each five hours worked.

30. Call Back

(a) Payment for call-back

(i) An employee who is recalled to work overtime after leaving the mine (whether the employee was notified before or after leaving the mine) will be paid for at least four hours work at the appropriate rate for each time the employee is recalled.

(ii) Except where unforeseen circumstances arise, the employee will not be required to work the full four hours if the job to be performed is completed within a shorter period.

(iii) The provisions of this clause do not apply in the following cases:

- where it is customary for an employee to return to the mine to perform a specific job outside the employee's ordinary working hours; or
- where the overtime is continuous (subject to a reasonable meal break) with the end or start of ordinary working time.

(b) Call-back less than four hours

Overtime worked in the circumstances specified in clause 29(a) will not be regarded as overtime for the purposes of a rest period as set down in clause 28 if the actual time worked is less than four hours on any recall or on each of any recalls.

31. Fatigue Breaks

31.1. Employees are required to have a minimum 10 hour break between shifts.

31.2. When overtime work is necessary it will be arranged where possible for employees to have at least 10 consecutive hours off duty between the work of successive days.

31.3. Where an employee has not had at least 10 consecutive hours rest between the end of the employee's ordinary hours of work on one day and the start of the employee's ordinary hours of work on the next day:

(a) the employee will be released from duty after that overtime is finished until the employee has had 10 consecutive hours off duty, and
(b) there will be no loss of pay for ordinary hours of work time which occur during this absence.

31.4. Where an employee resumes or continues work without having had 10 consecutive hours off duty

(a) the employee will be paid at double time during ordinary hours and after that until the employee is released from duty;
(b) the employee will then be entitled to be absent for 10 consecutive hours; and
(c) there will be no loss of pay for ordinary hours of work time which occur during this absence.

32. Starting and Finishing Places & Times

32.1. The starting and finishing place and time of a shift will be in line with the operations of the specific client sites and will be communicated to employees prior to the beginning of any assignment.

32.2. At underground mines, the designated starting and finishing place and time will be on the surface.

PART 5 – LEAVE ENTITLEMENTS

33. Annual leave

33.1. Employees other than casual employees will accrue leave entitlements in accordance with the table below;

Employees working a 6 or 7 day, continuous shift or permanent night shift or an employee who works a roster which requires ordinary shifts on public holidays and not less than 272 ordinary hours per year on Sundays	210 hours per year (4.0385 hours per completed week)
All other employees	175 hours per year (3.3654 hours per completed week)

33.2. The rate of pay for annual leave will be the following

(a) Base rate employees

(i) the employee's ordinary rate of pay plus a loading of 20% of that rate; or
(ii) the employee's rostered earnings for the period of annual leave, which includes all rostered overtime and rostered public holidays (paid at double time), but does not include shift allowances, other than for seven day roster employees; whichever is the greater.

(b) Flat rate employees will receive the flat rate of pay with no additional loading as the rate includes loadings and penalties in excess of the requirement in 12.1(a).

33.3. Employees must endeavour to provide CoreStaff at least 4 weeks' notice of intention to take annual leave to allow for operational requirements of our clients sites.

33.4. Annual leave will be granted pending the operational requirements of each client's site at the time of the application but will not unreasonably be refused

33.5. Part time, fixed term and maximum term employees will accrue personal leave on a pro-rata basis.

34. Personal leave

34.1. Employees other than casuals are entitled to 105 ordinary hours of personal / carers leave per year which becomes available on commencement and the anniversary of commencement, and accumulates without limitation.

34.2. Part time, fixed term and maximum term employees will accrue personal leave on a pro-rata basis.

35. Managing absenteeism

35.1. An employee absent from duty due to personal illness or personal incapacity must as soon as practicable (which to the extent possible should be before the employees shift commences):

- inform CoreStaff and the supervisor of CoreStaff's client of their inability to attend for duty by telephone;
- state the estimated duration of the absence;

35.2. CoreStaff may request evidence in cases of personal illness or injury, provided that a certificate from a registered medical practitioner or, where that is not reasonably practicable, a statutory declaration, is provided as evidence

36. Long service leave

An employee will accrue long service leave in accordance with the relevant federal Coal Mining Industry Long Service Leave legislation.

37. Public Holidays

37.1. Base rate employees required to work a public holiday will be paid treble time for ordinary hours and treble time for hours in excess of ordinary hours.

37.2. Flat rates are calculated including rostered public holidays and flat rate employees will be paid their flat rate of pay for any work on a public holiday.

37.3. Flat rate employees working an unrostered public holiday will be paid at a rate equivalent to the rate paid to base rate employees in 35.1.

38. Compassionate Leave

Compassionate Leave is provided for by the NES and as stated in this clause below.
Employees are entitled to paid compassionate leave of 2 days without loss of pay, for each occasion after the death of a member of their immediate family, or to spend time with a member of their immediate family who contracts or develops a life-threatening illness or injury. CoreStaff may request that the employees provide reasonable evidence to support compassionate leave.
Compassionate leave for casual employees will be unpaid.

39. Jury Service Leave

Employees required to attend jury service shall be reimbursed by CoreStaff an amount equal to the difference between the amount paid for jury service and the amount of wages they would normally have earned during the period of jury service.

40. Parental Leave

Parental Leave will be available in accordance with the NES or any changes in relevant legislation.

41. Shutdowns

CoreStaff may shut down operations to meet seasonal or operational requirements by providing at least one month's notice to affected employees. During periods of shutdown, employees may

(a) Take any accrued annual leave entitlements

(b) Take leave without pay. Leave without pay taken under the clause will count as continuous service.

(c) Come to agreement with CoreStaff to take annual leave in advance

(d) Take any accrued personal leave entitlements

Casual employees will not be entitled to payment for time not worked during a period of shutdown

42. Wet Weather

Where a client has directed that employees not attend work due to wet weather, and employees are notified before attending work

(a) Permanent employees will be entitled to payment for ordinary hours that would normally have been worked

(b) Casual employees will not be entitled to payment for hours not worked, however a casual employee who is not notified of stand down prior to attending site will be entitled to a minimum of 4 hours pay.

PART 6 – TERMINATION OF EMPLOYMENT

43. Termination of employment

43.1. The employment may be terminated by CoreStaff by providing the following notice in writing:

Employee's period of continuous service with Employer at the end of the day notice is given	**Period of notice**
Casual Employees	24 hours
All employees other than casuals	
Not more than 1 year	1 week
More than 1 year but not more than 3 years	2 weeks
More than 3 years but not more than 5 years	3 weeks
More than 5 years	4 weeks

43.2. The employment may be terminated by an employee by providing 1 week's notice, or forfeit to the employer 1 week's pay instead of giving notice

43.3. Employees made redundant under clause 44 of this agreement will be entitled to 4 week's paid notice.

43.4. Permanent employees over 45 years of age with more than 2 years continuous services will receive 1 additional week's notice

43.5. Where employment is terminated by CoreStaff, CoreStaff may make a payment in lieu of notice which will comprise of the time the employee would have ordinarily worked during the notice period.

43.6. Upon termination of employment, wages due to an employee will be paid on the day of such termination or forwarded by post, within 72 hours, to the last address notified in writing by the employee.

43.7. Fixed term or maximum term employees may be terminated by the following;

(a) Completion of the time period specified
(b) Completion of the assignment or task
(c) Completion of the project or closure of the site
(d) The notice required in 41.1

43.8. Nothing in this clause affects the right of CoreStaff to terminate an employee for serious misconduct. No notice is required to be given and employees are only entitled to wages earned up to the time of termination.

Examples of serious misconduct may include but are not limited to;

- Breaching site safety requirements including alcohol and other drugs
- Breaching CoreStaff's company policies
- Participating in illegal activities including possession of drugs or weapons
- Wilful damage of the client's property
- Discrimination or harassment of any kind

44. Redundancy

44.1. The redundancy arrangements in this Agreement are specific to this Agreement and operate to the exclusion of the NES and the BCMIA

44.2. Definition of redundancy

(a) An employee is made redundant where an employee's employment is terminated:

(i) because CoreStaff no longer requires the job done by the employee to be done by anyone where this is due to

- Market forces
- Technological change
- Diminution of reserves

(b) This clause does not apply to employees engaged for a fixed term or maximum term or on a casual basis or due to the ordinary and customary turnover of labour

44.3. For the purposes of this clause, a week's pay is the relevant ordinary rate of pay excluding payments or build up for overtime, penalties or allowances

44.4. Redundancy payment

(a) Except where clause 42.5 applies, when terminations occur due to redundancy the employees terminated are entitled to redundancy pay equal to three (3) ordinary week's pay for each completed year of employment.

(b) Regardless of length of employment, the minimum payment due to employees under clause 42.2(a) is two ordinary weeks' pay.

44.5. Exemption

CoreStaff is not liable for redundancy payment where it makes available for the employee, work:

(a) that the employee is competent to perform;

(c) in a position that carries the same or a higher classification rate of pay than the employee's previous position;

(c) that can reasonably be regarded as permanent; and

(d) allows the employee to reside in the same general locality as the employee's previous residence.

44.6. Where an employee agrees to transfer to a position with a lower rate of pay, CoreStaff may pay the employee an amount equal to the difference between the ordinary week's pay at the time of the redundancy, and the new ordinary week's pay, for the required amount of weeks of redundancy.

44.7. An employee who is terminated by retrenchment, retirement at or after the age of 60, ill health or death, must be paid for untaken personal leave at the base rate of pay if the balance of personal leave is in excess of 70 hours at the time of termination.

44.8. Where an employee is terminated during a period of paid personal leave, the employee must be paid until the personal leave entitlement expires or until the employee is fit for duty, whichever occurs first.

SIGNATORIES

Company Signatory

Signed for and on behalf of **CoreStaff NSW Pty Ltd**

12/9/18
Dated

ADRIAN BUTTON
Name

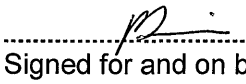
BUSINESS MANAGER
Position

204 HANNELL ST, MARYVILLE
Address

EXPLANATION OF AUTHORITY TO SIGN THE AGREEMENT:

MANAGE CORESTAFF WORKFORCE IN NEWCASTLE/HUNTER VALLEY

Employees' Signatory



Signed for and on behalf of: **Employees**

12/9/18
Dated

Joshua Davis
Name

Production operator
Position

115 Falbrook Rd Falbrook NSW 2330
Address

EXPLANATION OF AUTHORITY TO SIGN THE AGREEMENT:

Representative of employees covered by The Agreement

SCHEDULE 1

Examples of flat rate build up used to calculate minimum flat rates. Copies of rate builds for individual roster patterns will be provided to employees prior to commencement.

Example 1
4 on / 4 off roster pattern.

Roster

	M	T	W	T	F	S	S	M	T	W	T	F	S	S	M	T	W	T	F	S	S	M	T	W	T	F	S	S
Ord	10	10							10	10							10	10							10	10		
Ord Sat <4hrs																												
Ord Sat >4hrs																												
Ord Sun																												
Ord Night			10	10							10	10						10										
Ord Sat Night <4hrs																			4								4	
Ord Sat Night >4hrs																			6								6	
Ord Sun Night																												10
OT Day	2.5	2.5							2.5	2.5							2.5	2.5							2.5	2.5		
OT Night			2.5	2.5							2.5	2.5							2.5	2.5							2.5	2.5
Ord					10																10							
Ord Sat <4hrs						4							4															
Ord Sat >4hrs						6							6															
Ord Sun														10						10								
Ord Night								10							10	10						10	10					
Ord Sat Night <4hrs																												
Ord Sat Night >4hrs																												
Ord Sun Night							10																					
OT Day					2.5	2.5							2.5	2.5						2.5	2.5							
OT Night							2.5	2.5							2.5	2.5						2.5	2.5					

Rate Build Up

Agreement Level			Production Level 2B
Agreement Base Rate			$24.42
Number of weeks in roster cycle			8
Number of shifts in roster cycle			28
Hours per shift			12.5
Expected public holidays worked for year			7
Component	**No. hours**	**Rate (%)**	**Rate ($)**	**Total**
Ordinary day shift hours M-F	100	125.00%	$30.53	$3,052.50
Ordinary day shift hours Saturday <4 hrs	8	175.00%	$42.74	$341.88
Ordinary day shift hours Saturday >4 hrs	12	225.00%	$54.95	$659.34
Ordinary day shift hours Sunday	20	225.00%	$54.95	$1,098.90
Ordinary night shift hours M-F	100	140.85%	$34.40	$3,439.56
Ordinary night shift hours Saturday <4 hrs	8	190.85%	$46.61	$372.84
Ordinary night shift hours Saturday >4 hrs	12	240.85%	$58.82	$705.79
Ordinary night shift hour Sunday	20	240.85%	$58.82	$1,176.31
Total Ordinary Hours	**280**			**$10,847.12**
Average Ordinary hours	**35**			
Overtime day shift	35	200.00%	$48.84	$1,709.40
Overtime night shift	35	215.85%	$52.71	$1,844.87
Total Hours Worked Per Roster Cycle	**350**			**$3,554.27**
Average Total Hours	**43.75**			
Public holiday accrual (in addition to Ordinary)	13.46	215.85%	$52.71	$709.57
Minimum Payment Per Roster cycle				**$15,110.96**
Minimum Agreement flat rate				$43.17
Additional site/market payment				$2.20
Flat Rate for Specific Assignment				**$45.37**

Example 2
4 on / 5 off / 5 on / 4 off / 5 on / 5 off Roster Pattern

Roster

	M	T	W	T	F	S	S	M	T	W	T	F	S	S	M	T	W	T	F	S	S	M	T	W	T	F	S	S
Ord	10	10								10	10								10									
Ord Sat <4hrs																				4								
Ord Sat >4hrs																				6								
Ord Sun																					10							
Ord Night			10	10								10										10	10					
Ord Sat Night <4hrs													4															
Ord Sat Night >4hrs													6															
Ord Sun Night														10														
OT Day	2.5	2.5								2.5	2.5								2.5	2.5	2.5							
OT Night			2.5	2.5								2.5	2.5	2.5								2.5	2.5					

Rate Build Up

Agreement Level			**Production Level 2B**	
Agreement Base Rate				$24.42
Number of weeks in roster cycle	4			
Number of shifts in roster cycle	14			
Hours per shift	12.5			
Expected public holidays worked for year	7			
Component	**No. hours**	**Rate (%)**	**Rate ($)**	**Total**
Ordinary day shift hours M-F	50	125.00%	$30.53	$1,526.25
Ordinary day shift hours Saturday <4 hrs	4	175.00%	$42.74	$170.94
Ordinary day shift hours Saturday >4 hrs	6	225.00%	$54.95	$329.67
Ordinary day shift hours Sunday	10	225.00%	$54.95	$549.45
Ordinary night shift hours M-F	50	140.85%	$34.40	$1,719.78
Ordinary night shift hours Saturday <4 hrs	4	190.85%	$46.61	$186.42
Ordinary night shift hours Saturday >4 hrs	6	240.85%	$58.82	$352.89
Ordinary night shift hour Sunday	10	240.85%	$58.82	$588.16
Total Ordinary Hours	**140**			**$5,423.56**
Average Ordinary hours	**17.5**			
Overtime day shift	17.5	200.00%	$48.84	$854.70
Overtime night shift	17.5	215.85%	$52.71	$922.43
Total Hours Worked Per Roster Cycle	**175**			**$1,777.13**
Average Total Hours	**43.75**			
Public holiday accrual (in addition to Ordinary)	6.73	215.85%	$52.71	$354.78
Minimum Payment Per Roster cycle				**$7,555.48**
Minimum Agreement flat rate				$43.17
Additional site/market payment				$4.46
Flat Rate for Specific Assignment				**$47.63**

Example 3
2 on / 3 off / 3 on / 2 off / 2 on / 3 off / 3 on / 2 off / 2 on / 3 off Roster Pattern

Roster

	M	T	W	T	F	S	S	M	T	W	T	F	S	S	M	T	W	T	F	S	S	M	T	W	T	F	S	S
Ord	10	10								10	10								10									
Ord Sat <4hrs																				4								
Ord Sat >4hrs																				6								
Ord Sun																					10							
Ord Night					10										10	10								10	10			
Ord Sat Night <4hrs						4																						
Ord Sat Night >4hrs						6																						
Ord Sun Night							10																					
OT Day	2.5	2.5								2.5	2.5								2.5	2.5	2.5							
OT Night					2.5	2.5	2.5								2.5	2.5								2.5	2.5			

Rate Build Up

Agreement Level			**Production Level 3**	
Agreement Base Rate				$25.91
Number of weeks in roster cycle	4			
Number of shifts in roster cycle	14			
Hours per shift	12.5			
Expected public holidays worked for year	7			
Component	**No. hours**	**Rate (%)**	**Rate ($)**	**Total**
Ordinary day shift hours M-F	50	125.00%	$32.39	$1,619.38
Ordinary day shift hours Saturday <4 hrs	4	175.00%	$45.34	$181.37
Ordinary day shift hours Saturday >4 hrs	6	225.00%	$58.30	$349.79
Ordinary day shift hours Sunday	10	225.00%	$58.30	$582.98
Ordinary night shift hours M-F	50	140.85%	$36.49	$1,824.71
Ordinary night shift hours Saturday <4 hrs	4	190.85%	$49.45	$197.80
Ordinary night shift hours Saturday >4 hrs	6	240.85%	$62.40	$374.43
Ordinary night shift hour Sunday	10	240.85%	$62.40	$624.04
Total Ordinary Hours	**140**			**$5,754.48**
Average Ordinary hours	**17.5**			
Overtime day shift	17.5	200.00%	$51.82	$906.85
Overtime night shift	17.5	215.85%	$55.93	$978.72
Total Hours Worked Per Roster Cycle	**175**			**$1,885.57**
Average Total Hours	**43.75**			
Public holiday accrual (in addition to Ordinary)	6.73	215.85%	$55.93	$376.43
Minimum Payment Per Roster cycle				**$8,016.48**
Minimum Agreement flat rate				$45.81
Additional site/market payment				$4.09
Flat Rate for Specific Assignment				**$49.90**

IN THE FAIR WORK COMMISSION

FWC Matter No.: AG2018/5111

Applicant: CoreStaff NSW Pty Ltd

APPLICATION FOR APPROVAL OF THE *CORESTAFF NSW BLACK COAL MINING INDUSTRY ENTERPRISE AGREEMENT 2018*

Fair Work Act 2009—s.185

I, Martin Rodgers, General Manager - NSW, give the following undertakings with respect to the CoreStaff NSW Black Coal Mining Industry Enterprise Agreement (the **Agreement**):

1. I have the authority given to me by CoreStaff NSW Pty Ltd (**CoreStaff**) to provide this undertaking in relation to this application before the Fair Work Commission.

2. The Agreement will be read and interpreted subject to the National Employment Standards (**NES**) and, where any term of the Agreement is inconsistent with the NES and provides a lesser entitlement than that provided by the NES, the NES will apply to the extent of that inconsistency.

3. For the purposes of consultation with employees in the case of a change referred to in cl.9.1(a) of the Agreement, CoreStaff will:
   a. as soon as practicable after a definite decision has been made by CoreStaff to make the change(s), discuss with the employees and their representatives, if any, the introduction of the changes, effects the changes are likely to have on employees and measures to avert or mitigate the adverse effects of such changes;
   b. subject to clause 9.6, provide in writing to employees (and their representatives, if any) all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees; and
   c. give prompt to consideration to matters raised by the employees and/or their representatives about the changes.

4. CoreStaff undertakes that clause 10.5 of the Agreement will be applied as if the subclause reads "Where the matter in dispute remains unresolved, the Fair Work Commission may exercise any method of dispute resolution permitted by the Act it considers appropriate to ensure the settlement of the dispute." only.

5. CoreStaff will, at the time of engagement of a part-time employee, agree in writing on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day. Any agreed variation to the regular pattern of work will be recorded in writing. All time worked in excess of the hours as mutually arranged will be overtime.

6. With respect to clause 12.1(b) of the Agreement:
   a. The calculation referred to at cl.12.1(b)(iii) of the Agreement will also be provided to a flat rate employee prior to any change to that employee's assignment or change to their designated work cycle and/or rostered hours of work in a particular assignment. The calculation referred to at cl.12.1(b)(iii) of the Agreement will also be provided to a base rate

employee before any change is made to pay that employee a flat rate of pay in accordance with clause 12.1(b) of the Agreement.

b. Where a flat rate employee's employment ends or they cease to be paid a flat rate part-way through a designated work cycle, CoreStaff will calculate the amount that would have been payable to the employee (for that part of the designated work cycle) if the employee was a base rate employee and paid in accordance with cl.12.1(a) of the Agreement. Where that amount is higher than the amount the employee was actually paid for that part of the designated work cycle, CoreStaff will pay the difference to the employee, with timing of payment to be within 72 hours of the employment ceasing or, for an on-going employee, the employee ceasing to be paid a flat rate.
c. Any hours worked by a flat rate employee in addition to the hours required in their specific roster will be paid in accordance with cl.26.2(b) of the Agreement.
d. Employees who are not required to work a designated work cycle or specific roster must be engaged as base rate employees and paid in accordance with cl.12.1(a) of the Agreement.
e. An employee's designated work cycle must not exceed 12 weeks.

7. Clause 16 of the Agreement will not be applied by CoreStaff and will be of no effect.

8. The meal allowance paid under cl.17.2 of the Agreement will be $15.32 for each meal.

9. For the purposes of cl.32.1 of the Agreement, the starting and finishing place of a shift will be in the designated pre-start meeting room or crib room (located away from the pit and in or near the administrative building compound on site) or at any other place specifically agreed between CoreStaff and the majority of the affected employees. Any time spent traveling between that place and work equipment will be considered time worked.

10. Where personal leave provided by cl.34 of the Agreement is taken:

    a. no deduction from the employee's personal leave entitlement will be made if the absence is for fewer than half the ordinary hours component of the employee's shift; and
    b. in all other cases, the full ordinary hours component of the shift will be deducted for each absence.

11. Employees will only be permitted to take accrued personal leave entitlements under cl.41(d) o the Agreement where the employee's circumstances would entitle them to personal leave under cl.34 of the Agreement and the NES.

12. Subject to cl.44.2(b) and 44.5 of the Agreement, where an employee's employment is terminated because:

    a. CoreStaff no longer requires the employee's job done by anyone due to reasons other than those specified in cl.44.2(a)(i) of the Agreement; or
    b. of the insolvency or bankruptcy of CoreStaff

    the employee will be provided with severance pay equal to one ordinary week's pay for each completed year of employment. For the avoidance of doubt, cl.44.4 of the Agreement will not apply in this circumstance.

13. CoreStaff will not employ 'maximum term' employees under the Agreement and will not apply the terms of cl.43.7(d) of the Agreement.

14. The words 'in excess of 70 hours' at cl.44.7 of the Agreement will be applied by CoreStaff as meaning '70 or more hours'.

Martin Rodgers
General Manager NSW
5 June 2019