FEDERAL CIRCUIT COURT OF AUSTRALIA

POLICE FEDERATION OF AUSTRALIA (AUSTRALIAN FEDERAL POLICE ASSOCIATION BRANCH) & ORS v COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE (ON BEHALF OF THE COMMONWEALTH)

[2020] FCCA 3391

Catchwords:
INDUSTRIAL LAW – construction of enterprise agreement – considerations regarding use of extrinsic evidence – minutes of prior negotiation meetings do not assist in the current matter because they refer to "discussion" and disclose no actual "agreement" – clear distinctions on the face of relevant clauses between "Base Salary" and references to "salary increases" with no cross referencing to "Personal Development Agreement" or "PDA" – submissions of the Applicant accepted – parties to notify Court of procedural course following determination of the single issue in dispute – absent any application in 28 days no order as to costs.

Legislation:
Fair Work Act 2009 (Cth), ss.545, 570
Federal Circuit Court of Australia Act 1999 (Cth), s.16

Cases cited:
Amcor Limited v Construction, Forestry, Mining and Energy Union (2005) 222 CLR 241
Australian Manufacturing Workers' Union v Berri Pty Ltd (2017) 268 IR 285
Australian Meat Industry Employees Union v Golden Cockerel Pty Ltd (2014) 245 IR 394
Australian Federal Police Enterprise Agreement 2017 – 2020 [2018] FWC 2776
Bass v Permanent Trustee Co Ltd (1999) 198 CLR 334
City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union (2006) 153 IR 426
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Qantas Airways Limited [2020] FCAFC 205
Kucks v CSR Ltd (1996) 66 IR 182
National Tertiary Education Union v La Trobe University (2015) 254 IR 238
Nettlefold Advertising Pty Ltd v Nettlefold Signs Pty Ltd (1998) 90 FCR 453; 160 ALR 184
Toll (FGCT) Pty Limited v Alphapharm Pty Limited (2004) 219 CLR 165
Transport Workers' Union v Coles Supermarkets Australia Pty Ltd (2014) 245 IR 449

Transport Workers Union of Australia v Linfox Australia Pty Ltd (2014) 318 ALR 54

First Applicant:	POLICE FEDERATION OF AUSTRALIA (AUSTRALIAN FEDERAL POLICE ASSOCIATION BRANCH)
Second Applicant	KELLY LUK
Third Applicant	TIMOTHY COLLINS
Fourth Applicant	MARK PHILLIPS
Fifth Applicant	NAOMI RYAN
Sixth Applicant	XARLENE CASTRO
Seventh Applicant	DWAYNE BOTTOMLEY
Respondent:	COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE (ON BEHALF OF THE COMMONWEALTH)
File Number:	CAG 83 of 2018
Judgment of:	Judge W J Neville
Hearing date:	12 March 2020
Date of Last Submission:	12 March 2020
Delivered at:	Canberra
Delivered on:	15 December 2020

REPRESENTATION

Counsel for the Applicant:	Ms P Bindon
Solicitors for the Applicant:	Australian Federal Police Association Branch
Counsel for the Respondents:	Mr R A Miller
Solicitors for the Respondents:	King & Wood Mallesons

DETERMINATION

***Question**: Do employees who are "eligible to receive salary increases" under clause 63 of the EA, nevertheless receive the 3% increase on the commencement date of the EA, and other increases, pursuant to clause 7 of the EA?*

***Answer**: As asserted by the Applicants – yes. Clause 7 in the current Enterprise Agreement is unaffected by the terms of Clause 63 in the current Enterprise Agreement.*

ORDERS

(1) Within **28** days of the date of these Orders, being by **12 January 2021**, the parties are to notify the Court of the preferred procedural course in the light of the reasons contained within the judgment. Absent any agreement between the parties, the matter will be referred to mediation.

(2) Absent any other Application being filed within **28** days of the date of these Orders, being by **12 January 2021**, there be no Order as to costs.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT CANBERRA

CAG 83 of 2018

POLICE FEDERATION OF AUSTRALIA (AUSTRALIAN FEDERAL POLICE ASSOCIATION BRANCH) & ORS
Applicant

And

COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE (ON BEHALF OF THE COMMONWEALTH)
First Respondent

REASONS FOR JUDGMENT

Introduction

1. Briefly stated, this matter concerns the entitlements of the Applicants to certain benefits under the *Australian Federal Police Enterprise Agreement 2012 – 2016* ("the former EA"), and in turn, more particularly, under the successor Enterprise Agreement, the *Australian Federal Police Enterprise Agreement 2017 – 2020* ("the Current EA/the EA"). This latter EA came into effect by way of decision of the Fair Work Commission on 17th May 2018.[1]

2. The Applicants frame the question for determination in their written Submissions (par.1) as follows:[2]

> *The issue for determination is what base salary rates were applicable to the Second to Seventh Applicants upon the commencement of the Australian Federal Police Enterprise Agreement 2017-2020 on 24th May 2018?*

[1] *Australian Federal Police Enterprise Agreement 2017 – 2020* [2018] FWC 2776.
[2] The Applicants' submissions were filed on 5th March 2020.

3. As framed by the Respondent (Submissions, par.1), the issue is worded slightly differently as follows:[3]

> *The issue for determination by the Court turns on a short point. Do employees who are "eligible to receive salary increases" under clause 63 of the EA, nevertheless receive the 3% increase on the commencement date of the EA? The Applicants assert, and the Respondent denies, such an entitlement.*

4. Adapting the Respondent's question, the more apposite question should be framed in the following terms:

> *Do employees who are "eligible to receive salary increases" under clause 63 of the EA, nevertheless receive the 3% increase on the commencement date of the EA, and other increases, pursuant to clause 7 of the EA?*

5. Although not formally put in this way, the Court was effectively being asked to determine a legal question. This is a long-recognised course, sanctioned by the High Court. For example, although obviously in a different context, in *Bass v Permanent Trustee Co Ltd*, the High Court said, at [51] – [52]:[4]

> *[51] It cannot be doubted that in many cases the formulation of specific questions to be tried separately from and in advance of other issues will assist in the more efficient resolution of the matters in issue. However, that will be so only if the questions are capable of final answer and are capable of being answered in accordance with the judicial process.*
>
> *[52] Preliminary questions may be questions of law, questions of mixed law and fact or questions of fact. Some questions of law can be decided without any reference to the facts. Others may proceed by reference to assumed facts, as on demurrer or some other challenge to the pleadings. In those cases, the judicial process is brought to bear to give a final answer on the question of law involved. Findings of fact are made later, if that is necessary. Where a preliminary question is a pure question of fact that, too, can be answered finally in accordance with the judicial process if the parties are given an opportunity to present their evidence and, also, to challenge the evidence led against them.*

[3] The Respondent's submissions were also filed on 5th March 2020.
[4] *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334.

6. In their respective oral submissions, the central issue to determine was, as it were, "fleshed out" in the following summarised terms.

7. The Applicants submitted that the Performance Development Agreement Process ("the PDA") applied to other clauses in the current EA, such as Clauses 9 and 11, but it did not apply to Clause 7, which applies simply and solely to "Salary increases".[5] The terms of that Clause refer in particular, and only, to "Base Salary increase". "Base Salary" is defined in Clause 8.[6] The Applicants said that this was the plain and clear reading of the terms of the EA.[7] Further, there is no reference in Clause 7 to the PDA, or to Clause 63, which refers to the PDA process.

8. The Respondent submitted that the converse was true, namely that Clause 63 applied just as readily to Clause 7 as it did to other clauses in the EA.[8] Indeed, later in the hearing, Counsel for the Respondent stated:[9]

> *Clause 63 is clear in disentitling the employees from any salary increases if they're not PDA compliant.*

9. For the reasons that follow, the Applicants' construction of Clause 7 of the current EA should be preferred.

10. In short, on its face and in its terms, Clause 7 makes no reference to Clause 63, or otherwise to the PDA process. Nor, for that matter, does Clause 63 refer to Clause 7. Further, Clause 7 is under the heading "Salary Increases", unadorned. Clause 63 is in Part IX of the EA, under the heading "Miscellaneous". As the title suggests, this part of the EA covers a veritable miscellany of matters that range from, *inter alia*, "individual flexibility arrangement" (Clause 59), to "Job Sharing" (Clause 61), to Relocation Costs" (Clause 66), to "Dispute Resolution" (Clause 71), to name but some of the areas covered by Part IX. It is nowhere explained why, if the PDA process is so central to salary increases, it is placed in the "Miscellaneous" section of the EA, very far

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[5] The "PDA process" – the "Performance Development Agreement Process" – is set out in Clause 63 of the current EA.
[6] All relevant Clauses are set out later in these reasons.
[7] Among many places, see Transcript (12th March 2020), pp.5, 16, 19, 20 and 24. Hereafter "T" followed by page number.
[8] See, for example, T 6 – 7, and 10.
[9] T 39.

removed from Clause 7, with no specific cross reference to the matters set out plainly in Clause 7, in particular, "Base Salary". This is also in circumstances where Clause 63 makes no reference to "Base Salary" (which is in upper case), as referred to in Clause 7, at all. Clause 63 merely, or only, refers to "salary", in lower case".

11. Given (a) how many meetings took place to discuss the terms of the current EA, the Minutes of some of which were annexed to Affidavits put before the Court, (b) the terms of the previous EA,[10] and (c) how PDA compliance was obviously crucially important to the Respondent, one could and should have reasonably expected that, if the PDA was to apply to the "Base Salary" (which term, as earlier noted, was always in "upper case"), a clear reference to the PDA would be found in Clause 7. It is patently not referenced at all in that Clause. It is found in other clauses in the EA, such as Clauses 9 and 11, where there are references to "Salary Band" but not to "Base Salary." Presumably such distinctions were significant, and deliberate, in the drafting of the EA.

12. However, in my view, it does not follow that, in terms of relief, the declarations sought by the Applicants should automatically be made. This is so because, as noted in the course of the hearing, where there is a joinder of issue on a matter of construction of the current EA, in my view, in the light of the Court's determination of that issue, it would be more appropriate for the following course to be pursued subject to the parties having a reasonable period of time to consider the Court's reasons.[11]

13. In my view, the most appropriate course is simply to refer the parties to mediation, absent any other agreement that might be resolved between them privately, to see what can now be worked out.

14. Further and finally, particularly because the issue in dispute revolved solely around a matter of construction of the current EA, in my view, it is appropriate that, absent any other Application within 21 days, pursuant to s.570 of the *Fair Work Act 2009* (Cth) ("the FW Act"), there be no Order as to costs.

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[10] Clause 8 of the previous EA, like the current EA, simply refers to "Base Salary", without any reference to the PDA process. A copy of the former EA is Annexure EH-1 to the Affidavit of Ms Hardy, affirmed and filed 29th November 2019.
[11] See the discussion at T 39 – 40.

Orders sought

15. The Applicants' Statement of Claim, as amended on 19th July 2019, sought declarations (at [39]), pursuant to s.16 of the *Federal Circuit Court of Australia Act 1999* (Cth) ("the FCC Act"), or s.545 of the *Fair Work Act 2009* (Cth) ("the FW Act"), that:

> *(a) The Respondent breached s 50 of the Fair Work Act 2009 (Cth) in contravening the Australian Federal Police Enterprise Agreement 2017-2020 in failing to pay the Base Salary applicable to the Salary Band and Increment Point of the Second, Third, Fourth, Fifth, Sixth and Seventh Applicants as expressed and contained in Attachment A of the Australian Federal Police Enterprise Agreement 2017-2020 from 24 May 2018 and ongoing.*
>
> *(b) A declaration that +the Respondent breached s 50 of the Fair Work Act 2009 (Cth) in contravening the Australian Federal Police Enterprise Agreement 2017-2020 in failing to pay the Second, Third and Seventh Applicants the full composite allowance owed under cl 18(6) of the Australian Federal Police Enterprise Agreement 2017-2020 from 24 May 2018 and ongoing.*
>
> *(c) A declaration that the Respondent breached section 323 of the Fair Work Act 2009 (Cth) as a result of the conduct referred to in declarations 39(a) and 39(b) above.*
>
> *(d) A declaration that the Second, Third, Fourth, Fifth, Sixth and Seventh Applicants are entitled to be paid by the Respondent in accordance with the Base Salary applicable to their Salary Band and Increment Point as expressed and contained in Attachment A of the Australian Federal Police Enterprise Agreement 2017-2020.*

16. The particulars of the relief sought in the Applicant's Statement of Claim, as amended on 19th July 2019, were (at [40]):

> *(a) An order that the Respondent pay compensation to the Second, Third, Fourth, Fifth, Sixth and Seventh Applicants, pursuant to s 545(2) of the Fair Work Act 2009 (Cth), or loss suffered by them as a result of the contraventions referred to in the declarations in 39(a) and 39(b) above.*
>
> > *(i) The Respondent pay an amount equal to the difference between the amount of salary the Second, Third, Fourth, Fifth, Sixth and Seventh Applicants would have been paid had they received the Base Salary applicable to their Salary Band and Increment Point under Attachment A of the Australian*

Federal Police Enterprise Agreement 2017-2020 from 24 May 2018 and ongoing, and the amount of salary the Second, Third, Fourth, Fifth, Sixth and Seventh Applicants have been paid from 24 May 2018 and ongoing.

(ii) The Respondent pay an amount equal to the difference between the amount of composite allowance the Second, Third and Seventh Applicants would have been paid had they been paid the full composite allowance pursuant to cl 18(6) of the Australian Federal Police Enterprise Agreement 2017-2020 from 24 May 2018 and ongoing, and the amount of composite allowance the Second, Third and Seventh Applicants have been paid from 24 May 2018 and ongoing.

(iii) The Respondent pay an amount equal to the difference between the amount of overtime. paid recreation leave and paid personal/carer's leave the Second, Third, Fourth, Fifth, Sixth and Seventh Applicants would have been paid had the Base Salary applicable to their Salary Band and Increment Point under Attachment A of the Australian Federal Police Enterprise Agreement 2017-2020 been applied to them from 24 May 2018 and ongoing, and the amount of overtime, paid recreation leave and paid personal/carer's leave that the Second, Third, Fourth, Fifth, Sixth and Seventh Applicants have been paid from 24 May 2018 and ongoing.

(b) An order that the Respondent pay interest pursuant to s 547(2) of the Fair Work Act 2009 (Cth) on the amounts specified in order§ fe140(a)(i) to 40(a)(iii) above to the Second, Third, Fourth, Fifth, Sixth and Seventh Applicants.

(c) An order that the Respondent make adjustments to the superannuation contributions made on behalf of the Second, Third, Fourth, Fifth, Sixth and Seventh Applicants since 24 May 2018 and ongoing to their respective superannuation funds so that the contributions reflect calculations using the Base Salary applicable to their Salary Band and Increment Point under Attachment A of the Australian Federal Police Enterprise Agreement 2017-2020.

(d) An order that the Respondent pay to the First Applicant a pecuniary penalty pursuant to s 546 of the Fair Work Act 2009 (Cth), for breaches of ss 50 and 323 of the Fair Work Act 2009 (Cth) referred to in the declarations at 39(a) and 39(c) above.

(e) Any other order the Court sees fit.

17. The Respondent opposed any relevant relief as sought by the Applicants.

Statement of agreed facts

18. The relevant factual background and related matters were/are set out in the Statement of Agreed Facts ("SOAF"), jointly filed on 11th October 2019. That SOAF was in the following terms (emphasis in original):

> *Background*
>
> *1. The Respondent has all rights, duties and powers of an employer in relation to members of the Australian Federal Police ("AFP"), including the Applicant Employees, pursuant to section 23 of the Australian Federal Police Act 1979 (Cth). The Respondent is therefore an "employer" for the purposes of s 538 of the Fair Work Act 2009 ("FW Act").*
>
> *2. The Second, Third, Fourth, Fifth, Sixth and Seventh Applicants (collectively hereinafter referred to as "the Applicant Employees") were, at all material times, engaged by the Respondent pursuant to section 24 of the Australian Federal Police Act 1979 (Cth) as employees. The Applicant Employees are therefore "employees" for the purposes of s 538 of the FW Act.*
>
> *3. The First Applicant is:*
>
> > *a. An organisation of employees known as the Police Federation of Australia, registered under the Fair Work (Registered Organisations) Act 2009 (Cth), eligible to represent the industrial interests of members of the AFP, with corporate status capable of being sued in its own name and style;*
> >
> > *b. An employee organisation entitled to represent the industrial interests of the Applicant Employees; and*
> >
> > *c. An employee organisation who can seek orders for contraventions of civil remedy provisions pursuant to s 539(2), table item 4 and item 10 and s 540(2) of the FW Act.*
>
> *4. At all material times, the Respondent has had in place a process for appraising and managing the performance of its employees including by entering into a Performance Development Agreement with each of them ("PDA").*
>
> *5. The Australian Federal Police Enterprise Agreement 2012 – 2016 ("the Former EA") commenced, in accordance with s 54 of the FW Act, on 8 March 2012.*

6. The employees engaged under section 24, including the Applicant Employees, and the Respondent were covered, for the purposes of s 52 of the FW Act, by the Former EA from 8 March 2012.

7. The nominal expiry date of the Former EA was 8 March 2016.

8. Between 8 March 2012 and 23 May 2018, the Applicant Employees and the Respondent were covered by the Former EA.

9. The Former EA recognised the existence and operation of the Respondent's 'Performance Development Agreement' ("PDA") process at cl 60 of that agreement. Cl 60 provided that:

> *a. The PDA process was mandatory, and must be completed each year; and*
>
> *b. Employees will be ineligible to receive salary increases, incremental progression and progression through a broadband if they did not participate in the PDA process and attain a rating of at least 'fulfilled'.*

10. The aim of the PDA process was stated in cl 60(1) as follows:

> *'The AFP's Performance Development Agreement (PDA) process aims to facilitate effective performance management, in order to support the delivery of AFP objectives and outcomes. Effective performance management is achieved through building a workplace culture based on ongoing feedback between Supervisors and team members and the clarification of performance expectations and objectives.'*

11. During the course of the 2017-2018 PDA cycle, the Applicant Employees did not satisfy the criteria set out in cl 60(3) of the Former EA. The basis for the Applicant Employees not satisfying the PDA process was:

> *a. The Second Applicant did not obtain a rating of at least 'fulfilled';*
>
> *b. The Third Applicant did not participate in the PDA process;*
>
> *c. The Fourth Applicant did not obtain a rating of at least 'fulfilled';*
>
> *d. The Fifth Applicant did not participate in the PDA process;*
>
> *e. The Sixth Applicant did not obtain a rating of at least 'fulfilled'; and*

f. The Seventh Applicant did not participate in the PDA process.

12. On 17 May 2018, Deputy President Kovacic of the Fair Work Commission approved the Australian Federal Police Enterprise Agreement 2017 – 2020 ("the Current EA") by way of decision [2018] FWC 2776.

13. As at 23 May 2018 ("termination date"), the Applicant Employees had, in accordance with the terms of the Former EA, advanced to the following Salary Bands and Increment Points expressed at Attachment A in the Former EA:

Applicant	***Salary Band & Increment Point as at 23 May 2018***	***Salary***
Second Applicant	*Salary Band 4, Increment Point 5*	*$83,554.00*
Third Applicant	*Salary Band 5, Increment Point 3*	*$90,517.00*
Fourth Applicant	*Salary Band 6, Increment Point 3*	*$99,869.00*
Fifth Applicant	*Salary Band 8, Increment Point 3*	*$116,428.00*
Sixth Applicant	*Salary Band 4, Increment Point 2*	*$73,976.00*
Seventh Applicant	*Salary Band 5, Increment Point 3*	*$90,517.00*

14. In accordance with s 54 of the FW Act, the Current EA commenced on 24 May 2018 ("commencement date").

15. For the purposes of s 52 of the FW Act, the Applicant Employees and the Respondent were covered by the Current EA from the commencement date.

16. Pursuant to s 58(2)(e) of the FW Act, on the commencement date the Former EA ceased to apply and can never so apply again to the First Applicant, Applicant Employees and the Respondent.

17. From the commencement date the Applicant Employees and the Respondent were subject to the terms and conditions contained in the Current EA and not the terms and conditions contained in the Former EA.

18. On the commencement date, the Applicant Employees did not receive any salary increases, incremental progression or progression through a broadband.

19. The Current EA, at cl 7, provides that there will be a base salary increase of 3% effective from the commencement date, 2% effective 12 months from the commencement date, and 1% effective 24 months from the commencement date. Attachment A to the Current EA, expresses the base salary rates for each Salary Band and Increment Point reflecting these increments.

20. Cl 8 of the Current EA defines 'Performance Development Agreement' as 'an agreement made under the AFP's performance development and performance appraisal system.'

21. Cl 9(5) of the Current EA states that for progression within a Salary Band to occur annually on the anniversary date of the employee's previous advancement, engagement at, or assignment to, the relevant Salary Band:

> *a. The employee's Performance Development Agreement will need to be at the 'agreement signed' stage; and*
>
> *b. The employee's previous Performance Development Agreement will need to have a rating of at least 'fulfilled'.*

22. Cl 63(1) of the Current EA states the aim of the PDA process in almost identical terms to that stated in the Former EA.

23. Cl 63(3) of the Current EA states that:

> *'An Employee will be ineligible to receive salary increases, incremental progression and progression through a broadband, if they have not participated in the PDA process and have not attained the minimum rating of PDA 'fulfilled'.'*

24. Cl 63(5) of the Current EA states that:

> *'Non-compliance will result in a delay in any incremental progression or progression through a broadband, until the PDA is at the 'agreement signed' stage.'*

25. Cl 63(7) of the Current EA states that:

'Both Supervisors and Employees have a responsibility to actively participate in the PDA. Employees who can demonstrate that they have taken all reasonable steps to complete the PDA will receive their salary increase.'

The Second Applicant

26. From the commencement date to 17 April 2019, the Second Applicant was at Salary Band 4, Increment Point 5 and received a base salary of $83,554.00.

27. In this period, the Second Applicant was assigned to the 'Rostered Operations Working Pattern' under Determination no. 5 of 2017 – Assignment to Working Patterns. Pursuant to clause 24 of the Current EA, he was entitled to receive a 22% composite allowance additional to his base salary. The composite allowance paid to the Second Applicant was calculated on the salary expressed above in paragraph 0. The composite allowance was payable in recognition of expanded working hours, normal patterns of attendance and shift patterns (such as Afternoon Shifts, Night Shifts, Weekends and Designated Public Holidays) that are required under the Operations or Rostered Operations working pattern.

28. The Second Applicant, from time to time during this period, was entitled to penalties pursuant to clause 26 of the Current EA. The Second Applicant was paid this entitlement calculated on the salary expressed above in paragraph 0.

29. The Second Applicant, from time to time during this period, was entitled to night allowance and on-call allowance pursuant to clauses 30 and 31 respectively of the Current EA. The Second Applicant was paid for these allowances calculated on the salary expressed above in paragraph 0.

30. By 18 April 2019, the Second Applicant had completed the PDA process under clause 63 of the Current EA for the 2018-2019 year and had achieved at least a minimum rating of PDA 'fulfilled'. From this date, the Second Applicant was paid the base salary expressed at Attachment A of the Current EA for a Salary Band 4, Increment Point 5 for '3% on commencement date'.

31. On 8 May 2019, the Second Applicant was advanced to a Salary Band 5, Increment Point 2. From this date, the Second Applicant was paid the base salary expressed at Attachment A of the Current EA for a Salary Band 5, Increment Point 2 for '3% on commencement date'.

32. On and from 24 May 2019, the Second Applicant has been paid the base salary expressed at Attachment A of the Current EA for a Salary Band 5, Increment Point 2 for '2% 12 months from commencement date'.

The Third Applicant

33. From the commencement date to 23 May 2019, the Third Applicant was at Salary Band 5, Increment Point 3 and received a base salary of $90,517.00.

34. In this period, the Third Applicant was assigned to the 'Operations Working Pattern' under Determination no. 5 of 2017 – Assignment to Working Patterns. Pursuant to clause 23 of the Current EA, he was entitled to receive a 22% composite allowance additional to his base salary. The amount paid to the Third Applicant for the composite allowance was calculated on the salary as expressed above in paragraph 0.

35. The Third Applicant took some periods off work for long service leave between 11 October 2018 and 11 January 2019. During the periods of the long service leave, the Third Applicant was not entitled to the 22% composite allowance.

36. The Third Applicant, from time to time during this period, was entitled to overtime and penalties pursuant to clause 26 of the Current EA. The Third Applicant was paid this entitlement calculated on the salary expressed above in paragraph 0.

37. The Third Applicant, from time to time during this period, was entitled to night allowance and on-call allowance pursuant to clauses 30 and 31 respectively of the Current EA. The Third Applicant was paid for these allowances calculated on the salary expressed above in paragraph 0.

38. By 24 May 2019, the Third Applicant had completed the PDA process under clause 63 of the Current EA for the 2018-2019 year and had achieved at least a minimum rating of PDA 'fulfilled'. From this date, the Third Applicant has been paid the base salary expressed at Attachment A in the Current EA for Salary Band 5, Increment Point 3 for '2% 12 months from commencement date'.

The Fourth Applicant

39. From the commencement date, the Fourth Applicant has been at Salary Band 6, Increment Point 3 receiving a base salary of $99,869.00.

39. The Fourth Applicant did participate in the PDA process under clause 63 of the Current EA but did not achieve at least a minimum rating of PDA 'fulfilled' for the 2018-2019 year.

The Fifth Applicant

41. From the commencement date to 17 April 2019, the Fifth Applicant was at Salary Band 8, Increment Point 3 and received a base salary of $116,428.00.

42. The Fifth Applicant did not participate in the PDA process under clause 63 of the Current EA and did not achieve at least a minimum rating of PDA 'fulfilled' for the 2018-2019 year.

43. On 18 April 2019, the Fifth Applicant ceased employment with the Respondent following her resignation.

44. On or around that day, the Respondent paid the Fifth Applicant her accrued annual leave entitlements calculated on the base salary as expressed above in paragraph 0.

The Sixth Applicant

45. From 24 May 2018, the Sixth Applicant has been at Salary Band 4, Increment Point 2 receiving a base salary of $73,976.00.

46. The Sixth Applicant did participate in the PDA process under clause 63 of the Current EA but did not achieve at least a minimum rating of PDA 'fulfilled' for the year 2018-2019 year.

The Seventh Applicant

47. From the commencement date to 23 May 2019, the Seventh Applicant was at Salary Band 5, Increment Point 3 and received a base salary of $90,517.00.

48. In this period, the Seventh Applicant was assigned to the 'Rostered Operations Working Pattern' under Determination no. 5 of 2017 – Assignment to Working Patterns. Pursuant to clause 24 of the Current EA, he was entitled to receive a 22% composite allowance additional to his base salary. The amount paid to the Seventh Applicant for the composite allowance was calculated on the salary as expressed above in paragraph 0.

49. The Seventh Applicant, from time to time during this period, was entitled to overtime and penalties pursuant to clause 26 of the Current EA. The Seventh Applicant was paid this entitlement calculated on the salary as expressed above in paragraph 0.

50. The Seventh Applicant, from time to time during this period, was entitled to a night allowance pursuant to clause 30 of the Current EA. The Seventh Applicant was paid for these allowances calculated on the salary as expressed above in paragraph 0.

51. The Seventh Applicant was off work for long service leave from 14 November 2018 to 28 November 2018. During the periods of the long service leave, the Third Applicant was not entitled to the 22% composite allowance.

52. From the commencement date to 23 May 2019 the Seventh Applicant also performed periods of higher duties, where he was required to perform higher duties at a Salary Band 6, Increment Point 2 level. For these periods, the Seventh Applicant was entitled to receive the base salary expressed at Attachment A in the Current EA for a Salary Band 6, Increment Point 2 for '3% on commencement date'. The Seventh Applicant performed higher duties during seven different periods between 12 December 2018 and 2 May 2019. During these periods the Seventh Applicant was paid the base salary expressed at Attachment A in the Current EA for a Salary Band 6, Increment Point 2 for '3% on commencement date'.

53. By 24 May 2019, the Seventh Applicant had completed the PDA process under clause 63 of the Current EA for the 2018-2019 year and had achieved at least a minimum rating of PDA 'fulfilled'. From this date, other than during the further periods of higher duties the Seventh Applicant performed (as set out in paragraph 0 below),the Seventh Applicant received the salary as expressed at Attachment A in the Current EA for a Salary Band 5, Increment Point 3 for ''2% 12 months from commencement date'.

54. After 24 May 2019 the Seventh Applicant again performed periods of higher duties, where he was required to perform higher duties at a Salary Band 6, Increment Point 2 level. For these periods, the Seventh Applicant was entitled to receive the base salary expressed at Attachment A in the Current EA for a Salary Band 6, Increment Point 2 for '2% 12 months from commencement date'. The Seventh Applicant performed higher duties during five different periods between 28 May 2019 and 13 October 2019. During these periods the Seventh Applicant was paid the base salary expressed at Attachment A in the Current EA for a Salary Band 6, Increment Point 2 for '2% 12 months from commencement date.'

Documentary evidence

19. The Respondent relied upon two Affidavits: Ms Emma Hardy, affirmed 29th November 2019; and Ms Luci Henson, affirmed on the same date. Ms Hardy and Ms Henson are employed by the Respondent. Both Affidavits annexed copies of the current and former EAs.[12]

20. In general terms, Ms Hardy deposed that she has been regularly involved in the negotiation of the last three enterprise agreements, including the two Agreements that are the subject of argument in these proceedings. She gave evidence (but was not cross examined) regarding the general discussions over clauses in the relevant Agreements and various bargaining meetings that took place prior to settling on the final terms of them. Minutes were taken of those meetings which Ms Hardy consulted for the preparation of her Affidavit; she annexed copies of some of those Minutes at Annexures EH-2, EH-3 and EH-4. The meetings referred to took place on 3rd March 2016, 3rd August 2016, and 18th October 2017. She confirmed that at each meeting, various representatives of the First Applicant attended. There is no assertion or contention that any of the individual Applicants attended any meeting regarding the negotiation or drafting of the current (or former) EA.

21. The final paragraph of Ms Hardy's Affidavit, par.8, was in the following terms:

> *From my review of the minutes of the other bargaining meetings, and my recollection from my participation in all the other bargaining meetings relating to the current EA, the PDA process was discussed expressly with reference to salary increases during the bargaining meetings convened on 3 March 2016 and 3 August 2016. To the best of my knowledge and recollection, at no other time did any of the Applicants or their representatives raise any issue or concern regarding the PDA process with reference to salary increases in the course of negotiating the Current EA.*

22. In my view, such comments about her recollection and the like do not assist the Respondent. They do not refer specifically to the terms of Clause 7, nor is there any reference in that clause to any PDA requirement. Nor do Ms Hardy's remarks assist or suggest that any of

[12] As noted earlier in these reasons, in Ms Hardy's Affidavit, the former EA is Annexure EH-1; the Current EA is annexure EH-5.

the individual Applicants were, for example, (a) in attendance at any of the highlighted meetings, (b) privy to any formal agreement at those meetings that linked Clause 63 to Clause 7, or (c) provided with any material proposed to be put before the voting employees at the meeting to approve the current EA in December 2017 regarding Clause 7 being subject to PDA compliance. Further, it seems clear that the Respondent had a clear view, and/or clear intention, regarding the scope and operation of the PDA. But whatever that clear intention may have been, it did not materialise or translate into the express terms of Clause 7 of the current EA, or in Clause 8 of the previous EA. Indeed, on Ms Hardy's own evidence on behalf of the Respondent, there was clearly no meeting of minds or formal agreement between the parties regarding these matters involving the PDA, however frequent, large or consistent those discussions had been over a long time regarding the PDA.

23. Further, among other things, and as noted earlier in these reasons, there was also no distinction noted, or apparently appreciated, between, on the one hand, "Base Salary" as set out in Clause 7, and on the other, Clause 63, which refers only to "salary increases."

24. In general terms, Ms Henson deposed to what was/is comprehended as the "PDA process" under the Agreements. As noted earlier in these reasons, "PDA" is the acronym for the "Performance Development Agreement" process.

25. The Applicants formally objected to reliance upon, and the utility of, these Affidavits, principally on the basis of those authorities noted later in these reasons that set out the bases upon which "external material" may be used in the construction and interpretation of Enterprise Agreements.

26. In general terms, as submitted by the Applicants, the correspondence (including Minutes of various meetings regarding the negotiation of the current EA), reasonably clearly show that the issue of the PDA was the subject of discussion. However, subject to what is said later in these reasons, and recalling what has already been stated, showing that something was *discussed* at the negotiation stage does not, without more, show what was actually *agreed* between the parties. Further, given that the Second to Seventh Applicants were not formally part of those negotiating discussions, in my view there is nothing formally to bind

them that appears in the Minutes (and in the Affidavits), assuming that there was any agreement or understanding that preceded the written terms of the Current EA.

27. To emphasise the point, in my view, the recollection (for example) of attendees at bargaining meetings quite some time before the terms of the EA were (i) agreed and (ii) actually formalised by the Fair Work Commission, does not advance matters where (a) the meetings were clearly part of the process of ongoing discussions regarding the terms of the EA, and (b) as set out below, the terms of the EA (past and present) are plain and clear.

Relevant clauses of the Current EA

28. The relevant clauses of the Current EA that are the subject of the current dispute are as follows:

> ***PART I - INTRODUCTION***
>
> ***Clause 7 Salary Increases***
>
> *(1) There will be a Base Salary Increase of:*
>
> *(a) 3% effective from the Commencement Date.*
>
> *(b) 2% effective 12 months from the Commencement Date.*
>
> *(c) 1% effective 24 months from the Commencement Date.*
>
> ***Clause 8 Definitions***
>
> *IX* ***Base Salary*** *means the Salary Band and Increment Point against which an Employee is remunerated and, except for the calculation of higher duties allowance, does not include any allowance in Part VI of this Agreement.*
>
> *XLVII* ***Salary Band*** *means the range of Increment Points within the AFP's Classification Structure.*
>
> ***PART II – REMUNERATION AND CLASSIFICATION STRUCTURE***
>
> ***Clause 9 Remuneration Structure***

Salary on Commencement in a New Salary Band

(1) The minimum Increment Point of each Salary Band will be used when a person is engaged from outside the AFP, on promotion or advancement across a Hard Barrier, where an Employee is not already on that Increment Point, unless otherwise determined by the Commissioner.

(2) Where an Employee is promoted or advanced to a higher Salary Bank, the Employee will move to an Increment Point in that Salary Bank of not more than one Increment Point from their previous Salary Band, subject to the following sub-section.

(3) An Employee who is performing higher duties immediately prior to their advancement may move to a higher Increment Point where the Employee would otherwise have been on a higher Increment Point due to the performance of higher duties consistent with sub-section 29(6).

(4) When determining an Increment Point within a Salary Band upon promotion or advancement, any composite or allowance paid under the AFP Working Patterns will not form part of the consideration for a higher Increment Point.

Salary Increments

(5) Progression within a Salary Band will occur annually on the anniversary date of the Employee's previous advancement, engagement at, or assignment to, the relevant Salary Band. For the purposes of this sub-section the current Performance Development Agreement will need to be at the 'agreement signed' stage and the previous Performance Development Agreement will need to have a minimum rating of 'fulfilled'.

(6) Incremental advancement will be delayed where:

> *(a) an Employee has not participated in the AFP's Performance Development Agreement as outlined in section 63 of this Agreement;*
>
> *(b) an Employee has a Performance Development Agreement rated as 'underperforming', until such time as the Employee's performance is rated as 'fulfilled'; or*
>
> *(c) an adverse Professional Standards findings under Part V of the AFP Act, in relation to a category three conduct issue or a corruption issue has been made and the Commissioner has made a determination that the appropriate action in*

relation to the finding is to defer the incremental advancement for a period of time not exceeding 12 months.

(7) Periods of leave without pay exceeding 30 calendar days within the previous 12-month period that do not count for service will defer incremental progression for the equivalent period of leave taken.

Clause 11 Broadband and Advancement Arrangements

Broadbands

(1) A broadband is the combination of two or more Salary Bands into a single, broader designation. Broadbands are either:

(a) specified in Attachment B; or

(b) created by the Commissioner after the commencement of this Agreement, subject to the requirements in sub-section 11(6) below

(2) An Employee can only access one broadband arrangement at any one time.

(3) In accordance with section 63, movement through any broadband is subject to an Employee participating in the AFP's Performance Development Agreement process and achieving a rating of 'fulfilled' or higher in an Employee's Performance Development Agreement in the preceding 12 months.

(4) There is no ability for an Employee who is assigned to a position within a broadband to perform higher duties or gain a promotion or advancement within the broadband they are assigned.

(5) Entry into a broadband will be at the minimum Salary Band and Increment Point of the relevant broadband. An Employee may be eligible to commence at a higher Increment Point within the broadband if determined appropriate by the Commissioner.

PART IX - MISCELLANEOUS

Clause 63 Performance Development Agreement Process

(1) The AFP Performance Development Agreement (PDA) aims to facilitate effective performance management, in order to support the delivery of AFP objectives and outcomes. Effective performance management is achieved through building a

workplace culture based on ongoing feedback between the Supervisor and the Employee and the clarification of performance expectations and objectives.

(2) The PDA is mandatory and must be completed every 12-month period.

(3) An Employee will be ineligible to receive salary increases, incremental progression and progression through a broadband, if they have not participated in the PDA process and have not attained the minimum rating of PDA 'fulfilled'.

(4) Where an Employee goes on long term leave (e.g. maternity leave, long service leave), the Employee and their Supervisor must ensure the PDA cycle is completed prior to the leave commencing, unless exceptional circumstances exist.

(5) Non-compliance will result in a delay in any incremental progression or progression through a broadband, until the PDA is at the 'agreement signed' stage.

(6) Subject to sub-section 63(7), salary increases will be delayed until such time as a PDA exchange has occurred and a rating of 'PDA fulfilled' has been achieved. There is no ability to back date salary increases due to non-compliance.

(7) Both Supervisors and Employees have a responsibility to actively participate in the PDA. Employees who can demonstrate that they have taken all reasonable steps to complete the PDA will receive their salary increase.

(8) The AFP may review the performance management framework throughout the life of this Agreement. The AFP may implement an alternative model and system.

Clause 72 Transitional Provisions

Additional Remuneration

(1) Where an Employee is in receipt of Additional Remuneration in accordance with section 41 of the 2012 Agreement for their specialist technical skill, the Employee will transition to the AFP Technical Specialist Classification Structure on commencement of this Agreement. All of the provisions of the Technical Specialist Framework will apply to the Employee's role on commencement of this Agreement. The Employee will transition to the AFP Technical Specialist Classification Structure at their current Base Salary plus

any additional remuneration allowance approved under section 41 of the 2012 Agreement at commencement of this Agreement.

(2) Criminal Assets Litigation employees in receipt of Additional Remuneration in accordance with section 41 of the 2012 Agreement will not transition to Technical Specialist Framework.

(3) An Employee's Base Salary under the AFP Technical Specialist Classification Structure will be the Base Salary of the band and Increment Point of the Employee's role immediately prior to the commencement of this agreement (inclusive of any applicable salary increase) plus any additional remuneration. An Employee will transition to the AFP Technical Specialist Classification Structure at this Base Salary.

…

Project Macer, Project Guild and Project Ampla

(6) Where an Employee transitioned through either Project Macer, Project Guild or Project Ampla and as a result were subject to salary maintenance, will continue to have their Base Salary frozen on the date this Agreement comes into effect until the amount payable in Attachment A for the Increment Point for the Salary Band incorporates the aggregate of the Employee's Base Salary and as a result of Base Salary increases over the life of the Agreement.

Transition of Frozen Salary

(7) Where, prior to the commencement of this Agreement, an Employee, who is not subject to sub-section 72(6), had the AFP agree for the Employee's salary and any applicable allowances (however described) to be greater than the maximum Increment Point for the Salary Band applicable to the Employee, the Employee's existing Base Salary and any applicable allowances (however described) will continue to be frozen on the date this Agreement comes into effect until the amount payable in Attachment A for the Increment Point for the Salary Band incorporates the aggregate of the Employee's Base Salary and any applicable allowances (however described) as a result of Base Salary increases over the life of the Agreement.

The Applicants' outline of submissions

29. The Applicants' outline of submissions, filed 5th March 2020, was as follows (footnotes omitted; emphasis in original):

1. The issue for determination in this proceeding is what base salary rates were applicable to the Second to Seventh Applicants (Applicant Employees) upon the commencement of the Australian Federal Police Enterprise Agreement 2017-2020 (Current EA) on 24 May 2018.

2. The Applicants contend that the Applicant Employees were entitled to be paid the base salary rates applicable to their band and increment point as set out in the "3% on commencement date" column of Attachment A to the Current EA. Those rates represented a 3% increase on the base salaries payable to them under the Australian Federal Police Enterprise Agreement 2012-2016 (Former EA) in force immediately before the Current EA.

3. The Respondent contends that the Applicant Employees were not entitled to be paid the salary applicable to their band and increment point as set out in the "3% on commencement date" column of Attachment A to the Current EA because the Applicant Employees had not satisfied the requirements in clause 63(3) of the Current EA, namely participation in the performance development agreement (PDA) process and obtaining a minimum rating of "fulfilled".

4. It is not in dispute that the Applicant Employees either had not participated in the last PDA process that had concluded before the commencement of the Current EA, or had participated in it but had not obtained a rating of "fulfilled". It is also not in dispute that on commencement of the Current EA, the Respondent continued to pay the Applicant Employees according to the base salaries applicable to their salary band and increment point under the Former EA.

5. Resolution of the issue in dispute turns upon the proper interpretation of the Current EA. The relevant task is to discern the objective meaning of the words used "[h]aving regard to the industrial purpose of the agreement, and the commercial and legislative context in which it applies". As is often repeated, the construction of industrial agreements "should not be a strict one but one that contributes to a sensible industrial outcome such as should be attributed to the parties who negotiated and executed the Agreement."

6. It is important to bear in mind that an enterprise agreement is given force and effect by the Fair Work Act 2009 (Cth) (FW Act), not merely as an agreement between private parties. As pointed out in Toyota Motor Corporation Australia Limited v Marmara, an enterprise agreement specifies terms applicable to employees, some of whom may have had nothing to do with the choice of the

terms or the making of the agreement, and on pain of penal consequences.

7. That being the case, considerable caution needs to be exercised before a court resorts to evidence about the negotiation of the enterprise agreement or the parties' conduct after the enterprise agreement takes effect. The principles articulated in Australian Manufacturing Workers' Union v Berri Pty Ltd (2017) 268 IR 285 are relevant in this regard. Those principles make clear that evidence of the subjective intentions of the parties which are reflective of their actual intentions and expectations are not relevant. For this reason, the Applicants contend that large portions of the affidavit evidence proposed to be read by the Respondent in this proceeding are irrelevant and therefore inadmissible.

8. The particular clauses of the Current EA which assume central importance in resolution of the issue in dispute are clause 7 Salary Increases, clause 8 Definitions (in particular, the definitions of 'Base Salary', 'Classification Structure' and 'Increment Point'), clause 9 Remuneration Structure, clause 10 Classification Structure, clause 11 Broadband and Advancement Arrangements, clause 63 Performance Development Agreement Process, and Attachment A Classification Structures.

9. Clause 8 defines 'Base Salary' as the Salary Band and Increment Point against which an employee is remunerated, 'Salary Band' as the range of increment points within the AFP's Classification Structure, and 'Increment Point' as the point within a Salary Band that an employee is paid.

10. Clause 10 sets out the AFP's Classification Structure. It is stated to comprise two structures set out in Attachment A. The Band 1-8 Classification Structure comprises eight Salary Bands and / or associated broadbands specific to the functional areas set out in the Current EA. The Technical Specialist Framework Classification Structure comprises levels 1-4.

11. The logical inference from these provisions is that an employee must have a classification and that classification places the employee somewhere (i.e. at one of the increments) within a Salary Band as set out in Attachment A. That placement determines what 'Base Salary' the employee is paid.

12. Clause 9 explains how an employee may move up increments within a Salary Band. In particular, sub-clauses 9(5) and 9(6) expressly refer to PDAs under clause 63 and explain that salary

increment progression cannot occur if an employee does not have a current PDA at the 'agreement signed' stage and a previous PDA at a minimum rating of 'fulfilled'.

13. Similarly, clause 11 explains how an employee may move through a broadband. In particular, sub-clause 11(3) expressly refers to the PDA process under clause 63 and provides that movement through a broadband is subject to an employee participating in that process and achieving a rating of 'fulfilled' or higher in an employee's PDA in the preceding 12 months.

14. When clause 63 is read together with the provisions discussed above, it is clear that clause 63 articulates the requirements for a salary increase consequent on incremental progression and broadband progression. That is, there can be no incremental progression or broadband progression until the PDA is at the 'agreement signed' stage (sub-clause 63(5)), and the salary increase that accompanies such progression will not be payable until the PDA exchange has occurred and a rating of 'PDA fulfilled' has been achieved (sub-clause 63(7)). Sub-clause 63(3) summarises both of these outcomes.

15. If the same implications arising from the PDA process to progression through salary increments and through broadbands were intended to apply to the global increases to Base Salary articulated under clause 3, one would expect to see similar provisions to sub-clauses 9(5), 9(6) and 11(3) contained within clause 3. That is particularly so given that those provisions purport to impose a restriction on benefits to be applied to employees and therefore warrant clear and unambiguous expression. The fact that clause 3 contains no provisions imposing such a restriction, nor any cross-reference to clause 63, militates against a construction that would make the Base Salary increases contingent upon the PDA process requirements in clause 63.

16. The preferred construction, therefore, is that clause 63 does not qualify the global increases to Base Salary articulated under clause 3 and the entitlement to the "3% on commencement date" salary increase applied to all Base Salaries irrespective of whether an employee had complied with the PDA process under clause 63.

17. Importantly, this construction has the sensible industrial outcome of enabling all employees covered by the Current EA to identify what their base salaries are within the provisions of the Current EA. Given that base salaries are perhaps the most basic term of employment, such a construction is to be preferred over one which would require employees to resort to an instrument outside

the Current EA and, moreover, an instrument that the FW Act expressly states has ceased to apply and can never again apply (see section 58(2)(d)).

The Respondent's outline of submissions

30. The Respondent's outline of submissions, filed 5th March 2020, was as follows (footnotes omitted):

> *1. This proceeding involves an interpretation issue concerning the terms of the AFP Enterprise Agreement 2017-2020 (the EA). The issue for determination by the Court turns on a short point. Do employees who are 'ineligible to receive salary increases' under clause 63 of the EA, nevertheless receive the 3% increase on the commencement date of the EA? The Applicants assert, and the Respondent denies, such an entitlement.*
>
> *The relevant provisions of the EA*
>
> *2. Clause 63(2) of the EA states the Respondent's Performance Development Agreement (PDA) process is 'mandatory and must be completed every 12-month period.' Clause 63(3) of the EA provides:*
>
> > *An Employee will be ineligible to receive salary increases, incremental progression and progression through a broadband, if they have not participated in the PDA process and have not attained a minimum rating of PDA fulfilled.*
>
> *3. It is common ground between the parties that each of the Second to the Seventh Applicants had not satisfied the requirement in clause 63(3) of the EA, at least as at the commencement date of the EA, on 24 May 2018.*
>
> *4. Clause 7(1) of the EA provides for three salary increases, and states:*
>
> > *There will be a Base Salary increase of:*
> >
> > *(a) 3% effective from the Commencement Date.*
> >
> > *(b) 2% effective 12 months from the Commencement Date.*
> >
> > *(c) 1% effective 24 months from the Commencement Date.*
>
> *5. These increases are reflected in the table contained in Attachment A to the EA. Specifically, the columns to the table are titled '3% On Commencement Date', '2% 12 months from*

Commencement Date' and '1% 24 months from Commencement Date'.

6. The Respondent's interpretation is that an employee who has not satisfied the PDA requirements in clause 63(3) of the EA is not eligible, and therefore not entitled to, the salary increases referred to in clause 7 and Attachment A of the EA. The Applicant Employees contend that the starting base salary under EA includes the first 3% increase, and that the Second to the Seventh Applicants are entitled to the 3% increase even if they have not satisfied the PDA requirements which must be met to be eligible for salary increases.

Which interpretation should be preferred?

7. The Respondent's interpretation should be preferred as it accords with the plain wording of the EA. Clause 7(1) provides for three distinct Base Salary increases. It does not seem to be materially in dispute that clause 63(3) would prevent the salary increases under clauses 7(1)(b) and (c) being awarded, and there is nothing in the wording of the EA which suggests that the increase under clause 7(1)(a) should be treated any differently.

8. The Applicants' approach would read additional words into clause 63(3). It would effectively say 'An Employee will be ineligible to receive salary increases (except for the increase under clause 7(1)(a))…'. The clause does not say that. The term 'ineligible to receive' is unqualified and means what it says.

9. The rates in Attachment A reflect the base salary increases. The second column in the Attachment A table is not the 'starting rate' but is the rate after a 3% increase is applied. In any event, any right to pay increases arises from clause 7(1): Attachment A provides the classification structure adopted by clause 10(1) of the EA. The right to receive pay increases in clause 7 must be read alongside, and subject to, the disentitling provision in clause 63(3).

10. This view is supported by the evidence of the two witnesses being called by the Respondent, Ms Luci Henson and Ms Emma Hardy. Their evidence on the supporting circumstances known to the makers of the EA provides assistance to ascertaining the meaning of its terms. That evidence makes it clear that the PDA process has long been an integral part of the Respondent's remuneration arrangements, and that the EA was made in the context of express stipulation that employees 'must continue to be PDA compliant in order to receive salary increases'. The

Applicants ought not to be permitted to resile from that position through the interpretation now proposed by them.

11. The proceeding should be dismissed.

Outline of principle

31. There is a significant body of jurisprudence regarding the construction and interpretation of industrial instruments, in which term must be included enterprise agreements of the kind currently under consideration.[13] For immediate purposes, it is sufficient to note the following general principles.

32. First, in *Amcor Limited v Construction, Forestry, Mining and Energy Union*, the High Court (Gleeson CJ and McHugh J) said, at [2]:[14]

> *The resolution of the issue turns upon the language of the particular agreement, understood in the light of its industrial context and purpose, and the nature of the particular organisation.*

33. Secondly, in *Amcor v CFMEU*, at [96], Kirby J referred to a long-cited passage from the Federal Court decision in *Kucks v CSR Ltd* ("*Kucks*") (Madgwick J) (emphasis added):[15]

> ***It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon****. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And* ***meanings which avoid inconvenience or injustice may reasonably be strained for****. For reasons such as these, expressions which have been held in the*

[13] In this regard, see the important discussion by Jessup J in *NTEU v La Trobe University* at [30] regarding various legal distinctions between "awards and orders, on the one hand, and enterprise agreements, on the other." In my view, noting again that his Honour was in dissent in the result, nothing set out in the paragraph cited relates to the issues currently before this Court.
[14] *Amcor Limited v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241 ("*Amcor v CFMEU*"). See also the comments by Kirby J to similar effect, at [77].
[15] *Kucks v CSR Ltd* (1996) 66 IR 182 at 184. The same passage was also cited by Callinan J in *Amcor v CFMEU*, at [129]. See also the summary of principle in *Australian Manufacturing Workers' Union v Berri Pty Ltd* (2017) 268 IR 285 at [38], [65], [83] and [113] – [114].

> *case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand.*

34. I note that in *Transport Workers' Union v Coles Supermarkets Australia Pty Ltd* ("*TWU v Coles"*), the Full Federal Court referred to this same passage from *Kucks*, but noted in particular a less regularly cited passage that immediately follows it, thus (emphasis added):[16]

> *But* ***the task remains one of interpreting a document produced by another or others. A court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award****. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award. So, for example,* ***ordinary or well-understood words are in general to be accorded their ordinary or usual meaning****.*

35. Thirdly, still in *AMCOR v CFMEU*, at [97], Kirby J observed that it was appropriate to consider the agreement before the High Court using a "broad interpretation" but at the same time cautioned or noted that a more precise document, with a different context, history and purpose, may give a different result. Very purposefully, Kirby J stated, at [97] (emphasis added):

> *In a more precise document, with a different context, history and purpose, the opposite conclusion might be reached. But giving this document the broad interpretation that is appropriate to a certified agreement under the Act, the submission advanced by Amcor is acceptable.* ***But does it represent the preferable construction?***

36. Perhaps the highlighted question from his Honour poses the appropriate question in the current matter.

37. Fourthly, admittedly in the context of contract law and agreements generally, in *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* ("*Toll v Alphapharm*"), the High Court said, at [40] (internal citations omitted; emphasis added):[17]

> *This Court, in Pacific Carriers Ltd v BNP Paribas, has recently reaffirmed* ***the principle of objectivity*** *by which the rights and*

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[16] *Transport Workers' Union v Coles Supermarkets Australia Pty Ltd* (2014) 245 IR 449 at [39] quoting from *Kucks* at p.184.
[17] *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* (2004) 219 CLR 165.

> *liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe.* ***References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement****. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.*

38. To these authorities and the principles set out in, or derived from, them, the following considerations should also be noted.

39. In some instances, the language in an enterprise agreement can or may be more "aspirational" rather than that associated with enforceable obligations. Likewise, in certain instances, the relevant "voice" of the language used (active versus passive), including the distinction between declaratory terms and the language of obligation compared to the language of "comfort and reassurance", are all, subject to evidence and circumstances, matters to consider.[18] Courts have also, reasonably regularly, held that a "literal" or "pedantic" approach should be avoided where such would produce a result at odds with the apparent intention of those who framed the enterprise agreement.[19]

40. In other instances, it has been held that (a) it is no longer accurate to regard agreements made under the FW Act, strictly speaking, as having "parties" to them at all, and (b) it is often difficult if not of no practical utility to search for a "common understanding" of terms in the agreement because the employees who ultimately approved it will not necessarily have the same understanding of those terms as those who negotiated it.[20]

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[18] *National Tertiary Education Union ("NTEU") v La Trobe University* (2015) 254 IR 238 at [30] (Jessup J – dissenting in the result but not as to statements of principle) and at [109], [112] – [115] (White J).
[19] See *Amcor* at [96] and [129] – [130]; *SDA v Woolworths SA Pty Ltd* [2011] FCAFC 67 at [16].
[20] See, respectively, *TWU v Coles Supermarkets Pty Ltd* (2014) 245 IR 449 at [40]; *Health Services Union v Ballarat Health Services* [2011] FCA 1256 at [79] – upheld on appeal but without reference to this point [2012] FCAFC 79. See too the comments by Tracey J in *Transport Workers Union of*

41. Further, some caution needs to be exercised in the admission and use of extrinsic material in the aid of the interpretation of terms in an enterprise agreement.[21]

42. Finally, most recently, in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Qantas Airways Limited*, reflecting principles generally from earlier decisions, the Full Federal Court said, at [99] (emphasis added):[22]

> *The principles to be applied in interpreting an enterprise agreement were summarised in WorkPac Pty Ltd v Skene (2018) 264 FCR 563 at [197]. They emphasise the practical character of such instruments which are to read in a manner that is informed by the circumstances of the relevant industry rather than according to legal nicety.*

Consideration and disposition

43. In the light of (a) the Statement of Agreed Facts, (b) the Affidavit evidence filed, and (c) the principles outlined above, I make the following comments and findings.

44. Regarding Clause 7, I note and find as follows.

45. I recall that the High Court in *Toll v Alphapharm* referred, at [40], in particular to "[r]eferences to the common intention of the parties … are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement."

46. Likewise, as noted above, in the Full Court decision in *NTEU v La Trobe University*, White J in particular referred, at [109] – [115], to "statements of commitment", the "emphatic language of obligation", as well as to the use of the "active voice" in enterprise agreements, in contrast to the language of aspiration or of philosophy.[23]

Australia v Linfox Australia Pty Ltd ((2015) 318 ALR 54 at [29] – [41] regarding "construction of industrial instruments."

[21] See the discussion in *AMIEU v Golden Cockerel Pty Ltd* (2014) 245 IR 238.

[22] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Qantas Airways Limited* [2020] FCAFC 205.

[23] *NTEU v La Trobe University* (2015) 254 IR 238.

47. Although so regularly cited as to be almost "by-words" in matters of construction of industrial agreements, it is nonetheless important to recall Madgwick J's comments in *Kucks*, cited with approval by both the High Court (*Amcor Limited v CFMEU* at [96] and [129]), and the Full Federal Court (*TWU v Coles* at [39]), that "narrow and pedantic approaches to the interpretation …" are misplaced.

48. Similarly, in *TWU v Coles*, the Full Court said, at [39], that "ordinary or well-understood words are in general to be accorded their ordinary or usual meaning."

49. In the light of these authorities in particular, in my view, it is plain that the terms of Clause 7 are, and should be considered to be, uncomplicated and clear. Put another way, there is no relevant ambiguity about the relevant terms and their operation. In my view, Clause 7 should be understood as a stand-alone provision in the EA, unaffected in any way by Clause 63 of the EA. Accordingly, the construction advocated by the Applicants should be accepted, because:

    (a) Clause 7 refers specifically and solely to "Base Salary" (notably in upper case), not more generally or simply to "salary" or to "increases in salary" (notably in lower case) set out in Clause 63;

    (b) It is in the language of obligation ("there *will be* a Base Salary increase" – emphasis added) and is relevantly "declaratory"; it is not in the language of "aspiration", "comfort or reassurance" or of "philosophy";

    (c) Other clauses (*e.g.* Clauses (9 and 11) in close proximity to Clause 7 refer to the PDA process. There is no reference to the PDA in Clause 7, nor is there any cross reference to Clause 63 and or to the PDA process. Likewise, Clause 63 makes no reference to Clause 7 or to "Base Salary";

    (d) Presumably because those responsible for drafting the EA clearly, and one might assume, deliberately, chose to insert a clear and specific reference to the PDA process in other clauses *(e.g.* Clauses 9 and 11), it was also a deliberate choice (rather than inadvertence) *not* to insert any reference in

Clause 7 to the PDA process. *A fortiori* must this be the case given how central the PDA process is to the EA, according to the Respondent. Being so central to the EA, the Court may reasonably assume that those drafting the EA would have ensured that there was specific reference to the PDA in those Clauses to which it was intended to apply. Similarly, it was also the case that it was not a relatively simple "cut and paste" from the previous or earlier EA, which also had no reference to the PDA in relation to "Base Salary";

(e) Clause 63 is in the last section of the EA (Miscellaneous"), and is thereby significantly removed from Clause 7. In my view, such drafting of the EA, as an expression of the common agreement of the parties to it, rather poses the following somewhat rhetorical questions: (i) if it was the common understanding of the parties that Clause 7 was to be subject to the terms of Clause 63, why is there no reference to that Clause and the PDA process contained in it? And (ii) if, as the Respondent contended, Clause 7 is to be understood as being subject to Clause 63 and the PDA process, why is there reference to the PDA process in Clauses 9 and 11 but no such reference in Clause 7?

(f) Finally, if the PDA was so central to Clause 7, one might reasonably expect there to be specific reference in Clause 7 to the PDA, and or that the singular PDA process would not be removed to the general "catch-all" section of the EA under "Miscellaneous." One might have reasonably expected such a purportedly crucial plank of the EA to be given a more prominent or central place in it, and linked expressly to those Clauses in the EA that were, or were intended to be, subject to that process.

(g) None of this occurred in relation to Clause 7.

50. For the reasons given, in my view, there is no ambiguity in the terms of Clause 7. As such, there is no need to seek assistance in any material extraneous to the EA. Moreover, for reasons set out earlier, the evidence given on behalf of the Respondent does not otherwise assist the

Respondent's interpretation of the EA generally or of Clause 7 in particular.

51. In addition to these reasons, I prefer and accept the submissions on behalf of the Applicants to those of the Respondent.

52. Formally, the question, re-framed earlier in these reasons, thus:

> *Do employees who are "eligible to receive salary increases" under clause 63 of the EA, nevertheless receive the 3% increase on the commencement date of the EA, and other increases, pursuant to clause 7 of the EA?*

should be answered in the affirmative.

Conclusion

53. Having determined the single question before the Court in the Applicants' favour, the issue here relates to what, if any, relief should follow.

54. As noted earlier in these reasons, in my view, it does not follow that the declarations sought by the Applicants should automatically be made. This is so because, as noted in the course of the hearing, where there is a joinder of issue on a matter of construction of the current EA, in the light of the Court's determination of the issue in question, it would be more appropriate for the following course to be pursued subject to the parties having a reasonable period of time to consider the Court's reasons.

55. In my view, the most appropriate course is simply to refer the parties to mediation, absent any other agreement that might be resolved between them privately, to see what can now be worked out.

56. Accordingly, giving every allowance for the imminent cessation of the Court year, within 28 days the parties are to notify the Court of the preferred procedural course in the light of the reasons now delivered. For example, absent any resolution of the dispute, the parties should be referred to mediation. But the Court will wait to hear from the parties before making any such Order.

57. Further and finally, particularly because the issue in dispute revolved solely around a matter of construction of the current EA, it is appropriate

in my view that, absent any other Application within 28 days, pursuant to s.570 of the *Fair Work Act 2009* (Cth), there should be no Order as to costs.

I certify that the preceding fifty-seven (57) paragraphs are a true copy of the reasons for judgment of Judge W J Neville

Associate:

Date: 15th December 2020