ASU Submission

Senate Education and Employment Legislation Committee

Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 [Provisions]

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Organisation: Australian Services Union

Address: Ground Floor, 116-124 Queensberry Street
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Contents

1. The ASU

1. The Australian Services Union (**ASU**) is one of Australia's largest unions, representing approximately 135,000 members.

2. The ASU was created in 1993. It brought together three large unions – the Federated Clerks Union, the Municipal Officers Association and the Municipal Employees Union, as well as a number of smaller organisations representing social welfare workers, information technology workers and transport employees.

3. Currently ASU members work in a wide variety of industries and occupations because the Union's rules traditionally and primarily cover workers in the following industries and occupations:

   - Disability support
   - Social and community services
   - Local government
   - State government
   - Transport, including passenger air and rail transport, road, rail and air freight transport
   - Clerical and administrative employees
   - Call centres
   - Electricity generation, transmission and distribution
   - Water industry
   - Higher education (Queensland and South Australia)
   - Australian Taxation Office

4. The ASU has members in every State and Territory of Australia, as well as in most regional centres.

2. Our Submission

5. The proposed *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 [Provisions]* ('**the Bill**') will, if passed, diminish the rights of insecure employees, undercut the social safety net provided by the modern award system, and deny some employees the right to enterprise bargaining for long periods of time. We discuss the impact of workers in detail below. For ease of reading, our submission is divided by the Schedules of the Bill.

6. If passed, the Bill would place an excessive amount of power in the hands of employers. It would do so at a time when genuine collaboration and cooperation are not merely desirable, but absolutely necessary.

7. ASU members have experienced the pandemic in different ways. Some ASU members work on the front-line of our response to COVID-19, providing essential services in disability services, community services, and public health. Other ASU members have ensured the continued provision of essential services, such as electricity, water, freight, libraries and garbage collection. Other workers have been stood down without pay or lost their jobs as a result of the public health response. For example, this includes local government employees at pools, health centres and libraries; aviation workers; travel industry workers; and disability workers in day and community programmes.

8. What is common to all ASU members is that they have been able to organise and bargain collectively so that decisions are not made unilaterally by employers. In doing so, we have worked with employers to ensure the rights of employees are respected while supporting the continued operation of their businesses. The Bill, if made law, would weaken many of the rights our members have relied on to defend their interests during the pandemic.

9. The ASU calls upon the Senate to reject this harsh and oppressive legislation.

3. Schedule 1 – Casual Employees

3.1 Definition of casual employment

10. The Bill would insert a new definition of casual employment into the Fair Work Act 2009. The proposed definition is a significant departure from the definition of casual employee prevailing under the common law and in industrial instruments. It will not assist casual workers and will in fact make things worse.

11. The Bill inserts a new definition of 'casual employee' into the Fair Work Act. A person is a casual employee where 'an offer of employment made by the employer to the person is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person.'

12. The proposed definition places an unfair reliance on negotiations at the commencement of employment. Employees generally will not be in a position to judge if the actual working conditions reflect the offer of employment. The employer may offer 'casual' employment when they actually expect the worker to work hours like a permanent employee. Even if the initial work was genuinely casual, the nature of work may change overtime. Eventually, casual work may develop into something more permanent. This is recognised by the Australian common law. However, if the Bill were made law employees would only be able to challenge their casual status by reference to the employer's commitments to them at the time the offer of employment was made.

13. Notably, there is no obligation for an employer to pay a casual loading or other entitlements that may apply to a casual employee under an industrial instrument. The payment of a loading is simply one amongst other equally weighted indicia. An employee may therefore be a casual employee for the purposes of the Fair Work Act but not be entitled to the loadings and other entitlements that apply to casual employees under industrial instruments. Additionally, there is no indication in the proposed definition that a casual employee is not entitled to paid leave or other entitlements.

14. The proposed definition could easily be exploited by employers to hire a casual workforce without the protections and conditions a permanent workforce would require and will further foster the already increasing extent of insecure employment.

15. The ASU supports a statutory definition of casual employment that looks, as in the common law definition, to the objective circumstances of the employment relationship to determine its nature.

3.2 Casual loading

16. The Bill empowers a court to 'set off' amounts paid to an employee against compensation for lost entitlements. Firstly, s 545A(2) requires a court to set off a claim by the full amount of any loading paid. Secondly, s 545A(3) allows a court to instead set off a claim by an amount proportionate to the loading attributable to the entitlement being claimed.

17. This would be a significant departure from the well-developed common law principles that an employer and employee cannot contract out of statutory minima and that an employer may only 'set off' a payment against an entitlement unless those amounts are 'separately identifiable'. The Bill only makes reference to amounts paid which are 'identifiable'. Courts will be forced to determine the true character of payments made in excess of an employee's minimum statutory entitlements. In many cases this will be difficult where poorly drafted contracts do not clearly distinguish between market-rate wages and additional amounts paid in lieu of entitlements.

18. These provisions, if made law, would encourage employers to attempt to contract out of employee's statutory entitlements.

4. Casual Conversion

19. The Bill introduces a new statutory entitlement for casual workers to convert to permanent employment. Where an employee has worked for the employer for a period of 12 months and has worked a regular pattern of hours on an on-going basis for the last six months, an employer is obliged to make an offer to the employee for conversion to permanent employment.

20. This conversion “right” is littered with qualifications and places control with the employer and is easily subject to manipulation. Furthermore, the proposed Bill provides that an employer is not required to make the conversion offer if there are “reasonable grounds” not to do so.

21. The biggest failing of the proposed Bill is the lack of enforceability. In practice, an employer could refuse a request for casual conversion, refuse the employee’s a request to have that decision examined by the Fair Work Commission, leaving the Federal Court the employee’s only recourse. An application to the Federal Court is likely to be more expensive and time-consuming than arbitration in the Fair Work Commission. The FWC must be granted the power to arbitrate these matters where there is no agreement.

5. Schedule 2 – Modern awards

5.1 Additional hours for part time employees

22. The Bill would introduce a new Division 9 of Part 2-3 providing for agreements for part-time employees to work additional agreed hours. If Division 9 were made law, 16 modern awards would be varied to allow certain part-time employees who work at least 16 hours per week to agree to work additional hours without overtime by entering into a "simplified additional hours agreement". The ASU has members covered by the *Business Equipment Award 2020*; the *Vehicle Repair, Services and Retail Award*; and the *General Retail Industry Award 2010*. We are greatly concerned that the list of modern awards can be amended and added by regulation. Thus the list may increase from 12 to 24 Awards without legislative oversight or consideration by the Fair Work Commission. This will allow groups to lobby the government to introduce a specific industry award to the list.

23. A “simplified additional hours’ agreement" removes the need for an employer to renegotiate a part-time employee’s agreed pattern of work or pay additional hours at overtime rates when they require an employee to work additional hours. Simplified additional hours’ agreements allow employers to put enormous pressure on part-time employees to accept additional hours, on little to no notice, without being paid overtime.

24. The experience of ASU members in the community sector under a provision in the *Social, Community, Home Care and Disability Services Industry Award 2010* (‘**SCHDS Award**’) like a simplified hours agreement is as follows: under clause 28.2(b)(ii), a part-time employee is not entitled to overtime until they have worked 10 hours per day. These hours are supposedly voluntary but in practice they are an expectation of the employer. This is a particular burden on disability services employees because they are not required to work their ordinary hours of work continuously like other employees. It is a common practice in that sector for employers to

offer contracts of employment that guarantee fewer hours of work than the employer expects the employ to perform. Employees often feel pressured to accept additional hours.

Case Study – Disability Sector Worker

Mary is a part-time disability support worker employed under the SCHDS Award.

Mary has a contract of employment that specifies her agreed hours of work. She works 12 hours a week. She works a 3-hour shift starting at 8.00AM each Monday, a 3-hour shift starting at 4.00PM each Monday, a 3-hour shift starting at 8.00AM each Wednesday and a 3-hour shift starting at 4.00PM each Friday.

Mary is a single parent and cares for her elderly mother. She cannot work full-time hours because of her caring responsibilities but needs more than the 12 hours each week she has been offered by her employer to support her family.

Mary will accept almost any additional hours offered by her employer because she is worried that if she refuses a request to work, her employer will not offer her any additional work at all.

This means that Mary often accepts hours at times and locations that are inconvenient or interfere with her caring responsibilities. She only refuses hours she absolutely cannot work, such as when she accompanies her mother to a medical appointment with a specialist.

Mary is exhausted by this pattern of work and is considering leaving the sector.

25. These provisions are unnecessary because the modern awards identified already offer employers significant flexibility to alter a part-time employee's hours of work. Firstly, under most modern awards employers and employees may agree to alter the employee's agreed regular pattern of work. There is nothing stopping any employer covered by the identified awards from negotiating with employees to change their hours of work.

26. Secondly, many modern awards provide additional flexibilities to employers. For example, the Business Equipment Award only requires that a part-time employee is engaged for less than an average of 38 hours per week and work a regular pattern of hours. This pattern of hours must be arranged according to the rostering rules of clauses 12, 21 and 22. The arrangement of hours under these provisions may be altered at any time by mutual agreement, by a weeks' notice, or by 24 hours to the employee in case of an emergency. Significant changes to an employee's hours of work enliven the Awards consultation provisions. Overtime is only payable when they work in excess of or outside the ordinary hours established according to the Award. Where an employee is required to work outside of their pattern of work, they are compensated by overtime. This offers the employer flexibility to operate their business while protecting the employee's interest in a stable pattern of work.

5.2 Flexible work directions

27. The Bill permits employers to issue flexible work directions to employees about their duties and location of work. This is intended to replicate and continue some of the flexibility-enabling

directions available to employers during COVID-19 under certain modern awards and the JobKeeper scheme. These flexibilities are to be available for a period of 2 years from the passage of the Bill. However, compliance with JobKeeper enabling directions rewarded an employee with a guaranteed minimum payment of $1500 per fortnight. There is no such payment under this Bill.

28. Furthermore, unlike the equivalent JobKeeper directions, these directions are able to be given by any employer to whom these awards apply, not just employers affected by COVID-19 and who suffered a reduction in turnover. The employer does not need to show any downturn in revenue.

6. Schedule 3 – Enterprise Agreements

6.1 Approval process

29. This part of the Bill significantly weakens the pre-approval obligations that currently apply to employers. It replaces the mandatory procedural requirement that an employer 'take all reasonable steps' to ensure employees have access to the Agreement, are provided with an appropriate explanation of its terms and are informed of the voting process. It replaces it with a general requirement to 'take reasonable steps' to ensure employees are given a proper opportunity to decide whether or not to approve the Agreement. (Notice the removal of the critical word ALL). The Bill also removes the obligation on the employer to provide employees with relevant policies, old Awards and Agreements that may be referred to in the new Agreement. This waters down the process to the disadvantage of the employee.

30. Furthermore, under the proposed Bill there is an emphasis on accelerating the approval process with the FWC required to determine applications to approve agreements within 21 working days, as far as practicable.

31. In addition, there will be a limitation on the ability of third parties (which will include unions and other employee associations that are not bargaining representatives for the proposed enterprise agreement) to intervene in the FWC's enterprise agreement approval process.

32. The requirement for the FWC to approve agreements within 21 working days limits the ability of affected workers to learn about and resist any loss of benefits and conditions. The limitation on third party intervention appears to be aimed at restricting unions from intervening and objecting to non-union (and potentially non-BOOT compliant) enterprise agreements.

33. The ASU holds grave concerns about limiting union involvement in the certification of enterprise agreements, as over the years we have witnessed time and time again employers trying to

sneak through inferior agreements that sought to reduce the wages and conditions of employees.

Case Study - dnata/ Airport Handling Services Australia

In 2017 the ASU caught international airline service company dnata setting up a side company called Airport Handling Services Australia (AHSA) and register an Agreement with the FWC in a bid to undercut its existing employees.

This new company was established so that labour hire employees could be brought in to do the same work that dnata's existing employees were performing, but for less pay and conditions. AHSA employees were only guaranteed the legal minimum wage.

dnata Australia then commenced using AHSA to directly compete with dnata for contracts, taking work away from existing employees bit by bit and undermining job security.

Following a protracted campaign to defend the rights of the permanent workforce, dnata dropped their plan to put AHSA staff on a separate Agreement. The ASU successfully negotiated a watershed Agreement which covered all dnata and AHSA employees. Job security was increased under the new Agreement, with requirements to move labour hire and casual staff into permanent positions.

34. Under the proposed Bill employers such as dnata will be able to cut the wages and conditions of workers even further and unions will be unable to stop this from occurring. All workers suffer when the power of unions to intervene on their behalf is reduced.

6.2 Revised Better Off Overall Test (BOOT)

35. In addition, the Bill proposes COVID-specific changes to enterprise agreement approvals which will operate for a limited two-year period from the time the Bill passes into law. Under the proposed change, the FWC will be permitted to approve an enterprise agreement which does not pass the BOOT subject to specific considerations and deemed to be in the "public interest".

36. The ASU fundamentally objects to this new amendment as it risks employers taking advantage of their workforce using COVID-19 as the guise to do so. Employers will be incentivised to pressure workers into voting for agreements which undercut already minimum wages of pay.

37. The central justification of this amendment is that it will enable businesses to maintain and expand employment in the wake of the COVID pandemic. In reality we know that employers don't increase employment based on reduced labour costs, they increase employment if there is an increase in work to be performed. We saw this in the case of the reduction in penalty rates which was supposed to act as an incentive for employers to hire more workers. In fact, this did not happen and employers simply pocketed the profits.

38. The Bill allows the Fair Work Commission to approve agreements that do not pass the BOOT if 'appropriate in all the circumstances.' This is a very unwelcome change which means once these Agreements are approved they remain in force until replaced or terminated. Neither of

which are likely in any non-unionised workplace which unfortunately constitutes around 80% of workplaces.

39. As we know there are still WorkChoices "Zombie" agreements from 2006 in operation to this day, a situation this Bill wishes to fix by providing that these agreements will cease to operate on 1 July 2022 with employees reverting back to being covered by their relevant modern award. However, there is nothing in the current legislation that would prevent exactly the same situation from occurring again.

40. Importantly, none of the new provisions provide any real protections to ensure that a company is facing serious financial difficulties when they seek to make use of the Act. They essentially just need to assert that they are necessary.

Case Study - Swissport/Aerocare

In Australia, Swissport (formerly Aerocare) operates at multiple airports as a low-cost ground handler, partnering with all major domestic airlines and many international carriers in the region including Qantas, Jetstar, Virgin and Regional Express to name a few. Aerocare predominately employs staff on a 'permanent part-time' basis or as casuals.

Since 2012 the ASU along with other Unions has been to the Federal Court or the Fair Work Commission on 9 different occasions in regards to the underpayment of employees at Aerocare or to object to an application to approve an enterprise agreement as it fails the BOOT for reasons such as: rates of pay being less than the modern award, split shifts, poor rostering conditions, unfair payments for working extra shifts and penalty rates being absorbed into ordinary rates of pay.

We currently have a case before the Commission and should this new legislation be passed it would mean that the Swissport/Aerocare enterprise agreement would be approved and will fundamentally cut the wages and conditions of this workforce and potentially all aviation ground handler workers over time.

41. As demonstrated above, should the new legislation pass, employers will be rushing to negotiate non-union enterprise agreements that reduce the wages and conditions of workers. We already know from the WorkChoices era there was an explosion in non-union agreements with private sector non-union agreements rising from 20 to 60 percent in the space of 5 years. Unions will be unable to stop these unfair agreements that rip away the wages and conditions of hard working Australians and will permanently damage the living standards for all.

42. This is exacerbated by the fact that the Bill only allows the Fair Work Commission 21 days to collect submissions and evidence in deciding whether to approve the Agreement or not. All realistic IR practitioners know that 21 days is too short a period for the Commission to do its job properly. The Government is giving the Commission unrealistic timelines which will disadvantage workers.

Case Studies – Dnata Passenger Services NSW Agreement 2017 and Flight Centre Enterprise Agreement 2018

1. The ASU opposed the approval of the Dnata Passenger Services Agreement NSW by the FWC on the grounds that it did not meet the BOOT. This ASU challenge instigated meetings and discussions between the union, Dnata and the FWC which took a number of months to conclude. This process forced the company to make 13 Undertakings to the FWC which were to the benefit of the Dnata employees (**see Attachment 1**). This number of Undertakings is not unusual and the process keeps the employer and union on their toes which benefits employees. This result could not have been achieved within the time constraint of 21 days.

2. The ASU also opposed the approval of the Flight Centre Agreement largely on the grounds that it did not meet the BOOT. This also took some months to resolve. And while the FWC did ultimately approve the Agreement, this did not happen before a thorough investigation of the contents of the Agreement resulting in an unusually long 28 page Decision by the FWC (**see Attachment 2**).

It also meant that Flight Centre gave 7 Undertakings to the FWC which protected some 6500 employees. This could not have been done within a 21 day period and the employees may have been worse off.

7. The current BOOT already has flaws

43. The current BOOT already has its existing flaws which may disadvantage employees. For example, the BOOT only applies to the new Agreement at the time of approval. It does not have to continue to apply for the life of the Agreement which could be 4 years for normal Agreements and up to 8 years for Greenfield Agreements. Many employers exploit this loophole and 'cheat' by placing a greater pay increase at the start of the Agreement, so as to pass the BOOT, and then give little thereafter, e.g. 3% wage increase in the first year and the only 1% p.a. in years 2, 3 and 4.

44. This means that in 4 years' time the Agreement most probably will be below the CPI adjustments and FWC National Case Decisions and if allowed to continue for some years without being replaced or terminated will result in employees being paid less than the Award i.e. these are known as 'Zombie Agreements.'

45. This Bill which will water down the current BOOT will exacerbate those flaws.

7.1 Greenfield agreements

46. According to the Bill, the Fair Work Commission will be allowed to approve longer-term Greenfields agreements made in relation to the construction of a major project, to specify a nominal expiry date of up to eight years after the day the agreement comes into operation. If the expiry of the Greenfields agreements is after four years, the agreement must have a term providing for annual pay increases for the nominal life of the agreement.

47. This effectively means that workers on Greenfields sites would have no opportunity to negotiate their wages and conditions during the life of that agreement. It will provide the companies running these projects, which tend to be large resource and construction multinationals, a major reduction in their costs, and thus a boost to their profits, at a cost to the wages and conditions of workers.

48. In addition, under the revised BOOT provisions, a Greenfields agreement may be approved that undercuts the minimum standards of any industry award and it may not expire for eight years.

8. Conclusion

49. The ASU looks forward to continuing to act collectively on behalf of its members to establish terms and conditions of employment which are fair and reasonable, which provide decent terms and conditions of employment and which suit the needs of enterprises and the economy as a whole.

50. The Union believes that this is only achievable in a system which provides for and encourages collective action by employees actively participating in the determination of their specific wages and conditions of employment against a backdrop of a fair safety net of socially determined employment standards.

51. Working people should not be made to pay the price of economic recovery. The attack on the rights of employees under the proposed Jobs and Economic Recovery Bill is fundamental. It does not, in reality, seek to do any of the things that the Government's advertising says that it is intended to do. It is designed to place greater power in the hands of employers at the expense of the rights and living standards of employees.

52. It is not possible to propose amendments to this Bill which would render it acceptable to employees. There is, in this Bill none of the notional equality of power between employers and employees. There is no pretence of fairness to employees in this Bill.

53. As we saw as a result of the pandemic workers suffered terribly in 2020 and this continues for many hundreds of thousands of workers in 2021. Workers lost their jobs, worked less hours and consumed their leave, Super or savings in order to survive.

54. How does this Bill assist those hundreds of thousands of workers? Does it help casuals find more secure work? No. It allows the employer to unilaterally declare who is a casual with little recourse for the employee to challenge this. This could create a new class of employees who

work hours like a permanent employee, but do not enjoy the benefits attached to permanent employment and may be terminated at will.

55. Does it assist part-time employees covered by some Awards? No. Under the guise of providing more hours to part-time employees it offers a “loaded rate” which denies employees penalties and overtime, leaving them worse off. Does it assist workers covered by an enterprise agreement? No. It waters down both the Agreement FWC approval process and the BOOT leaving employees potentially worse off.

56. In fact, in all areas outlined in our submission, the proposed Jobs and Economic Recovery Bill worsens the bargaining position of employees and creates more choice for employers.

57. In conclusion, the ASU believes the proposed Jobs and Economic Recovery legislation is unfair, unreasonable and totally unacceptable and should be rejected by the Senate.

Attachment 1.

[2018] FWCA 2908

30/6/21

FairWork Commission

DECISION

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

dnata Airport Services Pty. Limited
(AG2017/4914)

DNATA PASSENGER SERVICES NSW ENTERPRISE AGREEMENT 2017

Airport operations

COMMISSIONER CAMBRIDGE SYDNEY, 24 MAY 2018

Application for approval of the dnata Passenger Services NSW Enterprise Agreement 2017.

[1] An application has been made for approval of an enterprise agreement known as the *dnata Passenger Services NSW Enterprise Agreement 2017* (the Agreement). The application was made pursuant to s. 185 of the *Fair Work Act 2009* (the Act). The application has been made by *dnata Airport Services Pty. Limited* (the Employer). The Agreement is a single-enterprise agreement.

[2] The application was lodged with the Fair Work Commission (the Commission) at Sydney on 18 October 2017. On 27 April 2018, the application was referred to the Commission as currently constituted. The application included a Statutory Declaration of *Robert Larizza* made on behalf of the Employer and dated 16 October 2017 (the Declaration). The Declaration stated that the Agreement was made on 6 October 2017. Therefore the application was made within the 14 day lodgement time limit established by subsection 185 (3) (a) of the Act.

[3] The application for approval was listed for Mention and Directions proceedings on 14 May 2018, at which time *Mr R Clarke* appeared for the Employer and *Mr M Rizzo* appeared for the *Australian Municipal, Administrative, Clerical and Services Union* (ASU). During the proceedings held on 14 May, the Commission identified various issues relating to the contents of certain terms contained in the Agreement which required clarification.

[4] *Mr Clarke* and *Mr Rizzo* provided some important clarifications during the proceedings. The Employer was invited to consider some residual issues raised by the Commission and to respond in writing. The Commission has received correspondence dated 14 May 2018, from the Employer, which included further material in support of the application together with Undertakings dated 14 May 2018, made by and duly signed by the Employer, and proposed to the Commission pursuant to s. 190 of the Act (the Undertakings).

[5] Consequently I have further considered the application for approval having regard for the clarifications provided during the proceedings held on 14 May, the further material in support of the application, and the Undertakings.

[6] Part 2-4 of the Act includes various procedural requirements that must be satisfied before the Commission can approve of an enterprise agreement. I have further examined the contents of the Declaration in the context of the clarifications provided during the proceedings held on 14 May 2018, and the further material in support of the application. On the basis of this material I am satisfied that the procedural requirements of Part 2-4 of the Act have been met in this instance.

[7] I note that the file has included a Statutory Declaration of *Linda White* made on behalf of the ASU, as an employee organisation in relation to the application. I also note that the Agreement contains a flexibility term at clause 7.5 and a consultation term at clause 7.4.

[8] I am prepared to accept the Undertakings. As provided by s. 191 of the Act, the Undertakings are taken to be terms of the Agreement. I am satisfied that each of the requirements of ss. 186, 187 and 188 of the Act as are relevant to this application for approval have been met.

[9] The ASU, being a bargaining representative for the Agreement, has given notice under s. 183 of the Act that it wants the Agreement to cover it. As required by subsection 201 (2) of the Act I note that the Agreement covers the ASU.

[10] The Agreement as varied by the Undertakings is approved. In accordance with subsection 54 (1) of the Act, the Agreement will operate from 31 May 2018. In accordance with clause 1.1 (c) of the Agreement the nominal expiry date of the Agreement is 30 June 2021.

SEAL OF THE FAIR WORK COMMISSION

COMMISSIONER

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In the Fair Work Commission
At Melbourne

FWC Matter Number: AG2017/4914

dnata NSW Passenger Services Enterprise Agreement 2017

Pursuant to section 190 of the Fair Work Act 2009 (Cth) (the Act) and Regulation 2.07 of the Fair Work Regulations 2009 (Cth), dnata Airport Services Pty Ltd provides the following written undertakings, which applies to dnata NSW Passenger Services Enterprise Agreement 2017 (the enterprise agreement) in respect of employees covered by the enterprise agreement.

1. In relation to enterprise agreement clause 3.3(b) regarding reassignment; dnata will not use or rely on the last sentence of clause 3.3(b) of the enterprise agreement.
2. Work undertaken by a full time employee in excess of 38 hours in a week will be overtime and paid in accordance with clause 5.4(b) of the enterprise agreement.
3. The enterprise agreement does not, and is not intended to, apply or cover day workers.
4. In relation to clause 5.4(h) of the enterprise agreement, where an employee (the first employee) seeks of their own initiative, to swap a shift with another employee (the second employee), dnata undertakes that the first employee will receive any allowances, penalties and loadings payable for the second employee's original shift that the first employee has swapped into and that the second employee will receive any allowance, penalties and loadings payable for the first employee's original shift that the second employee has swapped into.
5. In relation to enterprise agreement clause 5.1(c), where an employee is required to change his or her shift without at least 48 hours notice, the employee will be paid for the shifts worked during the 48 hour period at double time.
6. Where the term "standard rate" is used in the enterprise agreement, this will be taken to mean the CSA Level 2 ordinary hourly rate of pay multiplied by 38.
7. In relation to enterprise agreement clause 5.2, instead of the unpaid break a new employee will be provided a meal break of at least 20 minutes per shift to be counted as time worked.
8. In place of enterprise agreement clause 2.4(b) the following wording: "Casual employees are not entitled to any paid leave entitlements, unless specified otherwise".
9. Overtime for a casual employee occurs when the casual employee works more than 12 hours in a day, more than 5 days in a week or more than 38 hours in a week and will be paid in accordance with clause 5.4(b) of the enterprise agreement.

10. Saved Employee at L1 and L2 Right to a Wage Review

(a) A level 1 and level 2 saved employee has the right to request a review of the wages they received in a 4 week roster cycle under this Enterprise Agreement and the wages they would otherwise have received under the modern award;

(b) In addition, in respect of a level 1 and level 2 saved employee who has worked weekend work in a 4 week roster cycle, dnata will conduct a review every 4 weeks of the wages received by those employees under this Enterprise Agreement and the wages they would otherwise have received under the modern award;

(c) If the review identifies that there is any shortfall in wages which would have otherwise been payable under the modern award to the employee in a 4 week roster cycle, dnata will pay that shortfall to the employee plus a payment of an additional 2% (ie wages for the period + shortfall + 2%) in the next pay period after the review is completed.

11. Saved Employee Opt In

(a) A saved employee (on loaded rate) may elect in writing to be redefined as a 'saved employee base and penalties'. If so, the employee will be redefined by dnata to a 'saved employee base and penalties' effective from the start of the next full pay period and Attachment A will no longer apply to the employee from that date (ie the start of the next full pay period). Instead the terms of the agreement that will apply to the 'saved employee base and penalties' are those that apply to a new employee.

(b) If, in accordance with paragraph above, an employee elects to move from a 'saved employee' (loaded rate) to a 'saved employee base and penalties' the employee will not be able to subsequently move back to being defined as an saved employee (loaded rate)."

12. In relation to enterprise agreement Attachment A, paragraph 6; dnata will not use or rely on this paragraph.

13. In place of enterprise agreement Attachment A, paragraph 15 will read: "Saved overtime applies to full time, part time and casual employees.

Signed for and on behalf of dnata Airport Services Pty Ltd:

(Signature)

14 May 2018

Brett Fuller

Head of Ground Services

Address: Level 10, 1 York Street, Sydney, NSW 2000

Who is duly authorised to sign this undertaking for dnata NSW Passenger Services EA 2017 on behalf of the company

[2019] FWCA 7050

Attachment 2.

FairWork Commission

DECISION

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

Flight Centre Travel Group Limited T/A Flight Centre and Student Flights
(AG2018/6021)

FLIGHT CENTRE ENTERPRISE AGREEMENT 2018

Retail industry

COMMISSIONER SPENCER BRISBANE, 11 OCTOBER 2019

Application for approval of the Flight Centre Enterprise Agreement 2018.

Introduction

[1] This Decision relates to an application made pursuant to s.185 of the *Fair Work Act 2009* (the Act) by Flight Centre Travel Group Limited T/A Flight Centre and Student Flights (the Applicant/Flight Centre/the Employer/FCTG) for approval of the *Flight Centre Enterprise Agreement 2018* (the proposed Agreement/the Flight Centre Agreement). The Applicant submitted the *General Retail Industry Award 2010* (the GRIA) and the *Miscellaneous Award 2010* (the Miscellaneous Award) were the relevant Awards for undertaking the Better Off Overall Test (the BOOT).

[2] The Applicant submitted that the Agreement met all of the statutory tests for approval. The Australian Municipal, Administrative, Clerical and Services Union (the ASU/the Union) opposed the application on the basis that the Agreement was not compliant with some of the statutory approval tests under the Act. The Union raised concerns including the matching of pay rates under the applicable Awards and the proposed Agreement, asserting that the classifications and pay rates of certain employees had been incorrectly compared to classifications under the relevant Award by the Applicant, for the purposes of the BOOT. An individual employee also raised concerns. This employee was notified of the Hearing and the subsequent Directions, however further submissions from the employee were not received.

[3] This Agreement is the first Enterprise Agreement negotiated for Flight Centre. The employer has approximately 6 and a half thousand employees to be covered by the Agreement and some 182 bargaining representatives were involved in the negotiations. The Applicant's representative noted the valuable assistance provided by the Australian Services Union with the scope of the negotiations.

[4] The matter was listed for Hearing. The Applicant was represented by Mr Williams, Partner of Minter Ellison Solicitors. The Union was represented by Ms Joanne Knight, National Industrial Officer and Mr Michael Thomas, Director, Industrial Services. At the

Hearing, the Union stated it did not object to the Applicant being legally represented. Permission for the Applicant to be legally represented was granted pursuant to s.596 of the Act given the matter had sufficient complexity, due to the volume and nature of the matters to be dealt with. I also considered that allowing the Applicant to be legally represented would enable the matter to be dealt with more efficiently. In addition the Union was represented by two experienced industrial officers.

[5] At the Hearing Mr Williams indicated that the parties had undertaken the BOOT assessments and the classification comparisons with the GRIA and the Miscellaneous Award. Mr Williams indicated that the parties had noted that the employer and employees work in the travel industry and the duties of employees within that industry were not for all purposes easy to reconcile with the provisions of those Awards. There were a number of matters raised in contention between the parties relevant to the approval of the Agreement. The majority of these were the subject of submissions prior to the Hearing and oral submissions at the Hearing. After a consideration of a range of matters at the Hearing, by consent the parties agreed to provide further submissions after the Hearing, to refine the issues that remained between the parties. Directions were set for filing of those further responses. Prior to the Hearing, the Union had sought an extension of the initial Directions to provide additional evidence, the extension was not granted. However no such further evidence was provided before or at the Hearing. A statutory declaration was provided by Ms Kylie Conboy, Operational Business Leader for the employer. The Affidavit addressed a range of matters relevant to the Agreement approval.

[6] An adjournment was provided during the Hearing to assess the Undertakings that had been proposed by the Employer to allow the parties to consider whether they resolved a series of issues, that had been raised, including issues raised in submissions in reply at the Hearing. In response to this, the Union withdrew a number of its concerns, amended some or provided a willingness to consider some further instructions, to be gained by the Applicant and provided after the Hearing. As a result of that process, the parties agreed to set out a summary of remaining issues and, the proposed resolution of those issues. Whilst this was not provided in this way the Employer submitted a later table of issues in dispute which also referred to the parties respective positions in relation to each issue and reference to their initial submissions.

[7] The Applicant was provided with two separate opportunities following the Hearing to provide further submissions and undertakings addressing the outstanding issues that the Union had raised. This Decision documents the issues initially raised; Undertakings (attached to the Agreement) were subsequently provided and accepted in regard to a number of issues. The final issues in dispute have been further considered. The Applicant confirmed in writing that the Undertakings had been sent to the bargaining representatives.

Relevant statutory provisions

[8] Section 186 of the Act sets out the requirements for when the Commission must approve an Enterprise Agreement:

> **"186 When the FWC must approve an enterprise agreement—general requirements**
>
> *Basic rule*

(1) If an application for the approval of an enterprise agreement is made under section 185, the FWC must approve the agreement under this section if the requirements set out in this section and section 187 are met.
Note: The FWC may approve an enterprise agreement under this section with undertakings (see section 190).

Requirements relating to the safety net etc.

(2) The FWC must be satisfied that:

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

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

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

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

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

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

Note 1:For when an enterprise agreement has been genuinely agreed to by employees, see section 188.

Note 2:The FWC may approve an enterprise agreement that does not pass the better off overall test if approval would not be contrary to the public interest (see section 189).

Note 3:The terms of an enterprise agreement may supplement the National Employment Standards (see paragraph 55(4)(b)).
Requirement that the group of employees covered by the agreement is fairly chosen

(3) The FWC must be satisfied that the group of employees covered by the agreement was fairly chosen.

(3A) If the agreement does not cover all of the employees of the employer or employers covered by the agreement, the FWC must, in deciding whether the group of employees covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

Requirement that there be no unlawful terms

(4) The FWC must be satisfied that the agreement does not include any unlawful terms (see Subdivision D of this Division).

Requirement that there be no designated outworker terms

(4A) The FWC must be satisfied that the agreement does not include any designated outworker terms.

Requirement for a nominal expiry date etc.

(5) The FWC must be satisfied that:

(a) the agreement specifies a date as its nominal expiry date; and

(b) the date will not be more than 4 years after the day on which the FWC approves the agreement.

Requirement for a term about settling disputes

(6) The FWC must be satisfied that the agreement includes a term:

(a) that provides a procedure that requires or allows the FWC, or another person who is independent of the employers, employees or employee organisations covered by the agreement, to settle disputes:

(i) about any matters arising under the agreement; and

(ii) in relation to the National Employment Standards; and

(b) that allows for the representation of employees covered by the agreement for the purposes of that procedure.

Note 1:The FWC or a person must not settle a dispute about whether an employer had reasonable business grounds under subsection 65(5) or 76(4) (see subsections 739(2) and 740(2)).

Note 2:However, this does not prevent the FWC from dealing with a dispute relating to a term of an enterprise agreement that has the same (or substantially the same) effect as subsection 65(5) or 76(4)."

[9] Section 187 contains additional requirements for the approval of an Enterprise Agreement:

"187 **When the FWC must approve an enterprise agreement—additional requirements**

Additional requirements

(1) This section sets out additional requirements that must be met before the FWC approves an enterprise agreement under section 186.

Requirement that approval not be inconsistent with good faith bargaining etc.

(2) The FWC must be satisfied that approving the agreement would not be inconsistent with or undermine good faith bargaining by one or more bargaining representatives for a proposed enterprise agreement, or an enterprise agreement, in relation to which a scope order is in operation.

Requirement relating to notice of variation of agreement

(3) If a bargaining representative is required to vary the agreement as referred to in subsection 184(2), the FWC must be satisfied that the bargaining representative has complied with that subsection and subsection 184(3) (which deals with giving notice of the variation).

Requirements relating to particular kinds of employees

(4) The FWC must be satisfied as referred to in any provisions of Subdivision E of this Division that apply in relation to the agreement.
Note: Subdivision E of this Division deals with approval requirements relating to particular kinds of employees.

Requirements relating to greenfields agreements

(5) If the agreement is a greenfields agreement, the FWC must be satisfied that:

(a) the relevant employee organisations that will be covered by the agreement are (taken as a group) entitled to represent the industrial interests of a majority of the employees who will be covered by the agreement, in relation to work to be performed under the agreement; and

(b) it is in the public interest to approve the agreement."

[10] Section 193 contains the Better Off Overall Test:

"**193 Passing the Better Off Overall Test**

When a non-greenfields agreement passes the better off overall test

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

FWC must disregard individual flexibility arrangement

(2) If, under the flexibility term in the relevant modern award, an individual flexibility arrangement has been agreed to by an award covered employee and his or her employer, the FWC must disregard the individual flexibility arrangement for the purposes of determining whether the agreement passes the better off overall test.

When a greenfields agreement passes the better off overall test

(3) A greenfields agreement passes the better off overall test under this section if the FWC is satisfied, as at the test time, that each prospective award covered employee for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.

Award covered employee

(4) An award covered employee for an enterprise agreement is an employee who:

(a) is covered by the agreement; and

(b) at the test time, is covered by a modern award (the relevant modern award) that:

(i) is in operation; and

(ii) covers the employee in relation to the work that he or she is to perform under the agreement; and

(iii) covers his or her employer.

Prospective award covered employee

(5) A prospective award covered employee for an enterprise agreement is a person who, if he or she were an employee at the test time of an employer covered by the agreement:

(a) would be covered by the agreement; and

(b) would be covered by a modern award (the relevant modern award) that:

(i) is in operation; and

(ii) would cover the person in relation to the work that he or she would perform under the agreement; and

(iii) covers the employer.

Test time

(6) The test time is the time the application for approval of the agreement by the FWC was made under section 185.

FWC may assume employee better off overall in certain circumstances

(7) 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."

Summary of Submissions and Considerations in relation to the matters raised

[11] The decision tracks the issues as raised prior to and at the Hearing and the development of the issues and resolutions.

[12] In response to the matters raised by the ASU and the Commission, the parties made submissions as follows.
1st and 2nd Year Travel Consultants, and Trainee Consultants

[13] The Applicant asserted that employees undertaking their accredited AQF Certificate Level Traineeships automatically satisfy the eligibility requirements for paying a National Training Wage (NTW) rate of pay under the Miscellaneous Award to 1st and 2nd Year Travel Consultants employed by Flight Centre Travel Group Limited.

[14] The ASU stated that the classifications and pay rates for "1st Year Consultants", "2nd Year Consultants" and "Travel Consultants" have been incorrectly translated against the Miscellaneous Award rather than the GRIA, and that the proposed Agreement provides for rates which are less than the rates provided for under the GRIA. The ASU also raised concerns regarding the pay rate of the Assistant Team Leader classification.

[15] The Applicant submitted that the proposed Agreement provides a Certificate III and Certificate IV Traineeship that is accredited and supported by registered training organisations across Australia. It submitted that the ASU's objections to the approval of the proposed Agreement fail to have regard to clause 25 of the GRIA, which states:

> **"25. National training wage**
>
> 25.1 Schedule E to the Miscellaneous Award 2010 sets out minimum wage rates and conditions for employees undertaking traineeships.
>
> 25.2 This award incorporates the terms of Schedule E to the Miscellaneous Award 2010 as at 1 July 2018. Provided that any reference to "this award" in Schedule E to the Miscellaneous Award 2010 is to be read as referring to the General Retail Industry Award 2010 and not the Miscellaneous Award 2010."

[16] The Applicant submitted that on the basis of the accredited programmes provided by it, the proposed Agreement appropriately classifies Consultants undergoing traineeships as 1st Year and 2nd Year Consultants, and further that the Applicant has ensured the wages for these employees are higher than the rates specified in Schedule E of the Miscellaneous Award.

[17] Additionally, the Applicant submitted that clauses 6.2 and 13.2 of the proposed Agreement provide guidance that when initially employed by the Applicant; an employee will be paid as a Trainee while completing their relevant accredited certifications. The Applicant submitted: *"If an employee has previously completed these accreditations they will be employed as a Senior Consultant"*.[1]

[1] Applicant's Submissions in Support of Agreement Approval, filed 22 March 2019.

[18] The Applicant submitted that their "accredited AQF Certificate Level Traineeships" satisfies payment of a National Training Wage (NTW) to 1st and 2nd Year Travel Consultants. The ASU submitted that the Applicant has misapprehended the application of Schedule E of the Miscellaneous Award. The ASU submitted that at E2.2, the Award states:

> "The schedule applies to Certificate Level IV traineeships when a relevant Level III traineeship is listed in clause E.6. Furthermore, E.2.3(c) provides that the Schedule does not apply to 'qualifications in training packages that are not identified as appropriate for a traineeship.'"[2]

[19] The ASU submitted that the Applicant has failed to identify a relevant training package, and that the Commission should not be satisfied the employees covered by the Agreement are eligible to be paid the NTW.

[20] The Union initially asserted that the correct rates for those employees completing a traineeship should be appropriately classified as Retail Employee Level 3/4 under the GRIA. The Union withdrew this objection at the Hearing as it related to employees undertaking the traineeship only. They maintained an objection to travel consultants classed as Consultants A and B under the Agreement, who are not undertaking a genuine traineeship being assessed against classifications under the GRIA which the Union asserted are at lower levels than the work being completed. This is dealt with below.

Classification Matching for Travel Consultant A and B

[21] The ASU highlighted that the main duties of the Travel Consultant positions are provided at clause 6.2 of the Agreement. The ASU submitted that all Travel Consultants should be matched to GRIA Employee Levels 3 and 4, as 1st Year Travel Consultants are engaged to perform substantively the same work as "Consultant A", and 2nd Year Travel Consultants perform substantively the same work as "Consultant B" employees.

[22] The ASU further submitted the Applicant has incorrectly asserted that the classification descriptors for a GRIA employee Level 1 Clerical Assistant should apply to any new employee on the basis that they have "limited experience in the travel industry." The descriptors in the Agreement describe the principal purpose for which a Travel Consultant is employed by Flight Centre. The ASU submitted the Applicant relies on "entry level skills" provided at B.1.4 to B.1.7 of the GRIA and the ASU asserted this does not appropriately reflect the work performed by Travel Consultants employed by the Applicant and such work is "of a higher level of complexity".[3] No evidence was brought by the Union in relation to this issue.

[23] The Union submitted the job descriptions provided in the Agreement require a higher level of skill to perform the work. That is they argued to be competent in independent operation of business equipment; sales work and achievement of sales targets; building and maintaining customer relationships and records in support of individual sales work and development of new sales; ongoing development of retail business knowledge and completion of training relevant to ongoing development of business knowledge. It was stated that the next

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[2] ASU Reply Submission to Fair Work Commission dated 5 April 2019 at [3].

[3] Ibid at [9].

available classification that accurately reflects the clerical functions for the work described in the Agreement is provided under GRIA Employee Level 4 – Level 2 Clerical Officer.

[24] Therefore, the ASU submitted the Applicant's classification matching should be rejected, and that the GRIA Employee Level 3 and 4 classifications are the correct classifications to be applied for the assessment of the BOOT.

[25] The Applicant submitted that the correct comparator is Retail Level One, on the basis that the position of a travel consultant is effectively an entry level role. In that regard the Applicant submitted:

> (a) 'Consultant A' employees are effectively in the same position as trainees (although they are not eligible for a traineeship because they are not Australian citizens or permanent residents);
>
> (b) 'Consultant B' employees are those who have no more than 12 months experience working for FCTG.

[26] The Applicant also submitted that the entry level nature of the Consultant A and B roles is also clear because:

> (a) once a person has completed the Certificate III and Certificate IV qualification;
>
> (b) if the person had relevant qualifications prior to commencement; or
>
> (c) if the person has worked with FCTG for a period longer than 12 months,
>
> they will become 'Senior Consultants', which is the next classification level under the Agreement.

[27] The Applicant submitted that the proposed Agreement provides for employment to individuals working under visa restrictions, or individuals who are not eligible to receive traineeship wages. The Applicant submitted that such consultants are new to the travel industry, thus have limited or no experience in the field. The Applicant submitted that these individuals would be employed under the proposed Agreement as Travel Consultants, and that these employees have been classified appropriately in comparison to "Level 1 of the GRIA",[4] which provides, among other things, the following descriptors:

> "B.1.5 Employees at this level may include the initial recruit who may have limited relevant experience. Initially work is performed under close direction using established practices, procedures and instructions.
>
> B.1.6 Such employees perform routine clerical and office functions requiring an understanding of clear, straightforward rules or procedures and may be required to operate certain office equipment. Problems can usually be solved by reference to established practices, procedures and instructions.

[4] Ibid.

> B.1.7 Employees at this level are responsible and accountable for their own work within established routines, methods and procedures and the less experienced employee's work may be subject to checking at all stages. The more experienced employee may be required to give assistance to less experienced employees in the same classification."

[28] At the Hearing, Mr Williams, for the Applicant submitted that employees in these circumstances are new to the industry and do not have prior experience, so that they would not qualify to be paid at level 4, and therefore are paid at level 1 of the GRIA for the first twelve months of employment.

[29] Mr Williams stated the submission made by the Union is made without any evidence that the substantive duties of this class, would make the payment at level 1 improper. These matters were further considered by the parties and are dealt with in determination later in the Decision.

Assistant Team Leader

[30] The Applicant set out that the Assistant Team Leader position is "*closely aligned with the Base rate of pay applicable under the GRIA*". In summary terms the Applicant's submission on this matter was that:

> "*together with the provisions of commission and additional remuneration schemes as detailed in clause 13.17, as well as the structure of weekly guaranteed earnings in figure 13.1.1, and other benefits/entitlements that are detailed within the Agreement, FCTG submits that Assistant Team Leaders will be better off overall under the Agreement than under the GRIA*".

[31] The consideration of the submissions and evidence as set out above confirmed compliance with the BOOT.

Explanation of the terms and genuine agreement

[32] As to the requirements under s.180 of the Act, that an employer take all reasonable steps to ensure that the terms of an Agreement and the effect of those terms are explained to the employees who will be covered by the agreement, the Applicant submitted that they took all reasonable steps to ensure that all employees were provided with "*relevant clear information to assist them to understand the terms of the agreement and the impact of those terms*".[5]

[33] The Applicant submitted that the relevant case authorities demonstrate that s.180(5) does not necessarily require an employer to identify detriments in an Agreement as against a reference instrument;[6] and that where the terms of an agreement differ, s.180(5) does not impose a strict obligation to explain those differences through "clause-by-clause" analysis.[7]

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[5] Ibid.

[6] *BGC Contracting Pty Ltd* [2018] FWC 1466 at [87].

[7] *Diamond Offshore General Company* [2018] FWCFB 6907 at [29].

[34] The Applicant stated that the "*type of analysis of the Award contemplated by the objection put by the relevant individual employee was not necessary*" for the following reasons:

> "*(a) the comprehensive nature of the Agreement;*
>
> *(b) the fact that employees were advised in writing as to where and how to access the GRIA;*
>
> *(c) the extensive information sessions that were held by the employer (which were recorded for the benefit of employees who were unable to attend);*
>
> *(d) the written advice given to employees that the Agreement could only be approved if it passed the BOOT;*
>
> *(e) the fact that, through the bargaining process, employees were represented and had the benefit of the considerable industrial experience and advice of the ASU;*
>
> *(f) the extensive engagement of 182 individual employee bargaining representatives throughout the bargaining process.*"[8]

[35] The ASU submitted that further to the Applicant's submission as to the steps taken to reach genuine agreement, the content of the documents list referred to by the Applicant was not clear.

[36] Whilst the ASU submitted it had statements from employees and its members, supporting the proposition that genuine agreement was not reached, no evidence of such was provided.

[37] However the Applicant submitted that it made clear to its employees the terms and comprehensive nature of the Agreement, and further that it highlighted to employees the fact that a number of allowances contained in the GRIA were not included in the proposed Agreement as they were not relevant to the context in which travel consultants worked.[9] In the Applicant's submission, employees were afforded appropriate information to allow them to make an informed decision about whether to vote for the proposed Agreement. As to the steps taken to ensure all employees understood the terms and conditions of the Agreement, the Applicant submitted that it undertook the following for the purpose of the education on the Agreement and the access period prior to voting:

- Daily information explaining the agreement section by section via email;
- An explanatory memorandum sent out with the agreement, informing the employees of the voting process, the access period, the relevant award and how they could access the GRIA (ie. through an electronic link). As well as information on the actual agreement;
- All bargaining meetings were recorded and made available to anyone requesting the information and a copy of the recording;
- FAQ documents were sent to all employees via email and posted on intranet site;

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[8] Applicant's Submissions in Support of Agreement Approval, filed 22 March 2019.

[9] Ibid.

- Calculators were sent out with video on how to use the calculator in order to calculate guaranteed earnings and commission;
- Store visits by Senior Managers;
- An agreement tool kit which was emailed individually and posted on company intranet;
- Individual role classification letters to all employees explaining which classification is applicable to them;
- Videos and recording explaining the wages and conditions which were sent via email and housed on intranet sites in order for easy access;
- Open video conferences sent to all staff for Q&As with Leaders and human resources to answer any questions or provide clarity on the agreement;
- Explanations sent daily on the company 'Workplace' (internal facebook site) explaining different terms of the agreement;
- The Agreement was sent to all team members via electronic and hard copy for those unable to access a soft copy;
- Town Halls by General Managers and Area Leaders explaining the terms of the EA and what they mean for employees;
- Regular visits were made and information was sent by the ASU to FCTG stores explaining their view of the Agreement;
- Information was sent out by the ASU explaining the difference between the Award and the Agreement;
- A dedicated Agreement queries email address was set up to ensure that individual employees' questions were answered by Agreement Team.[10]

[38] The Applicant submitted that, therefore, s.180(5) has been satisfied,[11] and further that the Commission should be satisfied that any failure to provide an explanation "*was a minor procedural error, which was not likely to have disadvantaged any employees*".[12]

[39] Further to the above in terms of genuine agreement, the Applicant submitted that the Commission should be satisfied that employees had sufficient information before them to allow them to exercise an informed decision in respect of the Agreement, and therefore it was genuinely agreed to with 85.2% of the employees who cast a valid vote, voting in support of the proposed Agreement. This material has been considered in combination with the further submissions.

Individual flexibility arrangement (IFA)

[40] The Applicant submitted that s.203(3) of the Act requires that any flexibility arrangement be genuinely agreed. It submitted that clause 4.2 of the proposed Agreement reinforces this requirement. However, to assist in satisfying the BOOT, the Applicant proposed the following undertaking:

> "Flight Centre Travel Group Ltd undertakes that any individual flexibility arrangement reached between it and an employee who is under 18 years of age will be signed by a parent or guardian of the employee."[13]

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[10] Applicant's Submissions in Support of Agreement Approval, filed 22 March 2019.

[11] Ibid; *Huntsman Chemical Company Australia Pty Limited T/A RMAX Rigid Cellular Plastics & Others* [2019] FWCFB 318 at [74].

[12] Applicant's Submissions in Support of Agreement Approval, filed 22 March 2019.

[41] While the Applicant has provided an Undertaking on this issue, the ASU submitted the undertaking does not deal with concerns raised that the form of the term in the Agreement is inconsistent with the compulsory term.

[42] The Applicant subsequently advised in correspondence sent to Chambers on 6 September 2019 that it did not intend to rely on an undertaking in relation to individual flexibility arrangements under the Agreement and requested the Model Clause be inserted, and this has been included.

Additional work hours

[43] Clause 9.1 of the proposed Agreement provides that full-time employees are required to work 40 hours per week. These additional hours have been considered against the circumstances as provided. In response to concerns raised, regarding the GRIA and National Employment Standards (the NES) providing for an average of 38 hours per week, and the ability for employees to refuse to work additional hours, the Applicant submitted that while the proposed Agreement does not provide the ability for an employee to refuse to work the two additional hours per week, this is due to the fact that the requirement to work two additional hours under the Agreement is not unreasonable. The Applicant submitted the requirement is reasonable because:

> "*(a) The additional hours do not pose any risk to employees' health and safety;*
>
> *(b) The additional hours are consistent with long standing needs of the employer, and industrywide practice;*
>
> *(c) Employees are entitled to receive a payment of 150% of their Base rate of pay for those hours;*
>
> *(d) Employees are, through the terms of the EA and monthly rosters, provided with extensive notice as to the requirement.*"[14]

[44] Further the Applicant submitted:

> "*However, [Flight Centre] operates a culture that values flexibility. Therefore if an employee does not wish to work the two reasonable additional hours due to personal circumstances and this does not adversely impact other team members, business effectivity and productivity or customer service, the flexible arrangement can be made in line with clause 4.2, 32.1 and 32.2 of the Agreement.*"[15]

[45] No evidence was brought to refute any of these matters.

Abandonment and notice

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[13] Applicant's Submissions in Support of Agreement Approval, filed 22 March 2019.

[14] Ibid.

[15] Ibid.

[46] The Applicant submitted that clause 28.4 deems certain conduct by an employee as having amounted to a renunciation of their employment contract; and does not have the type of retrospective operation as the clause considered in the *Abandonment of Employment* case.[16] The Applicant submitted that in that case, the Full Bench expressly found that an acceptance by an employer of an employee's renunciation (through conduct amounting to abandonment) would not amount to a termination by the employer so as to activate the termination pay requirements under s 117(2) of the FW Act.

[47] However, the Applicant submitted that in the event the Commission finds that the clause merely provides for a process by which the Applicant can proceed to terminate an employee's employment where they have been absent for a continuous period of 3 working days. In response to matters raised with the clause the Applicant provided the following undertaking, in resolution of those issues:

> "Flight Centre Travel Group Ltd undertakes that it will apply clause 28.4 in a manner that is consistent with the NES.
>
> For the avoidance of doubt:
>
> (a) where the conditions of clause 28.4 have been met, an employee who has been assessed as having abandoned their employment will be provided with written notice of termination as set out in the NES.
>
> (b) the written notice will be given by sending the notice by pre-paid post to the employee's last known address.
>
> However, and having regard to s 117(2)(b) of the FW Act, in circumstances where the employee would not (due to their abandonment) have worked during any period of notice, any entitlement that they have to payment in lieu of notice will be nil."[17]

Weekly Ordinary Hours

[48] The ASU submitted that the Applicant has failed to *clearly* demonstrate that the requirements of the NES at s.62(3) are met, in relation to weekly ordinary hours. In satisfaction of this issue the Applicant provided an Undertaking on this issue in relation to clause 9.5 that forms part of the Agreement.

The Giving Bank; Personal/Carers leave

[49] I am satisfied that the Respondent's undertaking on this issue is sufficient to ensure the intent of this 'compassionate' clause. That is it provides for employees to 'give' a period of personal leave accrual to others in need, but to also allow it to operate consistently with the NES to preserve employees personal leave entitlements. If an employee requires to recoup the accrued entitlement, even after having donated part to the bank, the undertaking reconciles the provision with s.55 of the Act, and the requirement that an Agreement not include any terms that exclude any provision of the NES. The undertaking forms part of the Agreement.

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[16] Abandonment of Employment [2018] FWCFB 139.

[17] Ibid.

Other provisions

[50] The ASU made further submissions, which in summary terms, included the following and are later dealt with:

- *Ordinary time rates and casual employees:* the Applicant has failed to identify the minimum hourly Ordinary Time Rate of pay for each employment type and classification, and therefore the Commission cannot be satisfied the Agreement passes the BOOT;

- *Minimum hours:* the undertaking provided by the Applicant on this issue does not clarify the minimum engagement applies to 3 hours per ordinary hours shift, per day;

- *Trading hours beyond 9pm and weekly guaranteed earnings:* the Applicant has failed to identify the instrument it relies on to engage employees outside the maximum span of ordinary hours provided for in the GRIA and/or remunerated by an arbitrarily selected minimum rate for periods of work falling outside the span of ordinary hours;

- *Ambiguous terms:* It remains unclear how "mutual agreement" between the employer and employee is reached, so that Time Off In Lieu (TOIL) arrangements may be altered;

- *Break penalties:* the Union submitted that the Applicant knowingly allows staff to work excessive hours without a break, and submitted the employer has a positive obligation to ensure breaks are taken at appropriate times to meet WHS obligations;

- *Penalties and Commission:* the Applicant has not identified the GRIA provision that allows for the employer to "top-up" an employee's periodic wage with other components of the Remuneration Schemes at clause 5 of the Agreement; therefore the Commission cannot be satisfied an employee is better off under the Agreement;

- *Home/Remote User:* the Applicant has failed to clearly substantiate how an employee is engaged to work as a Home/Remote User in accordance with GRIA minimum entitlements, including hours of work, times work is performed, and whether breaks from work are met;

- *Overtime:* the Applicant has failed to identify the GRIA entitlement relied on to change the hours a part-time employee is engaged to work at the commencement of their employment, with each roster period; and

- *Averaging Hours:* the Applicant has provided an undertaking for the averaging of hours by mutual agreement, however the ASU seeks further clarity on how the arrangements may be altered, having regard to the flexibility term.

Classification matching

[51] The Applicant submitted the Certificate III and Certificate IV:

"(a) are post-compulsory education and training courses that lead to qualifications approved within the Australian Qualifications Framework;

(b) have been approved by the relevant State training authority (as evidenced by the fact that they are found on the training.gov.au website); and

(c) are components of the 'Tourism, Travel and Hospitality Training Package' developed by a relevant skills organisation and endorsed by the Australian Industry and Skills Committee."[18]

[52] It submitted accordingly that engagement of first and second year consultants amounts to traineeships for the purposes of Schedule E of the Miscellaneous Award. Further, it noted that such employees are engaged on "training contracts", thus satisfying that they are trainees.[19]

[53] Further to the above, the Applicant submitted that the highest rate payable to trainees undertaking the Certificate III under the GRIA is $657.30, which is lower than the rate provided for under the Agreement. It made submissions that likewise, the rates applicable for trainees carrying out a Certificate IV are higher under the Agreement than the Award.[20]

[54] The Applicant relied here on a witness statement of Ms Conboy – tourism, hospitality and events package.

[55] The Applicant submitted that should the Commission disagree with Ms Conboy's classification, then clause E4.4 would relevantly apply in adopting "wage B levels", which it submits are "lower still".[21]

Travel Consultants

[56] The Applicant noted that the ASU did not disagree that the proper Award "comparator" for "Senior Consultants" has been undertaken correctly. It submitted the only outstanding issue in this regard, is the classification matching of "Consultants". While the ASU submitted the relevant classification comparator is the "Retail Employee Level 4", the Applicant contents the relevant comparator is "Retail Employee Level 1" for the following reasons:

"(a) 'Consultant A' employees are effectively in the same position as trainees (although they are not eligible for a traineeship because they are not Australian citizens or permanent residents);

(b) 'Consultant B' employees are those who have no more than 12 months experience working for FCTG."

[57] It further submitted:

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[18] Applicant's Reply Submissions filed 15 April 2019, at [4].

[19] Ibid at [5].

[20] Ibid at [6].

[21] Applicant's Reply Submissions filed 15 April 2019, at [7].

"The entry level nature of the Consultant A and B roles is also clear because:

(a) once a person has completed the Certificate III and Certificate IV qualification;

(b) if the person had relevant qualifications prior to commencement; or

(c) if the person has worked with FCTG for a period longer than 12 months, they will become 'Senior Consultants', which is the next classification level under the Agreement."

Genuine Agreement

[58] Further to the initial documentation of the matter, the Respondent stated the ASU has submitted employees have reported they found the Applicant's explanations of the Agreement terms "contradictory, ambiguous or obfuscating", the Applicant submitted this is not supported by particular evidence and ought to be rejected.

[59] In response to the ASU's submission that the Applicant had implemented a new performance management process, the Applicant submitted the relevant clause (clause 28.1) was sufficiently explained, given it is in "plain and straightforward terms", and reflects a pre-existing workplace system.[22] The Applicant submitted:

"The performance management process contemplated by clause 28.1 is not 'new', is not tied to the minimum commission required to avoid a top of wages through the appropriation of commissions, and nor is it 'automatically' triggered if FCTG staff do not meet performance expectations."[23]

[60] At the Hearing the ASU withdrew its objection to the approval of the agreement on the basis that it was not genuinely agreed to.

[61] In summary terms, as referred to in addressing these issues; the further submissions of both parties, including those made at the Hearing have been considered in relation to the following matters:

- *Individual flexibility:* the Applicant submitted it does not understand the ASU's objection to the proposed undertaking in respect of clause 4 of the Agreement. It submitted clause 4.2 refers to the requirement that any flexibility agreement be "genuinely agreed";

- *Weekly hours:* the Applicant submitted there is no requirement under the NES for the Applicant to demonstrate special "operational circumstances" as to justify the two additional reasonable hours. It submitted any requirement to work the additional two hours will be "reasonable", and that enterprise agreements routinely provide for such;

- The concerns regarding the NES and the Giving Bank have been resolved by an undertaking. In terms of the undertaking, where an employee gives personal leave

[22] Ibid at [14].

[23] Ibid at [15].

accruals to the giving bank, and subsequently exhausts their own entitlements and accordingly requires time off for the purpose of personal/carer's leave, the previously gifted entitlements will be returned to them. On this basis, NES compliance is guaranteed;

- On the wages issues the relevant "Base Rate" is provided at 13.1.1 of the Award; and the "Weekly Guaranteed Earnings" rates in that same figure take account of the various loadings and penalties provided for under the Agreement, as well as overtime payments that apply to the two reasonable additional hours to be worked by employees under the GRIA;

- *Minimum hours:* further to the ASU's concerns, the Applicant proposed the following amended undertaking in respect of minimum engagement periods for casual employees:

  > "Flight Centre Travel Group Ltd undertakes that any engagement of a casual employee will be for a minimum of three hours per ordinary shift and per day worked."

- *Trading hours extending beyond 9pm and weekly guaranteed earnings:* the Applicant submitted there is "nothing unorthodox" about the Agreement providing for employees to work outside the spread of hours provided for by the GRIA. It submitted such hours are compensated for consistently with penalty loadings applied under clause 29.2 of the GRIA;

- *Ambiguous terms:* the Applicant submitted the objections held by the ASU are unclear. The Applicant therefore relies on its primary submissions;

- *Break penalties:* the ASU has failed to particularise its allegations in this respect. The Applicant submitted this should not have any impact on the Commission's consideration of approval of the Agreement;

- *Penalties and Commission:* further to the ASU's concerns, the Applicant submitted no provision needs to be identified to allow the employer to "top-up" an employee's periodic wage payment. The Applicant submitted the source of the entitlement will come from the Agreement, and further the employees are "guaranteed to be better off when all mandatory remuneration payments are made";

- *Overtime (part-time employees):* again, the Applicant submitted there is no requirement for the GRIA to provide authority as referred to by the ASU, and such submission "misapprehends the BOOT". The Applicant submitted the Agreement provides the employer greater flexibility than the Award in relation to setting of part time employee hours, however the BOOT is a "global test", and for the reasons already referred to, the entitlements provided for under the Agreement "offset the disadvantage that part time employees may experience as against the Award in that limited regards"; and

- *Averaging hours:* the Applicant submitted the ASU's reference to the "flexibility term" in regard to the averaging of hours is "misconceived". The Applicant submitted the Agreement already allows the averaging of hours, and the undertaking

provided in the Applicant's primary submissions acts as an additional safeguard to satisfy the Commission that there are no BOOT concerns in this regard.

Issues in dispute

[62] A number of issues were resolved, and undertakings proffered by the Applicant, as set out at the Hearing. Following the Hearing I requested the parties confer to better refine the issues that remained for determination.

[63] The Applicant's representative subsequently provided a response that included:

"...a table outlining the refined issues in dispute, and the proposed resolution of those issues. Please find that table set out below.

We have corresponded with the ASU, who have consented to this correspondence being sent jointly.

Issue in dispute	The parties' respective positions
Classification matching in respect of Consultants A and B (i.e. not those Travel Consultants who are trainees)	The ASU's position is set out at paragraph 5 to 12 of its written submissions (**attached**) and the relevant oral submissions made on 6 June 2019. FCTG's position has been set out in its oral and written submissions (see in particular paragraphs 9 to 11 of its reply submission (**attached**)).
Break penalties	The ASU's position is set out in paragraph 36 of its written submissions and the relevant oral submissions made on 6 June 2019. FCTG's response is set out in paragraph 26 of its reply submissions.
Penalties and commission	The ASU's position is set out in paragraphs 37-38 of its written submissions and the relevant oral submissions made on 6 June 2019. FCTG's response is summarised in paragraph 28 of its reply submissions. It is also dealt with in further detail in FCTG's primary written submissions, and its oral submissions.
Home/remote user	The ASU's position is set out in paragraph 39 of its written submissions and the relevant oral submissions made on 6 June 2019.

	FCTG confirms that Home/Remote users are contracted to work their 7.6 hours per week on a weekday and within the spread of hours referred to in clause 13.4 of the enterprise agreement (7.00am to 6.00pm). No Home/Remote user is required to work their hours on a weekend or public holiday. Consistent with the Guaranteed Earnings provision of the EA, which apply to Home/Remote users, FCTG will ensure that Home/Remote users always receive their Base Payment at the rate that applies to Senior Consultants.

FCTG and the ASU otherwise agree that all other issues will be dealt with if the Commission accepts the **attached** revised undertakings, as have been referred to in addressing a range of the issues."

[64] I am satisfied that the joint correspondence has accurately identified the outstanding issues and that the other issues, including those involving the genuineness of the agreement have been addressed by the submissions. I will now deal with each of these issues in turn.

Classification matching

[65] In support of the application for approval, the Applicant filed a Form F17 – Employer's statutory declaration in support of an application for approval of an enterprise agreement (other than a greenfields agreement) (Form F17). Item 3.3 of the Form F17 asks the declarant whether the classifications in the agreement are different to the classifications of the reference instrument. The Applicant has indicated that the classifications are different from the reference instrument. Attached to the Form F17 is an attachment that sets out the classification translations.

[66] The issue is now limited to the Agreement classification in relation to "Consultants". The Applicant maintains that the correct classification translation for these positions is to a Level 1 employee under the *General Retail Industry Award 2010* (the Award).

[67] The ASU's position is captured by paragraph 12 of the ASU's reply submissions, which states:

> *"The ASU submits that the classification matching undertaken by the employer be rejected and that [the Award] Employee Level 3 and 4 classifications would be the correct skill level required for Travel Consultant positions provided in the Agreement and assessment for the BOOT."*

[68] The Applicant submits that Consultant A employees are "effectively in the same position" as trainees, except that they are not, strictly speaking, trainees, because they are ineligible to undertake traineeships. This is because they are not Australian citizens or permanent residents. Consultant B employees are also of limited experience, being employees who have no more than 12 months experience working for the Applicant.

[69] The Agreement defines "Consultant A" and "Consultant B" as follows:

"*CONSULTANT A*

Consultant A is either a new Consultant or entry level Consultant within the Company who may have some experience within the travel or sales industry, is not an Australian passport holder or Australian permanent resident and is working under an appropriate visa and or immigration guidelines. Consultant A has a keen interest in travelling and may have personal exposure or experience in travel. Consultant A may be undergoing a relevant Certificate III through Flight Centre Accredited Training. Consultant A can often work with coaching and guidance from other Consultants or Leaders within the store. The position is customer focussed and sales oriented and involves working towards targets. Consultant A is working to build relationships with customers in order to build a strong customer database and understand customer needs, while also gaining a greater knowledge of Flight Centre brand or Student Flights operations, products and systems. Consultant A is required to attend training and complete relevant traineeship modules which may include help and guidance from The Peopleworks Team, Leadership team, Store team, Product team, Support Team and Flight Centre Accredited Training whilst also gaining greater practical experience in a store environment and being a self-directed learner. Consultant A may be required to support other 1st Year Consultants or Constultant's (sic) in a store environment.

Or

CONSULTANT B

Consultant B is a Consultant who has the same or similar industry experience for a minimum 12 month period or has previously worked for us for a period of more than 3 months and less than 12 months. They have a keen interest in travelling and may have personal exposure or experience in travel. Consultant B may be undergoing a relevant Certificate through Flight Centre Accredited Training, Consultant B can often work with coaching and guidance from other Consultants or Leaders within the store. The position is customer focused and sales oriented and involves working towards targets. Consultant B is working to build relationships with customers in order to build a strong customer database and understand customer needs, while also gaining a greater knowledge of Flight Centre brand or Student Flights Operations, products and systems. Consultant B is required to attend training and complete relevant Traineeship modules which may include help and guidance from The Peopleworks Team, Leaders team, Store team, Product team and Flight Centre Accredited Training whilst also gaining greater practical experience in a store environment and to be a self-directed learner. Consultant B may be required to support other 1st Year Consultants or Consultants in a store environment. Consultant B will stay in this category until 12 months has been completed within Flight Centre and/or applicable accredited qualifications have been achieved."

[70] The Award relevantly describes a Retail Employee Level 1 as:

"**B.1.1** An employee performing one or more of the following functions at a retail establishment:

- the receiving and preparation for sale and or display of goods in or about any shop;
- the pre-packing or packing, weighing, assembling, pricing or preparing of goods or provisions or produce for sale;
- the display, shelf filling, replenishing or any other method of exposure or presentation for sale of goods;
- the sale or hire of goods by any means;
- the receiving, arranging or making payment by any means;
- the recording by any means of a sale or sales;
- the wrapping or packing of goods for despatch and the despatch of goods;
- the delivery of goods;
- window dressing and merchandising;
- loss prevention;
- demonstration of goods for sale;
- the provision of information, advice and assistance to customers;
- the receipt, preparation, packing of goods for repair or replacement and the minor repair of goods;
- all directly employed persons engaged in retail stores in cleaning, store greeting, security, lift attending, store cafeterias and food services;
- Clerical Assistants functions Level 1; or
- work which is incidental to or in connection with any of the above.

B.1.2 Retail Employees will undertake duties as directed within the limits of their competence, skills and training including incidental cleaning. The cleaning of toilets is not incidental cleaning except in the case of a take away food establishment.

B.1.3 Indicative job titles which are usually within the definition of a Retail Employee Level 1 are:

- Shop Assistant,
- Clerical Assistant,
- Check-out Operator,
- Store Worker,
- Reserve Stock Hand,
- Driver,
- Boot/Shoe Repairer (Not Qualified),
- Window Dresser (Not Qualified),
- LPO,
- Photographic Employee,
- Store Greeter,
- Assembler,
- Ticket Writer (Not Qualified),
- Trolley Collector,
- Video Hire Worker,
- Telephone Order Salesperson,
- Door-to-door Salesperson, or Retail Outdoor Salesperson, and,
- Demonstrator and/or Merchandiser not elsewhere classified (including a Demonstrator and/or Merchandiser who is not a direct employee of the retailer).

B.1.4 Clerical Assistant means an employee accountable for clerical and office tasks as directed within the skill levels set out.

B.1.5 Employees at this level may include the initial recruit who may have limited relevant experience. Initially work is performed under close direction using established practices, procedures and instructions.

B.1.6 Such employees perform routine clerical and office functions requiring an understanding of clear, straightforward rules or procedures and may be required to operate certain office equipment. Problems can usually be solved by reference to established practices, procedures and instructions.

B.1.7 Employees at this level are responsible and accountable for their own work within established routines, methods and procedures and the less experienced employee's work may be subject to checking at all stages. **The more experienced employee may be required to give assistance to less experienced employees in the same classification.**

B.1.8 Indicative typical duties and skills at this level may include:

- reception/switchboard, e.g. directing telephone callers to appropriate staff, issuing and receiving standard forms, relaying internal information and initial greeting of visitors;
- maintenance of basic records;
- filing, collating, photocopying etc;
- handling or distributing mail including messenger service;
- recording, matching, checking and batching of accounts, invoices, orders, store requisitions etc; or
- the operation of keyboard and other allied equipment in order to achieve competency as prescribed in Level 2." (Emphasis added)

[71] The Award describes a Retail Employee Level 4 as:

"**B.4.1** An employee performing work at a retail establishment at a higher level than a Retail Employee Level 3.

B.4.2 Indicative of the tasks which might be required at this level are the following:

- Management of a defined section/department,
- Supervision of up to 4 sales staff (including self),
- Stock control,
- Buying/ordering requiring the exercise of discretion as to price, quantity, quality etc.,
- An employee who is required to utilise the skills of a trades qualification for the majority of the time in a week, or
- Clerical functions Level 2.

B.4.3 Indicative job titles which are usually within the definition of a Retail Employee 4 include:

- An Assistant, Deputy, or 2IC Shop Manager of a shop without Departments,
- An employee who is required to utilise the skills of a trades qualified person for the majority of the time in a week. This includes: Butcher, Baker, Pastry Cook, Florist,
- An employee who has completed an appropriate trades course or holds an appropriate Certificate III and is required to use their qualifications in the course of their work,
- A Qualified Auto Parts and Accessories Salesperson,
- A Window Dresser (Cert III or equivalent experience),
- A Boot/Shoe Repairer (Cert III),
- A Shiftwork Supervisor,
- Section/Department manager with up to 2 employees (including self),
- Service Supervisor of up to 15 employees,
- Nightfill Supervisor/Leader,

B.4.4 Clerical Officer Level 2 characteristics:

- This level caters for the employees who have had sufficient experience and/or training to enable them to carry out their assigned duties under general direction.
- Employees at this level are responsible and accountable for their own work which is performed within established guidelines. In some situations detailed instructions may be necessary. This may require the employee to exercise limited judgment and initiative within the range of their skills and knowledge.
- The work of these employees may be subject to final checking and as required progress checking. Such employees may be required to check the work and/or provide guidance to other employees at a lower level and/or provide assistance to less experienced employees at the same level.

B.4.5 Indicative typical duties and skills at this level may include:

- Reception/switchboard duties as in Level 1 and in addition responding to enquiries as appropriate, consistent with the acquired knowledge of the organisation's operations and services, and/or where presentation and use of interpersonal skills are a key aspect of the position.
- Operation of computerised radio/telephone equipment, micro personal computer, printing devices attached to personal computer, dictaphone equipment, typewriter.
- Word processing, e.g. the use of a word processing software package to create, format, edit, correct, print and save text documents, e.g. standard correspondence and business documents.
- Stenographer/person solely employed to take shorthand and to transcribe by means of appropriate keyboard equipment.
- Copy typing and audio typing.
- Maintenance of records and/or journals including initial processing and recording relating to the following:
  - **(i)** reconciliation of accounts to balance;
  - **(ii)** incoming/outgoing cheques;
  - **(iii)** invoices;
  - **(iv)** debit/credit items;
  - **(v)** payroll data;
  - **(vi)** petty cash Imprest System;
  - **(vii)** letters etc.

- Computer application involving use of a software package which may include one or more of the following functions:
  - (i) create new files and records;
  - (ii) spreadsheet/worksheet;
  - (iii) graphics;
  - (iv) accounting/payroll file;
  - (v) following standard procedures and using existing models/fields of information.
- Arrange routine travel bookings and itineraries, make appointments.
- Provide general advice and information on the organisation's products and services, e.g. front counter/telephone.

[72] I do not accept the ASU's submission that the appropriate classification against which to benchmark the classifications is the Level 4 position. In my view, the classifications in the Award have a significant overlap. The Award provides "indicative" typical duties; not prescriptive duties. The discerning difference between the two, amongst other matters, is the level of experience and training of the person. Level 1 is the classification that most closely aligns with an employee that is an "initial recruit", potentially with limited experience. The appropriate comparator for the purposes of the BOOT is Level 1.

Break penalties

[73] The ASU submits that the Applicant:

> *"knowingly allows staff to work excessive hours without a break. The ASU also submits that the employer has a positive obligation to ensure that breaks are taken at the appropriate times to meet their Work Health Safety obligations."*

[74] The Applicant rejects the allegation and submits that the issue, if indeed it is an issue, is not a matter that is relevant to the Commission's consideration in whether to approve the Agreement or not.

[75] The Agreement provides for breaks in clause 11, aptly entitled "*What breaks do I get?*". The clause is almost identical to the entitlement under the Award.

[76] To the extent that the ASU raises a concern around enforcement of breaks, it is not a matter that is relevant to my determination of whether I must approve the Agreement pursuant to the Act.

Penalties and commission

[77] The ASU submits:

> *"The Applicant (sic) submissions fail to identify [the Award] provision that would provide that an employer may top-up an employee's periodic wage payment with other components of the Remuneration Schemes highlighted at clause 5 of the Agreement, to meet penalties and allowances for all purposes application to the work performed by...employees and covered by the Agreement.*

The Commission cannot be satisfied that an employee covered by the Agreement will be better-off than if they were covered by the [Award]."

[78] The Applicant maintains that it is not obliged to identify any such provision and that the approach taken by the Agreement in this respect is not unusual and that all employees are guaranteed to be better off when all mandatory remuneration payments are made.

[79] The Agreement provides that "total remuneration" of employees contains 4 components; base wages; penalty payments; amounts earned under various remuneration schemes; and compulsory superannuation payments. As I understand it the contention relates, in part, to clause 13.8, which provides:

"*This means that you are guaranteed to earn your Base pay and the entitlements for the roster worked for that week including applicable penalties and overtime...through your weekly Base and a portion of the commission you have earned from your Minimum Transfer of commission. Your additional entitlements (i.e. Penalty Payments) are paid to you via the Minimum Transfer for that month. If you have not earned the Minimum Transfer for that month to cover your entitlements based on your roster you will be guaranteed to receive the Guaranteed Earnings set out in the table in clause 13.3...*"

[80] On my reading, this clause, and the remuneration structure in general, seeks to guarantee that employees will be paid at least a minimum level of remuneration to meet obligations under the reference instruments. There is nothing unusual, or prohibited, about an agreement including a provision that offsets certain earnings against additional payments, like bonuses or commissions. While I don't accept the ASU's submission, I do accept that this is a matter that is relevant to my overall assessment of the better off overall test.

Home/Remote users

[81] The ASU's concern in this regard is:

"*...no clarity whatsoever has been provided to substantiate how an employee is engaged to work as a Home/Remote User in accordance with their [Award] minimum entitlements, including hours of work, times that work is performed and whether breaks from work are met.*"

[82] The Applicant has stated, by the joint correspondence of 28 June 2019:

"*[The Applicant] confirms that Home/Remote users are contracted to work their 7.6 hours per week on a weekday and within the spread of hours referred to in clause 13.4 of the enterprise agreement (7.00am to 6.00pm). No Home/Remote user is required to work their hours on a weekend or public holiday. Consistent with the Guaranteed Earnings provision of the EA, which apply to Home/Remote users, [the Applicant] will ensure that Home/Remote users always receive their Base Payment at the rate that applies to Senior Consultants.*"

[83] Clause 9.3 deals with the hours of a Home/Remote User. That clause provides:

"A Home/Remote User has elected this option after qualifying through the criteria set out in clauses 6.3 and 13.11. A Home/Remote User is contracted to work a maximum of 7.6 hours per week from a location of their choice on any day or part day that is considered suitable to the Employee. If you are a Home/Remote User the provisions in this Agreement will apply to you on a pro-rata basis in line with your contracted hours of 7.6 per week (unless a particular clause in this Agreement expressly provides otherwise). This includes clause 15 My Leave."

[84] I accept the explanation given by the Applicant.

Conclusion

[85] As stated a series of issues were raised, the majority of which were considered at the Hearing and have resulted in the proposed undertakings that I consider as stated have resolved the issues.

[86] A residual issue was in relation to the engagement of trainees and whether the General Retail Industry Award commits employees undertaking traineeships to be paid in a manner consistent with the relevant schedule of the Miscellaneous Award. On the basis of Ms Conboy's evidence I accept that the relevant group of employees are undertaking training to which the Schedule applies therefore for the purposes of the Better Off Overall Test it is the Retail Industry.

[87] I am satisfied that the Consultant A and Consultant B as referred to would qualify as entry level employees for the purposes of the Award. The nature of the roles as entry level is supported by the submission from the Applicant that they will be reclassified as 'Senior Consultants', if the person has the relevant qualifications prior to commencement, or upon the person completing the relevant Certificate III and Certificate IV qualifications, or if the person has worked with the Applicant for more than 12 months. For these reasons I accept that entry level employees who are not entitled to be enrolled in the relevant training courses and do not have sufficient prior experience to qualify for level 4, should be classified as retail employee level 1 of the General Retail Industry Award for the purposes of the BOOT, and that these employees are better off overall.

[88] The proposed Undertakings as provided to the bargaining representatives have been considered against the issues as set out. I consider the undertakings as attached, remedy the issues as raised.

[89] The ASU being a bargaining representative for the Agreement has given notice under s.183 of the Act that it wants the Agreement to cover it. In accordance with s.201(2) I note that the Agreement covers the organisation.

[90] Further revised undertakings were offered by way of written undertakings dated 11 September 2019. As previously stated, the ASU has reviewed the revised Undertakings and not raised issues with them. Pursuant to s.190 of the Act, I accept the Applicant's undertakings. In accordance with s.201(3) of the Act, a copy of the undertakings will be attached to the Agreement and forms part of the Agreement.

[91] As noted, pursuant to s.190(3), I have accepted Undertakings from the employer. In accordance with s.191(1) and 201(3) of the Act the undertakings are taken to be a term of the Agreement. A copy of the undertakings is attached to the Agreement.

[92] As noted, pursuant to s.202(4) of the Act, the model flexibility term prescribed by the *Fair Work Regulations 2009* is taken to be a term of the Agreement.

[93] The Agreement is approved and, in accordance with s.54 of the Act, will operate from 18 October 2019. The nominal expiry date of the Agreement is 12 October 2022.

COMMISSIONER

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FLIGHT CENTRE Student Flights

FLIGHT CENTRE AGREEMENT 2018

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.

Note - the model flexibility term is taken to be a term of this agreement and can be found at the end of the agreement.

IN THE FAIR WORK COMMISSION

FWC Matter No.: AG2018/6021

Applicant: Flight Centre Travel Group Limited

Section 185 – Application for approval of a single enterprise agreement

Undertaking - Section 190

I, Carole Cooper, Global People Works Leader for Flight Centre Travel Group Limited give the following undertakings with respect to the Flight Centre Enterprise Agreement 2018 ("the Agreement").

Minimum hours of engagement for casual employees: Clause 9.4

Flight Centre Travel Group Ltd undertakes that any engagement of a casual employee will be for a minimum of three hours per ordinary shift and per day worked.

Average weekly hours for part time employees: Clause 9.5

Flight Centre Travel Group Ltd undertakes that the weekly hours of part-time employees will only be averaged over a four week period if such an averaging arrangement is mutually agreed with an affected employee and is to their benefit.

Airport store employees: Clause 13.12

Flight Centre Travel Group Ltd undertakes that any employees who are rostered to work at an Airport store, and whose regular rostered hours require them to work between 5.00am and 7.00am or between 9.00pm and midnight will receive at least an annualised payment of $2,000 (dependant on their role classification) payable in each week during which they regularly rostered in that manner.

Guaranteed Earnings for Senior Team Leaders: Clause 13.10

Flight Centre Travel Group Ltd undertakes that it will conduct quarterly audits in respect of all Senior Team Leaders who work a roster other than the one contemplated by clause 13.10 of the Agreement to ensure that those Senior Team Leaders are paid the applicable penalty rates and allowances that apply under the Agreement.

Personal/carer's leave – Giving Bank: Clause 18.8

Flight Centre Travel Group Ltd undertakes that, where an employee has donated any personal/carer's leave to the Giving Bank in accordance with clause 18.8 of the Agreement, they will nevertheless be entitled to take personal/carer's leave in accordance with the NES.

Accordingly, personal/carer's leave accruals will be recorded within the FCTG payroll records system (Kiosk) without deduction for any personal/carer's leave that is nominally donated pursuant to the procedure contemplated by clause 18.8. Kiosk will also record the amount of personal/carer's leave that is nominated donated by each employee that does so.

Guaranteed Earnings during performance improvement processes: Clause 28.1

Flight Centre Travel Group Ltd undertakes that no employee who is subject to a performance improvement process or whose employment is terminated due to performance related issues will receive less than the Guaranteed Earnings that apply to their role and rostering arrangement.

Abandonment of employment: Clause 28.4

Flight Centre Travel Group Ltd undertakes that it will apply clause 28.4 of the Agreement in a manner that is consistent with the NES.

Accordingly:

where the conditions of clause 28.4 of the Agreement have been met, an employee who has been assessed as having abandoned their employment will be provided with written notice of termination as set out in the NES.

the written notice will be given by sending the notice by pre-paid post to the employee's last known address.

I have the authority given to me by Flight Centre Travel Group Limited to provide these undertakings in relation to the application before the Fair Work Commission.

Signature

Date: 11 September 2019