FAIR WORK AUSTRALIA

REASONS FOR DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

McDonald's Australia Pty Ltd
(C2010/3643)

Shop, Distributive and Allied Employees' Association
(C2010/3668)

VICE PRESIDENT WATSON
SENIOR DEPUTY PRESIDENT KAUFMAN
COMMISSIONER RAFFAELLI SYDNEY, 21 JULY 2010

Appeal against decision [2010] FWA 1347 of Commissioner McKenna at Sydney on 23 April 2010 in matter number AG2009/23475 - whether the Commissioner erred in finding application did not meet statutory requirements for approval - whether the Commissioner erred in finding agreement did not satisfy no-disadvantage test - permission to appeal granted - appeal upheld - application for approval of agreement determined by Full Bench - application for approval of agreement granted - Fair Work Act 2009 ss 171, 180(2), 180(3), 180(5), 185-188, 604 - Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 Schedule 7 item 2.

Introduction

[1] On 22 June 2010 after the hearing of this appeal we announced our decision to grant permission to appeal, allow the appeal and approve the *McDonald's Australia Enterprise Agreement 2009* (the Agreement) under s 186 of the *Fair Work Act 2009* (the Act). The following are the reasons for our decision.

[2] The Agreement was made in December 2009. It covers approximately 80,000 employees employed in McDonald's outlets by McDonald's Australia Pty Ltd (McDonald's) and its franchisees. The application for approval of the Agreement was made on 23 December 2009.

[3] McDonald's and the Shop, Distributive and Allied Employees' Association (SDA) sought to appeal against the decision of Commissioner McKenna made on 23 April 2010.[1] The decision under appeal concluded that the Agreement was incapable of approval given deficiencies in the application, the failure to meet the Act's pre-approval requirements, the failure to meet the no-disadvantage test and the inadequacy of some of the proposed written undertakings.

[4] At the hearing of the appeal on 22 June 2010 Mr S Wood, Mr J Tracey and Mr D Cross of counsel represented McDonald's, Mr D Bliss represented the SDA and Mr M Mead represented Australian Industry Group (AIG).

The decision under appeal

[5] Prior to issuing the decision in this matter the Commissioner listed the matter for hearing on 19 January, 3 February, 25 February, 2 March and 11 March 2010. During those proceedings and in separate written material the Commissioner raised various issues of concern and the parties provided responses to the matters raised.

[6] In a very lengthy 110 page decision made on 23 April 2010 Commissioner McKenna decided to dismiss the application for approval of the Agreement on each of the following grounds:

1. The application, even with supplementary declarations, remains deficient as to the provision of required information;[2]
2. McDonald's did not take the required steps under s180(3) of the Act;[3]
3. McDonald's did not discharge its responsibilities concerning the provision of information to satisfy the requirements of s180(5)(a) of the Act;[4]
4. The application fails to address the obligations in s180(5)(b) and s180(6) of the Act;[5]
5. The employees who voted in favour of the Agreement cannot be said to have genuinely agreed to the Agreement;[6]
6. There was a failure to comply with the provisions of s180(2) of the Act;[7]
7. The Agreement does not satisfy the no-disadvantage test.[8]

[7] The Commissioner said that each of these grounds justified dismissal of the application alone. The Commissioner's reasons will be dealt with in greater detail in considering the grounds of appeal and the subject matter of the relevant aspects of the decision.

The nature and grounds of the appeal

[8] An appeal under s 604 of the Act is properly characterised as an appeal by way of a rehearing. The authorities in relation to the predecessor provisions of the *Workplace Relations Act 1996*[9] are equally applicable to appeals under s 604. A successful appeal requires the identification of error on the part of the primary decision-maker.

[9] To the extent that any part of the decision involves the exercise of a discretion, the principles concerning appeals against discretionary decisions apply.[10] Because a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be challenged by showing error in the decision-making process.[11]

[10] A decision is of a discretionary nature if no one consideration or combination of considerations is necessarily determinative of the result and the decision-maker is left some latitude as to the choice of decision to be made. The discretion may be broad or narrow such as when the decision-maker is required to make a particular decision if a particular opinion or value judgement is formed.[12]

[11] The appellants accepted that in order to succeed in the appeal they needed to demonstrate that each of the bases for dismissing the application was in error. They asserted that errors were made in the consideration and application of certain pre-approval requirements, errors were made in the approach to applying the no-disadvantage test and other

miscellaneous errors were made. Further details are discussed in relation to each ground of appeal below.

Relevant legislation

[12] Part 2-4 of the Act deals with enterprise agreements. That part has specific objects expressed in s 171 as follows:

> "**171 Objects of this Part**
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> The objects of this Part are:
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> (a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and
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> (b) to enable FWA to facilitate good faith bargaining and the making of enterprise agreements, including through:
>
> (i) making bargaining orders; and
>
> (ii) dealing with disputes where the bargaining representatives request assistance; and
>
> (iii) ensuring that applications to FWA for approval of enterprise agreements are dealt with without delay."

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

[14] Section 186 of the Act imposes an obligation on FWA to approve an agreement if an application for approval of the agreement is made under s 185 and the requirements of ss 186 and 187 are satisfied. These sections provide:

> "**186 When FWA 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, FWA must approve the agreement under this section if the requirements set out in this section and section 187 are met.
>
> Note: FWA may approve an enterprise agreement under this section with undertakings (see section 190).

Requirements relating to the safety net etc.

(2) FWA 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: FWA 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) FWA 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, FWA 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) FWA 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) FWA must be satisfied that the agreement does not include any designated outworker terms.

Requirement for a nominal expiry date etc.

(5) FWA 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 FWA approves the agreement.

Requirement for a term about settling disputes

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

(a) that provides a procedure that requires or allows FWA, 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: FWA 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 FWA 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).

187 When FWA must approve an enterprise agreement—additional requirements

Additional requirements

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

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

(2) FWA 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), FWA 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) FWA 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, FWA 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."

[15] Some of these tests are subject to further legislative explanation. The requirement that the agreement be genuinely agreed to by the employees covered by the agreement in s 186(2) is explained in s 188 as follows:

"**188 When employees have genuinely agreed to an enterprise agreement**

An enterprise agreement has been ***genuinely agreed*** to by the employees covered by the agreement if FWA is satisfied that:

(a) the employer, or each of the employers, covered by the agreement complied with the following provisions in relation to the agreement:

(i) subsections 180(2), (3) and (5) (which deal with pre-approval steps);

(ii) subsection 181(2) (which requires that employees not be requested to approve an enterprise agreement until 21 days after the last notice of employee representational rights is given); and

(b) the agreement was made in accordance with whichever of subsection 182(1) or (2) applies (those subsections deal with the making of different kinds of enterprise agreements by employee vote); and

(c) there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees."

[16] By virtue of item 2 of Schedule 7 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* the relevant test to be applied to agreements reached prior to 2010 is the no-disadvantage test in lieu of the better off overall test in s 186(2)(d).

[17] We propose to consider the matters in detail by reference to the Commissioner's grounds for dismissing the application for approval of the Agreement.

The validity of the application

[18] After reviewing the material filed with the application and the submissions made to her by the parties the Commissioner stated as follows:

> **"[34]** An acknowledgement that the employer's declaration in support of the application for approval was incorrect and incomplete, attended by an apology by the applicant's counsel, does not, and nor could it, relieve the applicant of the obligation to provide the information required of any applicant in support of an application for approval of an enterprise agreement. The applicant has not put on any supplementary declarations seeking to rectify in sworn form many of the incorrect assertions initially made in the employer's declaration. Further, even with the provision of supplementary statutory declarations, the applicant still has not provided information about a wide range of matters that must be addressed by an applicant in support of an application for the approval of an enterprise agreement. To that extent, the application before Fair Work Australia, even with the supplementary declarations, remains deficient as to the provision of required information. I would dismiss the application for that reason."

[19] The appellants submitted that this conclusion incorrectly elevated a requirement to file accurate forms and declarations to a requirement for approval of the agreement. They submitted that the critical questions for approval of an agreement are whether the statutory tests are met, not whether the original declarations made in support of the application are complete. They further submitted that during the process of hearings and submissions the appellants provided all missing information. The Commissioner never requested all of this information to be reflected in amended declarations and did not properly address the supplementary declarations filed by the parties and their submissions in the hearings.

[20] The appellants submitted that all relevant information was provided in a variety of ways including uncontested submissions and instructions given by counsel from the bar table and this is demonstrated by reference to the criteria for approval themselves. However in founding a decision to dismiss the application on the adequacy of the originating declaration the Commissioner was imposing a requirement not found in the Act. The appellants addressed each of the alleged deficiencies and demonstrated that complete information was provided at subsequent stages. The appellants submitted that this was the purpose of those hearings and submissions, yet the outcomes of those processes were not fully considered in determining that the application should be dismissed because of the state of the declarations.

[21] We agree with these submissions. If there is an omission of information relevant to any of the tests that are required to be determined it is prudent for FWA to draw these matters to the attention of the parties and give them an opportunity to supplement the material they have filed. Material provided in response to that request should be taken into account and put in a required form if requested. Often questions answered by representatives in proceedings or otherwise in writing will be sufficient. If the material is insufficient it bears upon the level of satisfaction for the relevant test. There is no separate requirement to remedy all deficiencies in sworn declarations. To the extent that information remained incomplete it is a matter for consideration later in relation to the applicable tests. As the Commissioner founded a conclusion on the general status of declarations and information she was in error. This amounted to the imposition of an additional test contrary to the terms of s 186 and was an error. We reject the notion that there was a requirement to be met independent of satisfaction of the tests in ss 186 and 187.

The requirements of s 180(3)

[22] The Commissioner's conclusion on this matter was expressed as follows:

> **"[56]** In conclusion, on this topic, I am not requisitely satisfied as to if and when the employees may have been given access, for the purposes of s.180(3) of the Act, to voting information on Metime (with Poster #3 being the only document which might reasonably be considered to provide any relevant information that would satisfy statutory requirements, albeit it contains what might be viewed as internally-contradictory information). I have the evidentiary spectacle of statutory declarations from the same deponent providing different dates (either 3 December or 7 December 2009) as to when information posters were said to have been accessible on Metime; and also now have evidence that a fourth poster was accessible on 7 December 2009. I am not otherwise satisfied on the improbable, hearsay evidence that "all" employees would have been informed by local managers of this information within the time-frames specified in the Act, if at all. Further, in the statement I had otherwise already accepted Ms Allen's evidence that some employees were not informed about the voting arrangements until meetings held as late as 14 December 2009. As such, I am not satisfied the applicant appropriately provided information to employees for the purposes of s.180(3) of the Act. I would dismiss the application for that reason alone."

[23] The requirement in s 180(3) was that the employer take all reasonable steps to notify employees of the time, place and voting method for a ballot prior to the access period for the agreement. The employer adopted a variety of means of communications and provided extensive details of these communications. The communications included a joint letter from McDonald's and the SDA provided electronically on 3 December, other electronic access to posters including poster #3 on or before 7 December, access to advice through local management and information sessions conducted by McDonald's. The Commissioner accepted that poster #3 contained the relevant information.

[24] The appellants criticised the breaking down of each separate communication to identify perceived deficiencies and suggest that it reflects an approach of trying to find defects rather than adopt a fair view of the communications as a whole. They submitted that the approach does not consider the essential task under s 180(3) - whether the employer took reasonable steps. They further submitted that the reliance on ambiguity as to the dates of some

communications was misconceived as whichever date the information was conveyed, the communication still occurred prior to the start of the access period.

[25] We are generally in agreement with the submissions of the appellants. It does not appear to us that the approach of the Commissioner is consistent with the requirement in s 188 to be satisfied that the employer took reasonable steps to ensure that certain information was provided to employees. The Commissioner has elevated the test to requiring the applicants to establish in a definitive way that all employees were in fact informed of the matters. Further, the Commissioner has apparently disregarded some evidence because of some confusion over the dates of communications where the differences were immaterial. She has further criticised some of the evidence as hearsay. In matters of this nature it is often unnecessary or impractical to lead better evidence. In our view the Commissioner's approach was not consistent with the Act. In not applying the correct test the Commissioner erred.

[26] On our consideration of the evidence in the matter we consider that it is beyond doubt that the employers took reasonable steps to notify employees of the relevant information in s 180(3) by the start of the access period. There are a large number of employees covered by the Agreement who work at a large number of work locations. McDonald's and the SDA adopted a collaborative approach to communicating to employees. In our view the approach was detailed, thorough and comprehensive. We commend them for their efforts. The requirements of s 180(3) are satisfied.

The requirements of s 180(5)(a)

[27] The Commissioner commenced her consideration of this matter as follows:

> "**Ensuring that the terms of the agreement, and the effect of those terms, are explained to the employees**
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> **[57]** The pre-approval step in s.180(5)(a) of the Act requires that an employer must ensure the terms of the agreement, and the effect of those terms, are explained to the employees. In the statement, I accepted Ms Allen's evidence that at least some employees were not provided with relevant information until they attended information meetings held as late as 14 December 2009 in anticipation of a vote opening on 17 December 2009. Accepting this to be the case, then the application would fail to meet the requirements of the Act, because such information was provided within the access period.
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> **[58]** Against that background, the applicant's case now contends it provided *access* to relevant information as to summary information on Metime in such a way as would otherwise satisfy the pre-approval requirements. I do not accept this to be the case."

[28] The Commissioner then reviewed the various communications by the SDA and McDonald's. She said:

> **"[74]** I do not accept the proposition that electronic posting on Metime of SDA documents (or manual posting on a notice board at the workplace or provision of such documents at information sessions) satisfies the obligations on the applicant itself to provide such information. The applicant cannot come before Fair Work Australia saying it did not actually provide the information contemplated by s.180(5) of the Act,

> but the application should be approved because another organisation or person provided such information. It is irrelevant, in terms of satisfying the applicant's own obligations for the purposes of s.180(5) of the Act, whether, for example, an officer of a union wishes to extol what he or she personally perceives as the benefits of an enterprise agreement and, in so doing, provides some summary of the terms of the agreement (as in the case of Exhibit 9-SDA15), and the applicant determined to post that commendation on Metime. Similarly, the minimalist brochure in Exhibit 9-SDA11, for South Australia, is bereft of any information which reasonably could be regarded as satisfying the requirements of s.180(5) of the Act – but nothing turns on that, because it was the *applicant's* statutory responsibility to comply with s.180(5), not that of the South Australian Branch of the SDA.
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> **[75]** I do not consider the applicant's own obligations under s.180(5) are somehow delegable in the way that has been adopted in this matter. If the applicant's contention were to be accepted that it can rely on the SDA's materials as having discharged its own responsibilities under s.180(5) of the Act, then there could be, by extension to other applications that may come before Fair Work Australia, some perverse outcomes. For instance, an employer could come to Fair Work Australia saying it had not provided any information whatsoever to employees proposed to be covered by an enterprise agreement, but the application should be approved because: (a) the employer was aware another organisation, such as a union, had provided a summary document for the information of employees/members in recommending a vote for or against a particular agreement; and (b) the employer was aware these union materials had been posted on the staff notice board or the union notice board at the workplace; or (c) the employer had, for example, allowed a union to disseminate its materials concerning the enterprise agreement on the internal email system at the workplace.
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> ...
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> **[79]** I would dismiss the application as I have not been satisfied the requirements of s.180(5) of the Act have been met. The evidence does not support a conclusion the applicant properly discharged its own responsibilities concerning the provision of documentation such as might otherwise satisfy the requirements of s.180(5)(a) of the Act."

[29] These extracts reveal a number of errors. First, the Commissioner has not accurately stated the test under s 180(5)(a). The heading and introductory paragraphs of this aspect of the decision express the test as an absolute requirement to ensure particular outcomes are achieved. The section does not establish any such requirement. It requires only that the employer take reasonable steps to ensure that the terms and conditions are explained to employees. In misstating the test the Commissioner erred.

[30] Secondly there is no requirement in the Act that there be a full explanation of the terms of the agreement prior to the employer requesting employees vote on an agreement. The requirement in s 180(5)(a) is that the employer take reasonable steps to ensure that explanations are provided. Under s 180(1) the employer must comply with this requirement before requesting employees to approve an enterprise agreement. In our view these provisions do not preclude explanations being given during the access period. It is open to an employer to make arrangements for subsequent explanations prior to requesting employees to vote. If the arrangements are reasonable steps, s 180(5)(a) is satisfied.

[31] Thirdly there is no impediment in the Act to collaborate with bargaining representatives to provide relevant explanations. The Commissioner rejected certain explanations because they were given by the SDA. In some cases SDA documents were communicated by McDonald's by electronic means. In our view the Commissioner was quite wrong to disregard these steps. In our view an employer would be taking reasonable steps to ensure terms are explained to employees if it collaborated with a bargaining representative to arrange for this to be undertaken.

[32] Considering the evidence for ourselves we are satisfied that the employer took reasonable steps to ensure that the agreement was explained to employees. The documents produced by the SDA and McDonald's were comprehensive and detailed. They clearly satisfy the obligations of the employer. Again, we commend the collaborative approach of the parties.

The requirements of s 180(5)(b)

[33] The Commissioner said the following in relation to s 180(5)(b):

> "**Explaining agreement in appropriate manner, taking into account the particular circumstances and needs of the relevant employees**
>
> **[80]** If I am wrong in my assessment about s.180(5)(a) of the Act, and the applicant is entitled somehow to appropriate the SDA summary information in satisfaction of its own obligations, then the provisions of s.180(5)(b) and s.180(6) of the Act have not been met. The information provided to the employees about the Agreement was the same irrespective of whether the employee was 15 or 55 and irrespective of any employees' culturally or linguistically diverse backgrounds, or other needs.
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> ...
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> **[82]** Unlike the enterprise agreement considered by *Cambridge* C, which covered eight young employees, this Agreement is proposed to cover 65,600 employees aged under 21 years. In this respect, I note also the comments of Mr Bullock in Exhibit 9-SDA15 that the applicant employs "large number of crew members aged under 16 years". If the applicant (or the SDA, or both) took any steps to differentiate the approach in the presentation of information about the Agreement to the young employees, many apparently very young indeed, there was no evidence of it in these proceedings. Moreover, there was no evidence of differential arrangements being put in place by the applicant (or the SDA, or both) to meet any special needs that may have been involved, for example, for the 2,400 employees with disabilities or the 28,800 employees from non-English speaking backgrounds who would be covered by this Agreement.
>
> **[83]** I would dismiss the application for failure to address the obligations identified in s.180(5)(b) and s.180(6) of the Act."

[34] The notion in this extract is that unless there is evidence of a differentiated method of explaining the terms of the agreement to different groups of employees the employer cannot be said to have taken reasonable steps to ensure that the explanation is provided in a reasonable manner. We reject this approach. If a method of explanation is adequate for all

groups of employees there is no need that it be differentiated. There is no suggestion in any of the material or the comments of the Commissioner that any of the means of communication, or the communications as a whole, were in any way deficient. We are of the view that the Commissioner erred in her approach to this requirement.

[35] Reviewing the evidence for ourselves we note that the employers held meetings to explain the agreement. The employers used a variety of meeting venues to encourage attendance including the hiring of movie theatres. Agreement summaries were prepared by the SDA in consultation with McDonald's. Those summaries set out the differences between the terms of the Agreement and current terms and conditions. Employees were given hard copies of the summaries or given access to electronic versions and copies on notice boards. Additional meetings were conducted by the union at which explanations were given and questions could be asked. Employees were also able to contact the People Resources Department in each State to seek clarification of any matter.

[36] In our view McDonald's clearly took reasonable steps to ensure that the explanation was provided in an appropriate manner taking into account the needs of employees including young people.

Genuine agreement

[37] The Commissioner determined that there were other grounds for believing that employees did not genuinely agree to the Agreement. The matters she relied on were the questions about the applicability of casual loadings in the territories, savings provisions, comparison materials which in some cases referred to agreements rather than reference instruments, and the content of summary documents regarding changes such as a one hour minimum engagement for attendance at training sessions and wage rates in Tasmania. In relation to the last mentioned matter the Commissioner said:

> "Although this matter is now the subject of a proposed written undertaking, the employees, including the employees in Tasmania, obviously could not have "genuinely agreed" to that starting wage rate from 1 January 2010 and wage decrease under the Agreement, as they could not purport to agree to accept wages rates that would be contrary to law."[13]

[38] The appellants take strong objection to the notion that there is not genuine agreement. They point out that: notice about the ability to appoint bargaining representatives was given some months before; not one of the employees appointed anyone other than the SDA; there was no evidence of any of the employees expressing concerns as to the genuineness of their agreement throughout the lengthy approval process; and, a 45% turn out to vote of which a majority of over 90% voted in favour. Further, ambiguities such as the application of casual loadings in the territories and wage rates in Tasmania were resolved by undertakings. The SDA submitted that minor language differences on savings and implementation issues amounted to very little as there was no practical differences in the outcome. The appellants further asserted that the modified wage increase for Tasmanian employees was wrongly described as a wage decrease.

[39] We agree that this aspect of the decision also involves errors. We find that there is no proper basis for concluding that the employees who voted for the agreement did not genuinely agree to it.

The requirements of s 180(2)

[40] The Commissioner decided to dismiss the application on the further ground that the employers did not provide employees with a copy of the National Employment Standards (NES) and did not provide employees in Broken Hill with a copy of the South Australian *Long Service Leave Act 1987*. The Commissioner determined that these documents were required to be provided to employees under s 180(2)(a)(ii).

[41] The appellants challenged the statement of the legislative requirement by the Commissioner. They submitted that there is a misstatement of the test which requires reasonable steps to be taken. We agree that the Commissioner misstated the test.

[42] The appellants also challenged the conclusion reached. Section 180(2) requires employers to take reasonable steps to ensure that employees have access to the agreement and other incorporated documents. This will particularly relate to documents that are not otherwise in the public domain. The appellants asserted that while the Agreement refers to the NES in various respects it does not incorporate the terms of the NES into the Agreement.

[43] We have reviewed the terms of the Agreement and agree with that submission. References in the Agreement to the NES do not incorporate the terms of the NES into the Agreement. The South Australian *Long Service Leave Act 1987* is however incorporated because the terms of the agreement provide for its application in Broken Hill - which is beyond its legislative effect. The benefits are greater than those provided by New South Wales legislation. The laws of the land are available to Australian citizens in a variety of ways. We find that the employer was not required to take any further steps to ensure that the relevant employees had access to the South Australian legislation. Because the legislation is freely available in the public domain, no further steps were required.

The no-disadvantage test

[44] The consideration by the Commissioner of the no-disadvantage test spans some 270 paragraphs of the decision. Her conclusion was expressed as follows:

> **"[356]** While I do not repeat the matters already identified under the various headings in this decision, I have considered the disadvantages and advantages of the Agreement in terms of the reference instruments considered in the context of the further evidence and submissions. Accepting the submissions by the applicant and the SDA as a distillation of some of the relevant principles to be considered in terms of the no disadvantage test, and considering the matters relied on as to the content of the Agreement, I am not satisfied the multitude of disadvantages presented by the Agreement is, in a form of overall industrial equilibrium, offset by its marginal advantages. I do not consider the Agreement satisfies the no disadvantage test. I would dismiss the application for that reason."

[45] The appellants challenged this finding and the analysis which led to this conclusion. Numerous errors are asserted. For example at paragraph [132] of the Commissioner's decision she identifies various benefits that are provided under the Agreement to employees at Levels 1-3 and which are not provided to employees classified at Level 4. The Commissioner describes the disadvantages as "industrially-confronting"[14] and largely on the basis of this analysis concludes that Level 4 employees are disadvantaged overall. The appellants pointed

out that the analysis fails to recognise that Level 4 employees were previously not covered by the reference instruments and the Commissioner has not undertaken any comparison between entitlements under reference instruments and entitlements under the Agreement in reaching a conclusion on no-disadvantage in relation to Level 4 employees.

[46] Another example is paragraph [250] in which the Commissioner said as follows:

> "**ANNUAL LEAVE – CLAUSE 29**
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> **[250]** Clause 29 of the Agreement provides annual leave by reference to the NES, and also addresses annual leave loading (cl.29.2), paid leave in advance (cl.29.3) and cashing-out of annual leave for Level 4 employees. Under cl.29.4 of the Agreement, cashing-out of annual leave appears to be restricted only to Level 4 employees. As I have noted earlier, the NES do not necessarily comprehend this type of delineation in industrial instruments in relation to the classes of employees who may seek the employer's agreement to cashing-out."

[47] The appellants submitted that the NES permit cashing out arrangements in enterprise agreements but do not contain any general entitlement to cashing out. The comparison with the NES is not to the point. The task was to consider the benefits under the Agreement by comparison with the relevant terms of reference instruments. It is irrelevant to compare benefits available to different categories of employees under the agreement and to construe the NES in this way.

[48] A further example concerns minimum engagement periods. For casuals, the minimum engagement period of two and a half hours is an improvement of 30 minutes on the provisions under the New South Wales reference instrument, the South Australian/Northern Territory instrument, the Victorian instrument, the Queensland instrument and the Western Australian instrument, each of which provide for a two hour minimum engagement. It is a decrease compared to the ACT instrument which provides for a three hour engagement or two hours by agreement with the employee. For part time employees, the minimum engagement period of three hours is a 30 minute improvement on the New South Wales and Victorian instruments, and a one hour improvement on the Queensland instrument. It is the same as the Western Australian and ACT instruments. The agreement also provides for a minimum engagement of one hour for attendance at voluntary crew meetings. Attendance at the crew meetings is voluntary but encouraged. The employers and the SDA considered that the nature of these voluntary crew meetings, which are primarily used for training, are not covered by the minimum engagement provisions of reference instruments and therefore do not involve a reduction in entitlements.

[49] The employer and the SDA contended before the Commissioner that these changes represented an advantage for employees. The Commissioner focused her attention on the one hour crew meeting provisions and rejected the proposition that the Agreement provides more beneficial arrangements.

[50] We consider that the Commissioner's conclusion in this regard is unsustainable. The changes regarding minimum engagement periods should have been considered as a whole. For junior employees, the additional income that is likely to arise for each engagement is significant. On the other hand, the voluntary attendance at crew meetings, even if it involves a reduction in entitlements, is far outweighed by the more beneficial entitlements. Any balanced

consideration of these provisions would determine that the Agreement contains advantages to employees in this regard.

[51] The Commissioner used her conclusion on this point as a factor leading to her conclusion that the Agreement represents an emphatic diminution in overall terms and conditions. Because of the errors in the examples we have given, which are only examples of the matters raised before us,[15] we believe that the Commissioner erred.

[52] We agree that these are fundamental errors. It is not necessary to consider all of the other alleged errors in order to determine whether to allow the appeal. In our view the conclusion on no-disadvantage is attended by errors of approach and in its underpinning reasoning. We will determine whether the Agreement passes the no-disadvantage test on the material before us.

[53] We have considered the material regarding the advantages and disadvantages to employees under the Agreement in conjunction with the undertakings given by McDonald's in the proceedings before the Commissioner and updated in the proceedings before us. We consider that the Agreement does contain some disadvantages to employees compared to the content in reference instruments. The disadvantage is minimised in many cases by undertakings given by McDonald's. In other cases the disadvantage is confined to a small proportion of employees and is the consequence of adopting uniform national provisions, or contingent on future events. Some disadvantage exists in relation to the wage rate for some age groups in Western Australia, the casual loading in Western Australia, some allowances, weekend overtime in Western Australia, public holidays in the ACT, South Australia and Northern Territory, redundancy, and compassionate leave consequent on the reduction of benefits to the level in the NES.

[54] The Agreement contains advantages to certain groups of employees or generally in relation to the classification structure, the rates of pay, early morning work penalties, hours of work provisions, minimum engagements, overtime rates, redundancy entitlements, casual loadings, junior rates, allowances, salary sacrifice, breaks, annual leave, public holidays, emergency services leave, national disaster leave, jury service, unpaid leave, blood donor leave, bone marrow leave, defence force leave, part-time employment and dispute resolution. There is a savings provision in the Agreement to protect each individual's current rate of pay. The undertakings provided by McDonald's are attached to our separate decision to approve the Agreement and form part of the Agreement.[16]

[55] We have considered the comparative material which explains the relevant advantages and disadvantages to employees and have concluded that the Agreement does not result, on balance, in a reduction in the overall terms and conditions of employment of the employees who are covered by the Agreement under reference instruments applying to the employees.

Conclusions

[56] For the above reasons, on 22 June we granted permission to appeal, allowed the appeal and quashed the decision of Commissioner McKenna.

[57] In a separate decision of 29 June 2010 we approved the Agreement under s 186 of the Act.[17]

VICE PRESIDENT WATSON

Appearances:

S Wood, J Tracey and *D Cross* of counsel for McDonald's Australia Pty Ltd
D Bliss for the Shop, Distributive and Allied Employees' Association
M Mead for the Australian Industry Group

Hearing details:

Melbourne
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[1] *McDonald's Australia Pty Ltd on behalf of Operators of McDonald's outlets* [2010] FWA 1347
[2] Ibid at [34]
[3] Ibid at [56]
[4] Ibid at [79]
[5] Ibid at [83]
[6] Ibid at [97]
[7] Ibid at [106]
[8] Ibid at [356]
[9] *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 204 [17]
[10] *House v R* (1936) 55 CLR 499
[11] *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 205 [21]
[12] Ibid at 204-205 [19]
[13] *McDonald's Australia Pty Ltd on behalf of Operators of McDonald's outlets* [2010] FWA 1347 at [96]
[14] *McDonald's Australia Pty Ltd on behalf of Operators of McDonald's outlets* [2010] FWA 1347 at [133]
[15] Exhibit W4
[16] *McDonald's Australia Pty Ltd*; *Shop, Distributive and Allied Employees' Association* [2010] FWAA 4754
[17] Ibid