DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

All Trades Queensland Pty Limited
v
Construction, Forestry, Mining and Energy Union;

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; and

Australian Manufacturing Workers' Union
(C2016/5213)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT BULL
COMMISSIONER SIMPSON SYDNEY, 7 FEBRUARY 2017

Appeal against decision [2016] FWC 2832 of Commissioner Spencer at Brisbane on 12 August 2016 in matter number AG2016/525.

Introduction and background

[1] All Trades Queensland Pty Limited (ATQ) has lodged an appeal, for which permission to appeal is required, against a decision of Commissioner Spencer issued on 12 August 2016[1] (Decision). The Decision concerned an application by ATQ for the approval of the *All Trades Queensland Pty Ltd Apprentice/Trainee Enterprise Agreement 2015* (2015 Agreement), a single-enterprise non-greenfields agreement. The 2015 Agreement, broadly speaking, applies to apprentices and trainees employed by ATQ in a wide range of industries including the building and construction, engineering and automotive industries. ATQ hires the services of these trainees and apprentices to other businesses in Queensland.

[2] The 2015 Agreement is the most recent of a series of enterprise-specific agreements applying to ATQ and its employees. In 2006, the *All Trades Queensland Pty Ltd Apprentice/Trainee Union Collective Agreement 2006* (2006 Agreement) was made and came into effect under the then applicable provisions of the *Workplace Relations Act 1996* (WR Act). This was replaced by the *All Trades Queensland Pty Limited Apprentice/Trainee Union Collective Agreement 2009* (2009 Agreement), which was made and approved under the provisions of the *Fair Work Act 2009* (FW Act). The approval decision was issued on 24

[1] [2016] FWC 2832

September 2009[2] and the 2009 Agreement commenced operation on 1 October 2009. The 2009 Agreement replaced the 2006 Agreement, which therefore ceased to operate when the 2009 Agreement took effect. The 2009 Agreement was replaced by the *All Trades Queensland Union Collective Agreement 2012-2015* (2012 Agreement), which was approved on 10 April 2013[3] and took effect on 17 April 2013. The 2015 Agreement is intended to replace the 2012 Agreement, the nominal expiry date of which was 31 October 2015.

[3] The application for approval of the 2015 Agreement was opposed by the Construction, Forestry, Mining and Energy Union (CFMEU), the Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU), and the Australian Manufacturing Workers' Union (AMWU) (collectively, the Unions). There was a dispute in the proceedings before the Commissioner as to what were the applicable comparator instruments for the purpose of the application of the "better off overall test" (BOOT) in s.193 of the FW Act. ATQ's position was that the applicable comparator instruments were a number of Queensland State awards and orders preserved in effect as "notional agreements preserving State awards" (NAPSAs). The Unions' position was that the relevant instruments were the modern awards made under the FW Act and in operation since 1 January 2010 which covered the work performed by the employees under the 2015 Agreement, and that the 2015 Agreement was incapable of passing the BOOT by reference to these instruments. The Commissioner heard the question concerning which were the applicable comparator instruments as a preliminary issue. In the Decision, the Commissioner determined that the relevant modern awards were the comparator instruments. In its appeal ATQ contends that the Decision was in error and should be quashed.

[4] The appeal was heard before us at Brisbane on 3 November 2016. In addition to receiving submissions from ATQ and the Unions, submissions were also received (in support of ATQ's appeal) from the Housing Industry Association (HIA), the Queensland Master Builders Association Industrial Organisation of Employers (QMBA), and the Group Training Association of Queensland and Northern Territory Limited trading as the Apprentice Employment Network (Apprentice Employment Network). These last three organisations were concerned that the Decision had direct implications for the way in which employers generally paid apprentices and trainees in the building and construction industry in Queensland. Having regard to the potential wider effects of the Decision, on 11 November 2016 we invited the Commonwealth Minister for Employment and the Queensland Minister for Employment and Industrial Relations to make written submissions in respect of the appeal. On 25 November 2016 we received a written submission made on behalf of the Commonwealth Minister which did not state any position with respect to the disposition of the appeal but contained some useful contextual information. The Queensland Minister did not respond to our invitation. We provided the other parties an opportunity to respond to the Commonwealth Minister's submissions, and two further written submissions were received pursuant to this invitation.

Relevant statutory provisions

[5] The statutory framework applicable to the determination of this appeal is complex and requires explanation at the outset. Sections 186 and 187 of the FW Act set out the requirements which must be satisfied in order for an enterprise agreement to be approved by

[2] [2009] FWA 369

[3] [2013] FWCA 2153

the Commission. Section 186(2)(d) requires that the Commission be satisfied that the agreement passes the BOOT. The content of the BOOT is set out in s.193, which relevantly provides:

> **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.
>
> …
>
> *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 subsection 182(4) or section 185.
>
> …

[6] Section 193 essentially requires a comparison to be undertaken between the entitlements of the enterprise agreement and those of any modern award(s) which cover the employees to which it is sought that the agreement apply. Relevant modern awards are therefore the comparator instruments for the purpose of the required comparison.

[7] By way of background, modern awards were made as a result of the conduct of the award modernisation process mandated by Part 10A of the WR Act, which was the immediate statutory predecessor of the FW Act. All current modern awards commenced effect on 1 January 2010. Each modern award (consistent with s.143 of the FW Act) contains coverage terms which set out (relevantly) the employees and employers which are covered by it. The employers and employees covered are usually expressed as classes by reference to a particular industry or a particular type of work.[4]

[8] The FW Act draws a critical distinction between when a modern award or an enterprise agreement *covers* an employee and when it *applies* to an employee. Section 48 deals with when a modern award *covers* an employer, employee and others relevantly as follows:

> **48 When a modern award covers an employer, employee, organisation or outworker entity**
>
> *When a modern award **covers** an employee, employer, organisation or outworker entity*
>
> (1) A modern award ***covers*** an employee, employer, organisation or outworker entity if the award is expressed to cover the employee, employer, organisation or outworker entity.
>
> …
>
> *Effect of other provisions of this Act, FWC orders or court orders on coverage*
>
> (2) A modern award also ***covers*** an employee, employer, organisation or outworker entity if any of the following provides, or has the effect, that the award covers the employee, employer, organisation or outworker entity:
>
> (a) a provision of this Act or of the Registered Organisations Act;
>
> (b) an FWC order made under a provision of this Act;
>
> (c) an order of a court.
>
> (3) Despite subsections (1) and (2), a modern award does not ***cover*** an employee, employer, organisation or outworker entity if any of the following provides, or has the effect, that the award does not cover the employee, employer or organisation or outworker entity:

[4] See FW Act s.143(5) and (6)

(a) a provision of this Act;

(b) an FWC order made under a provision of this Act;

(c) an order of a court.

Modern awards that have ceased to operate

(4) Despite subsections (1) and (2), a modern award that has ceased to operate does not ***cover*** an employee, employer, organisation or outworker entity.

Modern awards cover employees in relation to particular employment

(5) A reference to a modern award covering an employee is a reference to the award covering the employee in relation to particular employment.

[9] Section 47, which deals with when a modern award *applies* to an employer, employee and others, relevantly provides:

47 When a modern award applies to an employer, employee, organisation or outworker entity

*When a modern award **applies** to an employee, employer, organisation or outworker entity*

(1) A modern award ***applies*** to an employee, employer, organisation or outworker entity if:

(a) the modern award covers the employee, employer, organisation or outworker entity; and

(b) the modern award is in operation; and

(c) no other provision of this Act provides, or has the effect, that the modern award does not apply to the employee, employer, organisation or outworker entity.

Note 1: Section 57 provides that a modern award does not apply to an employee (or to an employer, or an employee organisation, in relation to the employee) in relation to particular employment at a time when an enterprise agreement applies to the employee in relation to that employment.

...

Modern awards apply to employees in relation to particular employment

(3) A reference in this Act to a modern award applying to an employee is a reference to the award applying to the employee in relation to particular employment.

[10] Sections 53 and 52, which respectively set out when an enterprise agreement *covers* an employee (and others) and when it *applies*, substantially reflect for relevant purposes the definitional structure of ss.48 and 47. Section 53 relevantly provides:

> **53 When an enterprise agreement covers an employer, employee or employee organisation**
>
> *Employees and employers*
>
> (1) An enterprise agreement ***covers*** an employee or employer if the agreement is expressed to cover (however described) the employee or the employer.
>
> ...
>
> *Effect of provisions of this Act, FWC orders and court orders on coverage*
>
> (3) An enterprise agreement also ***covers*** an employee, employer or employee organisation if any of the following provides, or has the effect, that the agreement covers the employee, employer or organisation:
>
> (a) a provision of this Act or of the Registered Organisations Act;
>
> (b) an FWC order made under a provision of this Act;
>
> (c) an order of a court.
>
> (4) Despite subsections (1), (2) and (3), an enterprise agreement does not ***cover*** an employee, employer or employee organisation if any of the following provides, or has the effect, that the agreement does not cover the employee, employer or organisation:
>
> (a) another provision of this Act;
>
> (b) an FWC order made under a provision of this Act;
>
> (c) an order of a court.
>
> *Enterprise agreements that have ceased to operate*
>
> (5) Despite subsections (1), (2) and (3), an enterprise agreement that has ceased to operate does not ***cover*** an employee, employer or employee organisation.
>
> *Enterprise agreements cover employees in relation to particular employment*
>
> (6) A reference in this Act to an enterprise agreement covering an employee is a reference to the agreement covering the employee in relation to particular employment.

[11] Section 52 provides:

> **52 When an enterprise agreement applies to an employer, employee or employee organisation**

When an enterprise agreement applies to an employee, employer or organisation

(1) An enterprise agreement ***applies*** to an employee, employer or employee organisation if:

(a) the agreement is in operation; and

(b) the agreement covers the employee, employer or organisation; and

(c) no other provision of this Act provides, or has the effect, that the agreement does not apply to the employee, employer or organisation.

Enterprise agreements apply to employees in relation to particular employment

(2) A reference in this Act to an enterprise agreement applying to an employee is a reference to the agreement applying to the employee in relation to particular employment.

[12] Section 57 deals with the interaction between modern awards and enterprise agreements, and operates to ensure that a modern award and an enterprise agreement cannot simultaneously *apply* to an employee as follows:

57 Interaction between modern awards and enterprise agreements

(1) A modern award does not apply to an employee in relation to particular employment at a time when an enterprise agreement applies to the employee in relation to that employment.

(2) If a modern award does not apply to an employee in relation to particular employment because of subsection (1), the award does not apply to an employer, or an employee organisation, in relation to the employee.

[13] Section 57 is one of a number of "interaction rules" which are set out in Pt.2-1 Div.3 of the FW Act and deal with the interaction between the National Employment Standards established in Pt.2-2, modern awards and enterprise agreements.

[14] Although under ss.48 and 53 respectively a modern award and an enterprise agreement may both *cover* an employee at a given time, because the terms of both instruments are expressed to cover the employee in relation to particular employment, only the enterprise agreement (while it is in effect) will *apply* to the employee. For the purpose of the BOOT in s.193, a modern award will be required to be used as the comparator instrument if it *covers* any employees to which the agreement, if approved, will apply. The comparator modern award need not *apply* to the employees. Often it will not, for example when there is an earlier enterprise agreement which covers and applies to the relevant employees.

[15] The operation of s.193 is modified by certain provisions of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Transitional Act) so that in some circumstances a NAPSA together with a "*transitional APCS*" are to be used as the comparator instruments. NAPSAs were established by Schedule 8 of the WR Act, as amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (Work Choices Act), as

transitional instruments applicable to employees brought into the federal industrial relations system who previously had their terms and conditions determined by a State award. Thus clause 31 of Schedule 8 provided:

> **31 Notional agreements preserving State awards**
>
> If, immediately before the reform commencement, the terms and conditions of employment of one or more employees in a single business or a part of a single business:
>
> (a) were not determined under a State employment agreement; and
>
> (b) were determined, in whole or in part, under a State award (the original State award) or a State or Territory industrial law (the original State law);
>
> a notional agreement preserving State awards is taken to come into operation on the reform commencement in respect of the business or that part of the business.

[16] At the time the Work Choices Act amendments came into effect, cl.38A of Sch.8 of the WR Act provided that a NAPSA ceased to have operation three years after the "*reform commencement date*" (27 March 2006) or earlier in relation to an employee if a workplace agreement made under the WR Act came into operation in relation to the employee, and that once a NAPSA ceased operating in relation to an employee it could never operate again in relation to that employee. However cl.38A was subsequently amended by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* so that it provided as follows:

> **38A Operation of a notional agreement preserving State awards**
>
> (1) A notional agreement preserving State awards ceases to be in operation at the end of:
>
> (a) unless paragraph (b) applies, 31 December 2009; or
>
> (b) if a later date is prescribed by the regulations--that later date.
>
> (2) A notional agreement preserving State awards ceases to be in operation in relation to an employee if a workplace agreement or a pre-transition workplace agreement comes into operation in relation to the employee.
>
> Note: The reference in subclause (2) to a workplace agreement includes a reference to a workplace determination (see section 506).
>
> (3) A notional agreement preserving State awards ceases to be in operation in relation to an employee if the employee becomes bound by an award.
>
> (4) If the notional agreement has ceased operating in relation to an employee because of subclause (2) or (3), the agreement can never operate again in relation to that employee.

(5) Despite subclause (4), a notional agreement that has ceased operating because of subclause (2) can operate again if:

(a) the notional agreement ceased to operate because it was replaced by a pre-transition workplace agreement (the replacement workplace agreement); and

(b) the replacement workplace agreement later ceased to operate because it did not pass the fairness test.

Note: See sections 346Y, 346YA and 346Z of the pre-transition Act.

(6) Despite subclause (4), a notional agreement that has ceased operating because of subclause (2) can operate again if:

(a) the notional agreement ceased to operate because it was replaced by a workplace agreement or a pre-transition workplace agreement; and

(b) the workplace agreement or pre-transition workplace agreement ceased to operate after the commencement of this subclause.

[17] Part 7, Division 2, Subdivision H of the WR Act, as amended by the Work Choices Act, also established a new class of instruments known as "*APCSs*" (Australian Pay and Classifications Scales). Section 208 brought into existence, in relation to any "*pre-reform wage instrument*", a "*preserved APCS*" which contained the wage rate and classifications, casual loading provisions, certain training provisions, frequency of payment provisions and the coverage provisions of the relevant "*pre-reform wage instrument*". The expression "*pre-reform wage instrument*" included State awards (including orders, determinations and decisions of State industrial authorities) and certain other State laws and instruments dealing with employment conditions.[5] Thus derived from any award or order of a State industrial authority was both a NAPSA and a preserved APCS, so that every NAPSA had a related preserved APCS. It may be noted that preserved APCSs only ever existed notionally for legal purposes, and were never given any authoritative documentary existence.

[18] The WR Act was replaced by the FW Act (except for Schedule 1 of the WR Act, which became the *Fair Work (Registered Organisations Act) 2009*). The Transitional Act was enacted as cognate legislation in order to deal with various matters in the transition from the WR Act industrial relations regime to the FW Act regime and other matters consequential to the FW Act. The Transitional Act was assented to on 25 June 2009. Schedule 1 to the Transitional Act effected the repeal of most of the WR Act. Schedule 3 to the Transitional Act is entitled "*Continued existence of awards, workplace agreements and certain other WR Act instruments*". Item 2(1) of Sch.3 provides:

(1) Each WR Act instrument (see sub-item (2)) that becomes a transitional instrument (see subitems (3) to (4A)) continues in existence in accordance with this Schedule from when it becomes a transitional instrument, despite the WR Act repeal.

[5] See the relevant definitions in ss.178 and s.4 of the WR Act.

[19] Item 2(2)(b) of Sch.3 provides that a NAPSA is a WR Act instrument, and item 2(3)(a) provides that each WR Act instrument that was in effect immediately before the "*WR Act repeal day*" (1 July 2009[6]), except a Division 2B State reference transitional award, becomes a transitional instrument. Item 2(5) classifies a NAPSA as an "*award-based transitional instrument*" (ABTI).

[20] Item 3 of Sch.3 defines when a transitional instrument covers, and when it applies, to an employee or employer. Item 3 relevantly provides:

> **3 The employees, employers etc. who are *covered* by a transitional instrument and to whom it *applies***
>
> (1) A transitional instrument ***covers*** the same employees, employers and any other persons that it would have covered (however described in the instrument or WR Act) if the WR Act had continued in operation.
>
> Note 1: The expression ***covers*** is used to indicate the range of employees, employers etc. to whom the instrument potentially ***applies*** (see subitem (2)). The employees, employers etc. who are within this range will depend on terms of the instrument, and on any relevant provisions of the WR Act.
>
> Note 2: Depending on the terms of a transitional instrument and any relevant provisions of the WR Act, the instrument's coverage may extend to people who become employees after the instrument becomes a transitional instrument.
>
> (2) A transitional instrument ***applies*** to the same employees, employers and any other persons the instrument covers as would, if the WR Act had continued in operation, have been:
>
> (a) required by the WR Act to comply with terms of the instrument; or
>
> (b) entitled under the WR Act to enforce terms of the instrument.
>
> Note: The expression ***applies*** is used to indicate the range of employees, employers etc. who are required to comply with, or can enforce, the terms of a transitional instrument.
>
> ...

[21] Item 3(4)(c) provides that the item has effect subject to Div.2 of Pt.5 of Sch.3, which "*deals with interaction between transitional instruments and FW Act modern awards, workplace determinations and enterprise agreements*". We will later refer to items 29 and 31 of Sch.3, which are contained in this Division.

[22] Item 20(1) of Sch.3 provides:

> **20 Sunsetting rules for various transitional instruments**

[6] Transitional Act, s.2 and Sch.2 item 2

Notional agreements preserving State awards

(1) A notional agreement preserving State awards (other than a notional agreement that is an enterprise instrument) terminates:

(a) on the 4th anniversary of the FW (safety net provisions) commencement day; or

(b) if the regulations prescribe a later day—on that later day.

[23] The "*FW (safety net provisions) commencement day*" referred to is 1 January 2010[7], so the 4th anniversary referred to is 1 January 2014.

[24] Item 21 of Sch.3 provides:

21 Effect of termination

If a transitional instrument terminates, it ceases to cover (and can never again cover) any employees, employers or other persons.

[25] Two other provisions of Sch.3 have the effect that a NAPSA, as an ABTI, may cease to cover or to apply to particular employees prior to the termination date provided for in item 20. Firstly, item 29 relevantly provides:

29 Modern awards and award-based transitional instruments

Modern awards other than the miscellaneous modern award

(1) If a modern award (other than the miscellaneous modern award) that covers an employee, or an employer or other person in relation to the employee, comes into operation, then an award-based transitional instrument ceases to cover (and can never again cover) the employee, or the employer or other person in relation to the employee.

The miscellaneous modern award

(2) While an award-based transitional instrument that covers an employee, or an employer or other person in relation to the employee, is in operation, the miscellaneous modern award does not cover the employee, or the employer or other person in relation to the employee.[8]

...

[26] Secondly, item 31 provides:

31 FW Act enterprise agreements and workplace determinations, and award based transitional instruments

[7] Transitional Act, s.2 and Sch.2 item 2

[8] The "*miscellaneous modern award*" is defined in s.163(4) of the FW Act as the modern award that is expressed to cover employees who are not covered by any other modern award.

> If an enterprise agreement or workplace determination (under the FW Act) applies to an employee, or an employer or other person in relation to the employee, then:
>
> (a) an award based transitional instrument ceases to apply to the employee, and the employer or other person in relation to the employee; but
>
> (b) the award based transitional instrument can (subject to the other provisions of this Part) continue to cover the employee, and the employer or other person in relation to the employee.
>
> Note: Subject to the other provisions of this Part, the award based transitional instrument can again start to apply to the employee, and the employer or other person in relation to the employee, if the enterprise agreement or workplace determination (under the FW Act) ceases to apply to the employee.

[27] The relevant effect of the provisions of Sch.3 to the Transitional Act referred to is therefore, in summary, that it extended the operation of each NAPSA which remained in operation immediately before 1 July 2009 until 1 January 2014 or any later date prescribed by regulations made pursuant to the Transitional Act, provided that before that date the NAPSA will cease to cover any employee who becomes covered by any modern award (other than the miscellaneous modern award) which comes into operation. Once any such NAPSA terminates, it ceases to cover and can never cover again any employees, employers or other persons. A NAPSA will, prior to its termination date, also cease to apply to an employee if an enterprise agreement or workplace determination applies to the employee, but will resume applying to the employee if the enterprise agreement or workplace determination ceases to apply.

[28] A preserved APCS is not specified as a transitional instrument under Sch.3. APCSs are dealt with separately in Sch.9, Minimum Wages. Item 5(3) of Sch.9 continues the existence of APCSs under the FW Act as "*transitional APCSs*", which are a subcategory of "*transitional minimum wage instruments*". Under item 11 of Sch.9, a transitional APCS ceases to cover an employee when a modern award that covers the employee comes into operation. Under item 7(1) and (4) of Sch.9, a transitional APCS may only be terminated by order of the Commission under item 3 of Sch.5 or item 9 of Sch.6 in specified circumstances which it is not presently necessary to describe.

[29] This position concerning the coverage of ABTIs and preserved APCSs was modified by reg.3B.02 of the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (Transitional Regulations). Regulation 3B.02 was added to the Transitional Regulations by the *Fair Work Legislation Amendment Regulations 2009 (No. 3)*, which was made by the Governor-General on 14 December 2009 and took effect on 1 January 2010. The regulation modified Schedule 5 of the Transitional Act by adding additional items and Parts. Relevantly, reg. 3B.02 added Part 15, item 16, which provides:

> **Part 5 Continued coverage under award-based transitional instruments**
>
> **16 Continued coverage**
>
> (1) Despite item 29 of Schedule 3, an award-based transitional instrument that:

(a) sets minimum terms and conditions for an employee to whom a training arrangement applies; and

(b) either:

(i) provides for competency-based wage progression; or

(ii) provides solely for the provision of tools for use by apprentices; and

(c) covered an employee or employer immediately before 1 January 2010;

continues to cover the employee or employer

(2) Despite the rule in item 11 of Schedule 9, an employee who is covered by the award-based transitional instrument is also covered by a transitional APCS that would have covered the employee immediately before 1 January 2010.

(3) The award-based transitional instrument and transitional APCS also cover an employee to whom a training arrangement applies:

(a) who is employed, on or after 1 January 2010, by an employer who is covered by the award-based transitional instrument; and

(b) who would have been covered by the award-based transitional instrument and transitional APCS under subitems (1) and (2) if the employee had been employed immediately before 1 January 2010.

(4) For subitems (1) to (3), the award-based transitional instrument and transitional APCS only cover an employer in respect of an employee to whom a training arrangement applies.

(5) Despite section 47 of the FW Act, a modern award that would, but for this subitem, apply to the employee does not apply for the period during which the award-based transitional instrument covers the employee.

[30] Reg.3B.02 was expressed as having been made pursuant to item 8(1) of Sch.2 to the Transitional Act, which provides:

8 Regulations relating to matters dealt with in the transitional Schedules

(1) The regulations may modify provisions of the transitional Schedules.

...

[31] Item 18 of Sch.7 of the Transitional Act deals with the application of the BOOT to enterprise agreements made after the end of the "*bridging period*" if one or more of the employees covered by the agreement is an "*unmodernised award covered employee*". Item 18 is within Part 4 of Sch.7, which is entitled "*Transitional provisions to apply the better off overall test after end of bridging period if award modernisation not yet completed*". The

"*bridging period*" was the period starting on 1 July 2009 and ending immediately before 1 January 2010.[9]

[32] Item 18 relevantly provides:

> **18 Application of better off overall test to making of enterprise agreements that cover unmodernised award covered employees**
>
> (1) This item applies in relation to an enterprise agreement made after the end of the bridging period if one or more of the employees covered by the agreement is an unmodernised award covered employee.
>
> *Non-greenfields agreements*
>
> (2) Despite section 193 of the FW Act, if the enterprise agreement is not a greenfields agreement, the agreement passes the better off overall test under that section only if:
>
> (a) the FWC is satisfied as referred to in subsection (1) of that section in relation to the agreement; and
>
> (b) the FWC is satisfied, as at the test time, that each unmodernised award covered employee, and each prospective unmodernised award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant award-based transitional instrument and transitional APCS applied to the employee.
>
> ...
> *FWC may assume employee better off overall in certain circumstances*
>
> (4) 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 or relevant award-based transitional instrument and transitional APCS 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.
> ...

[33] The expression "*unmodernised award covered employee*" is defined in item 20 of Sch.7 as follows:

> ***unmodernised award covered employee***, for an enterprise agreement, means an employee who:
>
> (a) is covered by the agreement; and
> (b) at the test time, is covered by an award-based transitional instrument (the ***relevant award-based transitional instrument***) that:
>
> (i) is in operation; and

[9] Transitional Act, s.2 and Sch.2 item 2. Schedule 7 Parts 2-3 dealt with the position applying to enterprise agreements made during the bridging period.

(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.

[34] Item 20 also defines the expression "*prospective unmodernised award covered employee*" as follows:

> ***prospective unmodernised award covered employee***, for an enterprise agreement, means 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 an award-based transitional instrument (the ***relevant award-based transitional instrument***) 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.

[35] "*Test time*" is defined in item 20 to mean, for the purpose of item 19, the time the application for approval of the agreement by the Commission was made under s.185 of the FW Act.

[36] It is clear that the application of item 18 depends on the relevant enterprise agreement covering employees who are also covered by an ABTI. If no employee is covered by an ABTI, then whether any employee is covered by a preserved APCS is irrelevant. If item 18 applies, then paragraph (a) of item 18(2) still requires (in accordance with s.193(1) of the FW Act) that, for modern award-covered employees, the BOOT must be passed using the relevant modern award as the comparator instrument, and paragraph (b) requires, for employees covered by an ABTI, that the BOOT must be passed using the relevant ABTI and its associated transitional APCS as the comparator instrument.

ATQ's case

[37] ATQ's case at first instance and in the appeal, supported by the HIA, the QMBA and the Apprentice Employment Network in the appeal, was that for the purpose of applying the BOOT to the 2015 Agreement, the comparator instruments were the following NAPSAs (and, presumably, their associated transitional APCSs) derived from the following awards and orders of the Queensland Industrial Relations Commission (relevant NAPSAs):

- AN140045 - Building Products, Manufacture and Minor Maintenance Award - State 2003
- AN140043 - Building Construction Industry Award - State 2003

- AN140061 - Civil Construction, Operations and Maintenance General Award - State 2003
- AN140103 - Electrical Contracting Industry Award - State
- AN140107 - Engineering Award - State 2002
- AN140128 - Furniture and Allied Trades Award - State 2003
- AP789529 - Metal, Engineering and Associated Industries Award 1998 - Part 1
- AP790899 - National Training Wage Award 2000
- AP792354 - Plumbing Industry (QLD and WA) Award 1999
- AP824308 - The Vehicle Industry - Repair, Services and Retail Award 2002
- AN140326 - Order - Apprentices' and Trainees' Wages and Conditions (Excluding Certain Queensland Government Entities) 2003 (One Big Order)
- AN140350 - Order - Supply of Tools to Apprentices (Tools Order).

[38] ATQ contended that the relevant NAPSAs remained in effect immediately before 1 October 2009, and thus became ABTIs preserved in effect by item 2(1) of Sch.3 of the Transitional Act. Item 16(1) of Sch.5 applied to the NAPSAs as ABTIs because:

- all the NAPSAs set minimum terms and conditions for employees to whom training arrangements applied;
- the awards identified above and the One Big Order provided for competency-based wage progression;
- the Tools Order provided solely for the provision of tools by apprentices; and
- all the NAPSAs applied to ATQ and its employees immediately before 1 January 2010.

[39] ATQ further contended that the effect of the application of item 16(1) to the NAPSAs was that:

- item 16, which was enacted by virtue of reg.3B.02, prevailed over the sunsetting provision in item 20(1) of Sch.3, so that the NAPSAs in question continued in operation after 1 January 2014;
- item 16 also prevailed over item 29 of Sch.3, so that the NAPSAs did not cease to cover ATQ and its employees once relevant modern awards came into effect on 1 January 2010;

- the effect of item 16(5) was that relevant modern awards, when they came into operation on 1 January 2010, did not apply to or cover ATQ or its employees; and

- the NAPSAs were therefore to be used as the comparator instruments for the purpose of the BOOT pursuant to item 18(2) of Sch.7.

The Unions' case

[40] The Unions' position was that, pursuant to s.193 of the FW Act, the BOOT was to be applied using modern awards which covered employees to whom the 2015 Agreement would apply if approved. At least the following modern awards (relevant awards) "*covered*" these employees, it was contended, within the meaning of s.48 of the FW Act:

- *Manufacturing and Associated Industries and Occupations Award 2010*;

- *Vehicle Manufacturing, Repair, Services and Retail Award 2010*;

- *Electrical, Electronic and Communications Contracting Award 2010*;

- *Plumbing and Fire Sprinklers Award 2010*;

- *Building and Construction General Onsite Award 2010*; and

- *Joinery and Building Trades Award 2010.*

[41] The Unions contended that the relevant NAPSAs were not to be used as comparator instruments in favour of the modern awards for the purpose of the BOOT for three reasons:

(1) Item 16 of Sch.5 to the Transitional Act did not apply to the NAPSAs in respect of ATQ's employees, because the requirement that the NAPSAs covered an employee or employer immediately before 1 January 2010 was not satisfied. The effect of cl.38A of Sch.8 of the WR Act was that that the relevant NAPSAs ceased operating in relation to ATQ's employees once the 2006 Agreement came into effect, and could never operate again in relation to them.

(2) Item 16 of Sch.5, even if it applied to the NAPSAs, did not have the effect of displacing the coverage, as distinct from the application, of the relevant modern awards. Because those modern awards covered ATQ's employees to which the 2015 Agreement would apply, they were required under s.193 of the FW Act to be used as the comparator instruments for the BOOT, regardless of whether the NAPSAs also covered or applied to the employees.

(3) In any event, item 16 of Sch.5 operates subject to the sunsetting provision in item 20(1) of Sch.3. The relevant NAPSAs all terminated on 1 January 2014.

The Decision and the appeal submissions

[42] The Commissioner's first conclusion was that the relevant NAPSAs did cover ATQ's employees immediately before 1 January 2010. The Commissioner's reasoning was that when

the 2006 Agreement ceased to operate on 1 October 2009, ATQ's employees reverted to coverage by the NAPSAs pursuant to cl.38A(6) of Sch.8 of the WR Act. The 2009 Agreement, while it applied to ATQ's employees, did not displace the coverage of the NAPSAs. As a result, the requirements of the application of item 16 of Sch.5 to the Transitional Act were satisfied.[10]

[43] The Commissioner then concluded that the sunsetting provision in item 20 of Sch.3 was not displaced in its operation by item 16 of Sch.5. The Commissioner reasoned as follows:

> "[185] Item 16 in Regulation 3B.02 of the *Transitional Regulations* expressly excludes the operation of Item 29 of Schedule 3 if the criteria are met. This has the effect that the ABTI continues to cover the Applicant even if a Modern Award comes into operation.
>
> **[**186] Item 16 of Regulation 3B.02 of the *Transitional Regulations* does not expressly exclude the operation of Item 20 of Schedule 3 (the sunsetting clause) of the *Transitional Act*, like it does Item 29.
>
> [187] Item 20 of Schedule 3 operates such that a NAPSA terminates on the 4th anniversary of the safety net commencement (the 4th anniversary being 1 January 2014) or if regulations prescribe a later day – on that later day.
>
> [188] If it was the intention to continue the operation of the ABTIs that met the criteria in Item 16 of Regulation 3B.02, it is surprising that Item 16 does not express an exclusion for Item 20 as well as Item 29.
>
> [189] However, in considering the full clause of Item 20, it must be considered whether the Regulations prescribe a "later day" for the termination of the NAPSA. Item 16 of Regulation 3B.02 does not prescribe a "later day", it only indicates that an ABTI "continues to cover" under certain circumstances.
>
> [190] In considering the material in evidence before the Commission, it appears that it is the Fair Work Ombudsman's advice to the Applicant that the Regulations do not have an end date and will continue to apply until the Regulations are changed, however, the Fair Work Ombudsman does not specifically make any reference or consideration of Item 20, Schedule 3 (the sunsetting clause). The advice is not specifically given in relation to the Applicant's circumstances or the matter before the Commission. That is, the advice does not take into account the 2006 or the 2009 Agreements in the chronology of considerations and the specific date of the sunsetting clause as applicable to the termination of NAPSAs.
>
> [191] Referring to the Explanatory Statement in relation to the introduction of Item 16 of Regulation 3B.02, the Applicant argued that it reflected a shift in policy whereby the ABTIs are expressly identified to be continued. However, it is also noted that the Explanatory Statement contains the following extract that may lead a reader to believe the ABTIs were to continue for a limited duration only, to accommodate the

[10] Decision at [170]-[174]

apprenticeships being undertaken and the transition of the system to the Federal jurisdiction:

> "This regulation ensures employees who currently have access to competency-based wage progression continue to have access to those arrangements for the duration of their traineeship or apprenticeship. Similarly, entitlements for apprentices to be provided with tools by their employer will continue to apply for the duration of their apprenticeship…"

[192] From the above, it would seem that the purpose of the Regulation was to ensure the continuation of the protection of the unique system for those already participating in it.

...

[194] The Applicant's submitted that Item 16 of Regulation 3B.02 "carved out" ABTIs that provided for competency-based wage progression to protect them from the operation of Item 29 of Schedule 3. The Applicant submitted that Item 20 of Schedule 3 (the "sunsetting clause") was enacted as a general provision in the original *Transitional Act*, commencing on 1 July 2009. Because Item 16 was taken to be inserted into the *Transitional Act* after it had commenced (Regulation 3B.02 taking effect on 1 January 2010), it should be understood as creating an exception to the sun-setting provision.

[195] It was submitted that the "saving" of a NAPSA under Item 16 puts that NAPSA in a different category, and further, the exception had been kept separate (the insertion of the content of Regulation 3B.02 was taken to occur in Schedule 5 of the *Transitional Act*) from the sun-setting provision in Schedule 3 of the *Transitional Act*.

[196] In the current circumstances, Items 20 and 21 of Schedule 3 of the *Transitional Act* "sunsetted" the NAPSAs that continued to cover the Applicant under Item 16 of Regulation 3B.02. Item 16 of Regulation 3B.02 clearly excluded the operation of Item 29 of the *Transitional Act*, but did not exclude Items 20 or 21 of the *Transitional Act*. Considering the current circumstances against the provisions, Item 16 of Regulation 3B.02 provides for continued coverage of the OBO and the Tools Order, until all NAPSAs terminated 4 years after the FW (safety net provisions) commencement day, that is, 4 years after 1 January 2010, being 1 January 2014."

[44] The Commissioner also expressed the additional conclusion that the relevant modern awards covered the employees of ATQ regardless of the application or coverage of the relevant NAPSAs. The Commissioner relevantly said in the Decision:

> "[221] There is nothing in the *Fair Work Act 2009* that makes reference to NAPSAs or prior legislative provisions to exclude coverage of Modern Awards. It is noted that Item 16 of Regulation 3B.02 only referred to the ceasing of the *application* of Modern Awards during the period that ABTIs continued to cover, and did not cease the *coverage* of Modern Awards.
>
> [222] Accordingly, the employees are considered to be award covered employees for an enterprise agreement under s.193(4), being employees who are covered by the proposed Agreement and are covered by a Modern Award."

[45] In the appeal ATQ submitted that the Commissioner erred in concluding that the relevant NAPSAs terminated on 1 January 2014. It submitted that:

- Item 16 of Sch.5 as enacted by reg.3B.02 manifested an intention to continue coverage of ABTIs of the nature of the relevant NAPSAs without there being any termination date for this continued coverage.

- Item 16 was directly contradictory of item 20 of Sch.3.

- This conflict was to be resolved on the basis that item 16 of Sch.5, which was a later provision directed at a specifically identified situation, prevailed over item 20 of Sch.3, which was an earlier provision expressed in general terms. There was an implied repeal of item 20 of Sch.3 to the extent that it was in conflict with item 16 of Sch.5.

- Item 16 of Sch.5 was also inconsistent with the continued application of any modern award to any employee to which an ABTI continued to apply because of the item. No modern award applied to any such employee.

[46] As earlier indicated, the HIA, the QMBA and the Apprentice Employment Network supported ATQ's appeal and its submissions. They identified the wider ramifications of the Decision, namely that many employers of trainees and apprentices in Queensland had operated under the belief that item 16 of Sch.5 continued the operation and application of the relevant NAPSAs (and the associated APCSs) beyond 1 January 2014. They also pointed to the fact that advice from the Fair Work Ombudsman and submissions made by the Queensland Government to the Annual Wage Review in 2015 were consistent with this belief.

[47] The Unions contended that the Decision was correct, and its submissions were consistent with the Commissioner's reasoning in the Decision.

Consideration

[48] We consider that permission to appeal should be granted. The appeal raises issues which are novel, complex, and (as the submission of the HIA, the QMBA and the Apprentice Employment Network make clear) have broader implications for the pay rates and conditions of employment for trainees and apprentices in the State of Queensland generally.

[49] There was no cross-appeal or anything in the nature of a notice of contention with respect to the Commissioner's conclusion that the relevant NAPSAs covered ATQ and its relevant employees immediately before 1 January 2010, and therefore that item 16(1) of Sch.5 of the Transitional Act applied to those NAPSAs. We will therefore proceed upon the assumption that this conclusion was correct.

[50] ATQ's submissions focused upon whether the relevant NAPSAs continued to apply to, or cover, it and its employees covered by the 2015 Agreement. However, we consider that the critical question is whether the relevant modern awards relied upon by the Unions covered employees to whom the Agreement will apply if approved (regardless of whether the NAPSAs covered or applied to such employees). Section 193(1) requires the relevant modern award to be the comparator instrument for the BOOT in respect of award covered employees

and prospective award covered employees. Under s.193(4), award covered employees and their employer must at the test time be covered by an operative modern award (which is the "*relevant modern award*" for the purpose of s.193(1)), and under s.193(5) prospective award covered employees must, if they were employed at the test time, be covered by a modern award together with the employer.

[51] Section 48(1) provides that a modern award *covers* an employee and an employer if it is expressed to cover them. It is clear, we consider, that the modern awards relied upon by the Unions were, at the "test time" for the 2015 Agreement (that is, under s.193(6), the time at which ATQ made its application for approval of the 2015 Agreement[11]) expressed to cover various categories of employees to whom the 2015 Agreement would apply if approved. It is not necessary to examine the coverage provision of each of the modern awards relied upon by the Unions, since ATQ did not submit that any of them were not expressed to cover employees to whom the Agreement would apply. One example will suffice. Clause 4 of the *Building and Construction General Onsite Award 2010* sets out its coverage, and relevantly provides:

> **4. Coverage**
>
> 4.1 This industry award covers employers throughout Australia in the on-site building, engineering and civil construction industry and their employees in the classifications within Schedule B - Classification Definitions to the exclusion of any other modern award.
>
> 4.2 Without limiting the generality of the exclusion, this award does not cover employers covered by:
>
> (a) the Manufacturing and Associated Industries and Occupations Award 2010;
> (b) the Joinery and Building Trades Award 2010;
> (c) the Electrical, Electronic and Communications Contracting Award 2010;
> (d) the Plumbing and Fire Sprinklers Award 2010;
> (e) the Black Coal Mining Industry Award 2010;
> (f) the Mining Industry Award 2010; or
> (g) the Quarrying Award 2010; or
> (h) the Pre-Mixed Concrete Award 2010.
>
> 4.3 The award does not cover an employee excluded from award coverage by the Act.
>
> 4.4 The award does not cover employees who are covered by a modern enterprise award, or an enterprise instrument (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees.
>
> 4.5 The award does not cover employees who are covered by a State reference public sector modern award, or a State reference public sector transitional award (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees.

[11] 9 March 2016

> 4.6 This award covers any employer which supplies labour on an on-hire basis in the industry set out in clause 4.1 in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry. This subclause operates subject to the exclusions from coverage in this award.
>
> 4.7 This award covers employers which provide group training services for apprentices and/or trainees engaged in the industry and/or parts of industry set out at clause 4.1 and those apprentices and/or trainees engaged by a group training service hosted by a company to perform work at a location where the activities described herein are being performed. This subclause operates subject to the exclusions from coverage in this award.
>
> 4.8 Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.
> NOTE: Where there is no classification for a particular employee in this award it is possible that the employer and that employee are covered by an award with occupational coverage.

[52] The expression "*on-site building, engineering and civil construction industry*" used in clause 4.1 is given a detailed definition in clauses 4.9 and 4.10 which it is not necessary to reproduce. Schedule B sets out classifications for the range of job functions performed in the industry as defined. Schedule C, Appendix C1 and Schedule D make provision for wage rates for trainees and apprentices in the industry. It is clear, having regard in particular to clauses 4.1, 4.6 and 4.7, that *Building and Construction General Onsite Award 2010* is expressed covers trainees and apprentices employed by ATQ who work on-site in the building and construction industry. Neither of the exclusions in clauses 4.4 or 4.5 applies (and no party submitted otherwise).

[53] The question is then whether anything in the Transitional Act alters the clear position established by s.193 of the FW Act and an examination of the coverage provisions of the relevant modern awards. Because the Transitional Act is legislation which is cognate to the FW Act, and because both Acts operate as component parts of an overall scheme of industrial relations legislation, the two Acts should generally be interpreted in a co-ordinated way as far as their respective texts permit.[12] Further, item 4(1)(b) of Sch.2 of the Transitional Act provides that expressions used in a Schedule that are defined in the FW Act are to bear the same meaning in the Schedule as they do in the FW Act unless a contrary intention appears. Therefore the definitional distinction between when a modern award *applies* to an employee and employer and when it *covers* them, as established by ss.47 and 48 of the FW Act, should be applied to the Transitional Act. We cannot identify the expression of any contrary intention in the FW Act.

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[12] See *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56; (2012) 248 CLR 378 at [97] per Kiefel J (as she then was); *Commissioner of Stamp Duties v Permanent Trustee Co Ltd* (1987) 9 NSWLR 719 at 722-724 per Kirby P (as he then was).

[54] Item 16 of Schedule 5 (as enacted by reg.3B.02), while it operates to continue the coverage of ABTIs to which it applies, does not displace the *coverage* of any modern award to an employee. Critically, item 16(5), while it provides that a modern award shall not *apply* to an employee while an ABTI still covers the employee, does not provide that a modern award shall not continue to *cover* the employee. ATQ submitted that it was necessarily implicit in item 16 that a modern award could not continue to cover where there was coverage by an ABTI. We do not agree. As earlier indicated, there is no inherent conflict in there being coverage of an employee by two different instruments, since coverage is only concerned with the potential and not the actual application of the instrument. Thus, for an example, a modern award will continue to *cover* an employee even though an enterprise agreement is the legally effective regulatory instrument because it both *covers* and *applies* to the employee. Difficulty could only arise if two instruments both applied to the employee, and the legislative scheme resolves the potential of any such conflict arising by interaction rules which generally ensure that one of the instruments does not apply (such as, for example, s.57 of the FW Act). Item 16(5) is an interaction rule of this type.

[55] The use of an ABTI (including a NAPSA) and a transitional APCS as the comparative instrument for the purpose of the BOOT is authorised only by item 18 of Sch.7 to the Transitional Act. As we have earlier noted, item 18 is a provision within Part 4 of Sch.7, which is entitled "*Transitional provisions to apply the better off overall test after end of bridging period if award modernisation not yet completed*". That heading indicates that the purpose of the provisions in the Part was to deal with the approval process for enterprise agreements made after 1 January 2010 in the event that the award modernisation process had not been completed by that date. This tends to be confirmed by paragraph [348] of the Explanatory Memorandum for the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*, which stated in relation to Part 4:

> "It is intended that award modernisation will be substantially completed by the end of 2009 and that modern awards will operate from 1 January 2010. These provisions cater for the possibility that award modernisation may not have been completed and also have application to employers and employees covered by enterprise award-based transitional instruments."

[56] Since, as earlier indicated, the award modernisation process did in fact complete by that date, it is not clear that an interpretation of item 18 which would, notwithstanding this, give it work to do after 1 January 2010 is consistent with that intention. In any event, item 18(2)(a) maintains the requirement that s.193(1) must be satisfied in order for an agreement that covers any "*unmodernised award covered employee*" to be approved. That means that for any employee covered by a modern award, the BOOT must be undertaken using the relevant modern award as the comparator instrument. That means, even assuming that the 2015 Agreement does cover any "*unmodernised award covered employee*", that the BOOT must nonetheless be applied using the relevant modern award as the comparator instrument in respect of any employees covered by the 2015 Agreement who are also covered by a modern award (whether or not such employees might also be covered by an ABTI). Item 18(2)(b) adds an additional requirement that for any "*unmodernised award covered employee*" the BOOT must also be passed using the relevant ABTI and the associated transitional APCS as comparators. At the time the Transitional Act was enacted, containing as it did Sch.7 item 18, it may not have been contemplated that an employee might simultaneously be covered by a modern award and an ABTI, so that both (a) and (b) of item 18(2) would need to be satisfied. That potential situation was only brought about by the later enactment of Sch.5 item 16 via

reg.3B.02. Notwithstanding this, there is no inherent impracticability or absurdity about the proposition that the BOOT might have to be applied twice to any employees covered by both a modern award and an ABTI such that it would cause us to search for an alternative interpretation of the relevant provisions that is contrary to the clear language that is actually used.

[57] We therefore accept the Unions' second contention (set out above in paragraph [41]), and consider that the Commissioner's additional conclusion in paragraphs [220]-[221] of the Decision was correct. On one view, that conclusion is sufficient to allow us to dispose of the appeal by dismissing it. However because, in ultimately dealing with the application for approval of the 2015 Agreement, it will be necessary to determine whether item 18 of Sch.7 has any application at to the 2016 Agreement, we consider that we should express our view as to whether the relevant NAPSAs continue to cover any employees of ATQ. That involves considering whether the effect of item 16 of Sch.5 as enacted by reg.3B.02 is to modify the effect of item 20 of Sch.3 such that the NAPSAs did not terminate on 1 January 2014.

[58] In dealing with that question, it is necessary to consider the relevant provisions having regard to their context and legislative purpose.[13] The provisions should, prima facie, be read as giving effect to harmonious goals, and any apparent conflict should, as far as possible, be dealt with by interpreting the provisions in a way which best gives effect to their purpose and language while maintaining the unity of all the statutory provisions.[14]

[59] The subject matter of Sch.3 to the Transitional Act can be identified in its title: "*Continued existence of awards, workplace agreements and certain other WR Act instruments*" (underlining added). That is, the schedule is concerned with continuing the legal existence of various types of instruments that were made under the WR Act upon the FW Act coming into effect, subject to various conditions and limitations which are set out in the Schedule. As earlier stated, item 2 gives continued existence to NAPSAs as a category of transitional instruments upon the FW Act's commencement. However item 20(1) brings that existence to an absolute end at the later of 1 January 2014 or a later date prescribed by the regulations. Items 20(2)-(7) specify the termination dates of the other types of transitional instruments. Item 21 confirms what might otherwise be regarded as obvious, namely that once the existence of a transitional instrument terminates, it ceases to cover and can never cover again any employees, employers or other persons.

[60] Item 29 of Schedule 3 falls within Division 3 of the Schedule, which is entitled "*Interaction between transitional instruments and FW Act modern awards, enterprise agreements and workplace determinations*". As may be gleaned from this title and the provisions contained within the Division, it is concerned with establishing interaction rules between transitional instruments which are given legal existence earlier in the Schedule and instruments made under the FW Act's provisions. These interaction rules are concerned with the *coverage* and *application* of various categories of instruments to employers, employees and others at particular times and in particular circumstances, but are not concerned with their *existence* as legal instruments.

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[13] See *Alcan (NT) Alumina Pty Ltd v Commissioner for Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at [14]; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408

[14] *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [70]

[61] Item 29(1) is to be interpreted in that context. It is concerned with the coverage of ABTIs in relation to particular employers, employees or others who have become covered by a modern award, and mandates that in that circumstance the coverage of the ABTI ceases in respect of any such person and cannot thereafter recommence. Importantly however, item 29(1) does not itself bring an end to the legal existence of the relevant ABTI as a whole, only its coverage of particular persons. In circumstances where the scope of coverage of an ABTI may not be co-extensive with that of a modern award, the provision allows for the possibility that some persons previously covered by an ABTI may cease to be covered by it because they have become covered by a modern award, but other persons continue to be covered by the ABTI while it retains legal existence because they have not become covered by a modern award.

[62] Bearing these contextual matters in mind, we turn to the consideration of item 16 of Sch.5 as enacted by reg.3B.02. It is important to note at the outset that reg.3B.02 was not made in exercise of the power in item 20(1)(b) of Sch.3 (supported by the general power in s.4(a) of the Transitional Act to make regulations "*prescribing matters ... required or permitted by this Act to be prescribed*") to prescribe a day later than 1 January 2014 for the termination of NAPSAs. The regulation, as earlier noted, expressly states that it was made in exercise of the power contained in item 8(1) of Sch.2 to make regulations modifying provisions of the Schedules to the Transitional Act. The power in item 8(1), insofar as it authorises the variation of primary legislation by way of regulations, is in the nature of a Henry VIII clause. The validity of such provisions in Australian law is well-established[15], and their use in transitional legislation has been described as "... the striking of a legislated balance between flexibility and accountability in the working out of the detail of replacing one modern complex statutory scheme with another."[16] However it can be expected that the statutory modification effected by a regulation made in exercise of this power would clearly be identified, and in accordance with usual principles the conclusion that a regulation made pursuant to item 8(1) modified or repealed a provision in the schedules by implication because of some apparent inconsistency in language would not readily be reached.[17]

[63] Regulation 3B.02 in terms modifies Sch.5 by adding the new items 15-17. Item 16 itself further identifies in express terms the other provisions in the schedules the effect of which is modified in the item. Relevant to ABTIs, item 16(1) states that it operates "*Despite item 29 of Schedule 3...*". The terms of item 16(1) itself demonstrate that it is concerned with the continuation of the *coverage* by certain ABTIs of a specified category of person in a manner which is inconsistent with and therefore modifies the effect of item 29 of Sch.3. Item 16(2) in a similar way modifies in express terms item 11 of Schedule 9 so that a transitional APCS associated with an ABTI also continues its coverage, and item 16(5) expressly modifies s.47 of the FW Act so that a modern award does not apply to an employee while the employee is covered by an ABTI of the type to which the item applies.[18] There is no statement in item 16 of any purpose to modify the effect of item 20 of Sch.3, and the provisions of item 16 do not deal with the subject matter of item 20(1) earlier identified, namely the termination of NAPSAs the legal existence of which were continued as

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[15] *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* [1931] HCA 34; (1931) 46 CLR 73

[16] *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18 at [61] per Gageler J

[17] *Goodwin v Phillips* (1908) 7 CLR 1 at 10 per Barton J; Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed. at [7.11]

[18] There might be a question as to how item 8(1) of Sch.2 of the Transitional Act could validly authorise the modification by regulation of a provision of the FW Act, but this issue was not raised by any party.

transitional instruments by item 2(1) of Sch.3. Neither does any part of item 16 in expression or effect seek to modify item 21 of Sch.3. Item 16(1) is therefore to be understood as no more than a modification of the interaction rule in item 29(1) of Sch.3 concerning an ABTI which remains in existence in accordance with the other provisions of Sch.3 and a modern award which comes into effect. The other parts of the item operate entirely consistent with item 16(1) read in this way.

[64] For these reasons, contrary to the submission of ATQ and the other parties which supported its position, there is no inconsistency between item 20 of Sch.3 and item 16 of Sch.5 which requires the implication to be drawn that the latter provision modifies the effect of the former. Item 16 of Sch.5, on the ordinary meaning of the language used read in context, does not operate to extend the legal existence of any NAPSA beyond the 1 January 2014 date specified in item 20 of Sch.3. Nor does it or could it modify the position in item 21 of Sch.3 that a terminated ABTI could no longer cover anybody. The continued coverage under transitional APCSs effected by item 16(2) also lapsed on 1 January 2014 for persons covered by NAPSAs prior to that date because, even though there is no sunset provision for transitional APCSs, the continuation of their coverage under item 16(2) was conditional upon continued coverage by an ABTI.

[65] The explanatory statement for the *Fair Work Legislation Amendment Regulations 2009 (No. 3)* tends to confirm the ordinary meaning of the reg.3B.02 provisions.[19] It relevantly states:

> "**Item [4] – After regulation 3B.01**
>
> This item inserts new regulation 3B.02 after regulation 3B.01 of the Transitional Regulations.
>
> *Regulation 3B.02 – References to award-based transitional instruments and continued coverage under award-based transitional instruments*
>
> This item inserts new regulation 3B.02 in the Transitional Regulations to provide for continued coverage under transitional instruments for employees to whom a training arrangement applies. It also deals with references to award-based transitional instruments in modern awards.
>
> This regulation modifies Schedule 5 to the Transitional Act by inserting new item 15 after item 14 of Part 4, along with new Parts 5 and 6 (consisting of new items 16 and 17 respectively).
>
> …
>
> *New item 16 of Schedule 5 to the Transitional Act continues coverage of transitional instruments for certain employees to whom a training arrangement applies.*
>
> *Most modern awards will commence operation on 1 January 2010 and many contain terms and conditions for employees to whom a training arrangement applies. As a result, from 1 January 2010, most employees to whom training arrangements apply and who are currently covered by award-based transitional instruments, will instead by covered by modern awards.*

[19] See *Acts Interpretation Act*, s.15AB(1)(a)

This item ensures that for employees to whom a training arrangement applies (and their employer), an award-based transitional instrument continues to cover the parties where the instrument:

- sets minimum terms and conditions for employees to whom a training arrangement applies;
- provides for competency-based wage progression or provides solely for the provision of tools for apprentices; and
- covered the employee or employer immediately before 1 January 2010.

Competency-based wage progression enables employees to whom training arrangements apply to access higher pay rates if they attain certain skills levels ahead of time, thereby completing their traineeship or apprenticeship more quickly. Employees still progress on a time-served basis if they do not achieve competency in the relevant stage of their training arrangement.

This regulation ensures employees who currently have access to competency-based wage progression continue to have access to those arrangements for the duration of their traineeship or apprenticeship. Similarly, entitlements for apprentices to be provided with tools by their employer will continue to apply for the duration of their apprenticeship.

Affected employees will also continue to be covered by the transitional APCS that covered them immediately before 1 January 2010.

This regulation makes clear that while an employee is covered by an award-based transitional instrument satisfying the above criteria, a modern award does not apply. This is the case despite the rule in section 47 of the Act which specifies when a modern award that covers an employer or employee will apply to the employer or employee.

In respect of any other employees who are not employees to whom a training arrangement applies, an employer will be covered by the relevant modern award applicable to their industry or the employee's occupation. The employer will also be covered by any continuing transitional instruments in respect of future employees at their workplace to whom training arrangements apply…" (emphasis added)

[66] The first emphasised part of the explanatory statement above confirms that the purpose of item 16 was to allow ABTIs of the specified type to continue to *cover* relevant employees and employers upon the commencement of modern awards. The second emphasised passage suggests that it was not intended that the provision have a long term effect insofar as it was directed at allow existing traineeships and apprenticeships to be completed in accordance with the pre-existing arrangements, although it must be acknowledged that item 16(3) of Sch.5 in terms continues the coverage of relevant ABTIs for persons employed after 1 January 2010 who meet the specified conditions.

[67] Other matters raised by ATQ, the HIA, the QMBA and the Apprentice Employment Network concerning the way in which the BOOT was applied to the 2012 Agreement, the Fair Work Ombudsman's advice and submissions made by the Queensland Government to the Annual Wage Review in 2015 are incapable of affecting the conclusions we have reached concerning the interpretation and application of the relevant provisions of the Transitional Act.

[68] We therefore consider that the relevant NAPSAs relied upon by ATQ terminated on 1 January 2014, and consequently do not cover any of the employees covered by the 2016 Agreement. Coverage by the associated transitional APCSs ceased on the same date. The Commissioner's conclusion on this score was correct. Item 18 of Sch.7 of the Transitional Act has no application to the approval process for the 2016 Agreement, and the BOOT must be applied in accordance with s.193 of the FW Act using the relevant modern awards as the comparator instruments. ATQ's application for approval of the 2015 Agreement will be referred back to the Commissioner for final determination in accordance with this decision.

Orders

[69] We order as follows:

(1) Permission to appeal is granted.

(2) The appeal is dismissed.

(3) ATQ's application for approval of the *All Trades Queensland Pty Ltd Apprentice/Trainee Enterprise Agreement 2015* (AG2016/525) is referred back to Commissioner Spencer for final determination in accordance with this decision.

VICE PRESIDENT

Appearances:

J. Murdoch Q.C with *M. Coonan* solicitor for All Trades Queensland Pty Limited.
C. Hartigan of counsel for the Construction, Forestry, Mining and Energy Union, the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia.
M. Adler for the Housing Industry Association
D.G. Pratt for the Master Builders Association

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