[2016] FWCA 5277

DECISION

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

MMA Offshore Logistics Pty Ltd T/A MMA Offshore Logistics
(AG2016/3091)

MMAOL PTY LTD ENTERPRISE AGREEMENT 2016

Maritime industry

COMMISSIONER CLOGHAN PERTH, 8 AUGUST 2016

Application for approval of the MMAOL Pty Ltd Enterprise Agreement 2016.

[1] MMA Offshore Logistics Pty Ltd trading as MMA Offshore Logistics (**MMAOL or Employer**) has made application to the Fair Work Commission (**Commission**) for approval of an enterprise agreement pursuant to s.185(1) of the *Fair Work Act 2009* (**FW Act**).

[2] The Employer has made an enterprise agreement with five (5) employees employed by MMAOL. The name of the enterprise agreement is the *MMAOL Pty Ltd Enterprise Agreement 2016* (**MMAOL Agreement**).

[3] Shortly after MMAOL made application for approval of the MMAOL Agreement, the Maritime Union of Australia (**MUA**) emailed the Commission and requested to be heard or granted permission, to participate in the approval proceedings of the MMAOL Agreement.

[4] The MUA's request has been the subject of two Decisions of the Commission [2016] FWC 3789 (**First Decision**) and [2016] FWC 4868 (**Second Decision**).

[5] The application by MMAOL is also the subject of a Confidentiality Order (PR580602).

[6] In the First Decision, I exercised my discretion to allow the MUA to inform the Commission, by way of evidence and submissions, its contention that the group of employees employed by MMAOL, and who voted and made the MMAOL Agreement, were not "fairly chosen" pursuant to s.186(3) of the FW Act.

[7] In the Second Decision, I assessed the evidence of Mr W Tracey, Deputy National Secretary of the MUA, the Union's submissions that the group of employees was not "fairly chosen". Having considered the evidence, submissions and case law, I determined that I could proceed to conclude the application for approval of the MMAOL Agreement, without any further participation of the MUA. I provided MMAOL with the opportunity to conclude its case for approval of the enterprise agreement on 1 August 2016.

[8] At the hearing, MMAOL was represented by Mr R Dalton of Counsel and evidence given on behalf of the Employer by Mr D Lofthouse and Mr M Gillett who are both members of the MMAOL executive management and the MMA group of companies (**MMA Group**).

[9] This is my decision and reasons for approving the MMAOL Agreement.

RELEVANT LEGISLATIVE FRAMEWORK

[10] Section 186 of the FW Act states:

> "**186 When the FWC must approve an enterprise agreement—general requirements**
>
> *Basic rule*
>
> (1) If an application for the approval of an enterprise agreement is made under section 185, the FWC must approve the agreement under this section if the requirements set out in this section and section 187 are met.
>
> *Requirements relating to the safety net etc.*
>
> (2) The FWC must be satisfied that:
>
> (a) if the agreement is not a greenfields agreement—the agreement has been genuinely agreed to by the employees covered by the agreement; and
>
> (b) …
>
> (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.
>
> *Requirement that the group of employees covered by the agreement is fairly chosen*
>
> (3) The FWC must be satisfied that the group of employees covered by the agreement was fairly chosen.
>
> (3A) If the agreement does not cover all of the employees of the employer or employers covered by the agreement, the FWC must, in deciding whether the group of employees covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

Requirement that there be no unlawful terms

(4) The FWC must be satisfied that the agreement does not include any unlawful terms (see Subdivision D of this Division).
Requirement that there be no designated outworker terms

(4A) …

Requirement for a nominal expiry date etc.

(5) The FWC must be satisfied that:
(a) the agreement specifies a date as its nominal expiry date; and

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

Requirement for a term about settling disputes

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

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

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

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

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

[11] Section 187 of the FW Act states:

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

Additional requirements

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

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

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

Requirement relating to notice of variation of agreement

(3) …

Requirements relating to particular kinds of employees

(4) ...

Requirements relating to greenfields agreements

(5) …"

CONSIDERATION

Commencing point

[12] If an enterprise agreement is made, a bargaining representative **must** apply to the Commission for approval of the agreement.[1]

[13] An enterprise agreement is **made** when a majority of employees, who will be covered by the proposed single enterprise agreement, cast a valid vote to approve the agreement.[2]

[14] Shortly stated, when a majority of employees cast a valid vote to approve a proposed enterprise agreement, the employer is legislatively required to seek approval of that agreement from the Commission.

[15] The Commission must approve the proposed enterprise agreement if the requirements in ss.186 and 187 of the FW Act are made.

[16] After considering the objects of Part 2-4 Enterprise Agreements, in the FW Act, Buchanan J in *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd* (**John Holland)** [2015] FCAFC 16, stated:

> "It may readily be seen that the emphasis in these statutory objects is upon the notion of giving effect to bargains made by parties of the bargaining process, rather than upon determination by the FWC of what might be a suitable outcome."[3]

[17] This observation of Buchanan J was agreed with by Besanko and Barker JJ, at paragraphs [1] and [87] respectively.

[18] Accordingly, subject to the requirements in ss.186 and 187 of the FW Act being met, the Commission's primary role is to give effect to the bargain reached between the employer and employees.

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[1] Section 185(1) of the FW Act

[2] Section 182(1) of the FW Act

[3] *John Holland* at [12]

[19] I now turn to a summary of proceedings to date which is intended to be both a background to my decision and highlight the main issues which have arisen during the application to approve the proposed MMAOL Agreement.

The nature and history of Commission proceedings

[20] MMAOL made application for approval of the proposed enterprise agreement. The signature page of the proposed agreement and parts of the Form F17 were redacted to ensure the identity of the employees and employee bargaining representative was not revealed. As part of the covering email with the application, a confidentiality order was sought.

[21] Shortly after making the application, the MUA sought access to the material on the Commission's file and to be heard in relation to the application.

[22] My Associate provided the MUA with copies of the Form F16, F17 and proposed enterprise agreement, in the manner provided to the Commission.

[23] MMAOL opposed the MUA involvement in the application to approve the enterprise agreement.

[24] I afforded the MUA with the opportunity to provide evidence, and submissions, in support of its request to be heard in relation to MMAOL's application for approval of the proposed agreement.

[25] In both its submissions and reply to MMAOL's submission opposing the MUA's participation in the approval proceedings, the MUA expressed its "very real concern" that the employees employed, and who voted on the proposed agreement, were not fairly chosen (**fairly chosen**).

[26] Secondly, the MUA suspected that, "if any bargaining representative was in a classification such as a Master…then a real question arises as to whether the bargaining representative was free from control or improper influence as required by Regulation 2.06 of the Fair Work Regulations 2009 (Cth). In that case, the Commission would not be able to approve the agreement because the Commission could not be satisfied that the employees genuinely agreed to the proposed enterprise agreement".[4]

[27] The MUA's second concern will be described as "employee bargaining representative" (**employee bargaining representative**).

[28] On 8 July 2016, I provided the parties with my First Decision.

[29] As a consequence of the MUA's submissions that it had evidence to support the contention that the employees who voted on the proposed enterprise agreement were not fairly chosen, I determined that the Commission should inform itself pursuant to s.590(c) and (d) of the FW Act. The MUA was provided with the opportunity to provide documents, evidence and submissions. MMAOL was given the opportunity to "test" any evidence and make submissions in response.

[4] MUA submission 20 May 2016 (51)

[30] After considering the evidence and submissions, I declined permission for the MUA to participate any further in the approval proceedings (for the reasons set out in the Second Decision) and provided an opportunity for the Employer to conclude its case for approval of the proposed enterprise agreement.

[31] The Employer concluded its case on 1 August 2016.

[32] I shall now consider the Employer's closing submissions, its evidence, and in further detail, the MUA's issues of concern, as part of my consideration of whether the requirements in ss.186 and 187 of the FW Act have been met.

Corporate structure

[33] MMA Limited is a global services company listed on the Australian Stock Exchange.[5]

[34] MMA Limited is the parent company of the MMA Group which includes 21 subsidiary companies based in Australia and Asia.[6]

[35] MMA Vessel Operations Pty Ltd (**MMAVO**) and MMAOL are wholly owned subsidiaries of MMA Limited.[7]

[36] MMAVO is an Australian based "full service logistics contractor". By "full service", it is meant:

- receipt of freight and supplies, and delivery to lay down areas at the relevant port;
- organising freight and supplies in lay down areas, and stevedoring onto vessels; and
- supplying vessels and crew.[8]

[37] MMAOL is a labour-hire company. Prior to October 2011, it was owned by Brambles. MMAOL continue to provide on hire labour to entities that carry out "land based logistical support – that is, receipt of freight and supplies and delivery of same to the lay down area at the Dampier wharf".[9]

[38] Recently the MMA Group made a decision to expand MMAOL's labour-hire business to include "all aspects of logistics applicable to the offshore oil and gas industry". This included supplying on-hire officers, engineers and other seafarers for vessel operations.[10]

[39] The decision of the MMA Group to expand MMAOL on-hire operations in the maritime area, led to the employment of the five (5) employees, the making of the proposed enterprise agreement and an application for approval of the MMAOL Agreement.

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[5] Exhibit A4 (8)

[6] Exhibit A4 (10)

[7] Exhibit A4 (10)

[8] Exhibit A4 (11)

[9] Exhibit A4 (12)

[10] Exhibit A4 (13)

Context to MMAOL's decision to expand its labour hire operations

[40] Since mid-2014, there has been a significant downturn in the global marine services industry, and particularly, the oil and gas sector.

[41] The downturn is associated with a fall in the oil price, the ending of the construction phase in some Australian offshore industry projects and further, no large projects to replace the previous construction upswing.

[42] Mr Lofthouse gave evidence that as a consequence of the downturn:

- "clients have expected vessel managers (like MMAVO) to cut their total contract prices significantly in order to win and even retain existing contracts"; and
- "clients are placing increased pressure on vessel operators to provide certainty of service delivery and continuity of supply without disruption or delay".[11]

[43] In and around early 2016, the MMA Group decided to expand MMAOL's labour hire services for a number of reasons. Firstly, there was a market to supply marine personnel particularly to overseas based vessel operators for projects in Australia.

[44] Secondly, clients, in some cases, were only seeking short term contracts.

[45] Thirdly, some clients did not require a vessel and were only seeking part, or all, of the crew. In other words, clients were not seeking the "full service" but local specialist crew.

[46] Fourthly, after three-and-a-half years of bargaining with respect to a replacement to the MMAVO enterprise agreement, "there was little likelihood of achieving a breakthrough in those negotiations with the MUA". Attempts to reach agreement with officers, engineers and seafarers directly had failed. In the Second Decision, I stated that there is a reasonable inference, on the evidence, that no enterprise agreement has been made between employers and employees, because the MUA will not endorse any of the proposed agreements.

[47] Mr Lofthouse's evidence is that while there will continue to be opportunities for "full service" contracts offered by MMAVO, "the commercial reality of not having an in-term enterprise agreement is that it becomes difficult to maintain or win contracts".[12]

[48] Finally, the extension of MMAOL, from its existing on-hire land labour to marine personnel, was a natural extension of the business.

[49] It was in this context that the MMA Group made the decision to expand MMAOL operations into on-hire marine labour. In time, MMAOL expects that the re-profiling of its labour services will provide vertical integration for clients who will deal with one labour provider from "depot to port to port".[13]

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[11] Exhibit A4 (17)

[12] Exhibit A4 (25)

[13] Exhibit A4 (28)

[50] To achieve such a strategic outcome, it is necessary for MMAOL to have in place an enterprise agreement for marine labour, as well as its current agreement for the on-hire land logistics employees.

[51] Mr Gillett's evidence describes the recruitment process for the five (5) employees and bargaining for the MMAOL Agreement.

[52] A Human Resources officer recruited suitable employees. Mr Gillett's evidence is that, "the group of five Employees included at least one representative of each of the Deck Officer Department, the Engineering Department and the Ratings and Caterers Department".[14]

[53] The five (5) employees remain the only employees who would fall within the scope of the proposed MMAOL Agreement, however, this would be expected to increase as MMAOL is able to secure new contracts.[15]

[54] Four (4) of the five (5) employees appointed another employee as their bargaining representative. One (1) employee appointed himself as a bargaining representative. The person who appointed him or herself, as a bargaining representative, is also the person appointed by the other four (4) employees as their bargaining representative. I have been provided with the un-redacted nomination of a bargaining representative from all five (5) employees.

[55] I will refer to the nominated employee, who is the bargaining representative, as the Employee Bargaining Representative.

[56] Mr Gillett's evidence is that the Employee Bargaining Representative is employed to work in an operational role and does not have an authority to "hire or fire" staff. The Employee Bargaining Representative is not a member of MMAOL's management, "and was at all times free to make decisions without control or influence of MMA Group and MMAOL".[16]

[57] I have no reason to disbelieve Mr Gillett's evidence. At the beginning of bargaining, the Employee Bargaining Representative questioned and sought clarification on certain matters related to bargaining for the proposed MMAOL Agreement.

Employee Bargaining Representative

[58] Mr Tracey's evidence was that, "employees on a vessel work according to strict chain of command. The Master has command and charge of the vessel. The Master is the representative of the employer in the workplace and is charged with overall supervision and management of the employees".[17]

[59] For the most part, there is little to argue with Mr Tracey's evidence, except to say that the inference is that if the Employee Bargaining Representative was a Master, there is a question of whether that person could be free from the control or improper influence of

[14] Exhibit A5 (29)

[15] Exhibit A5 (32)

[16] Exhibit A5 (37)

[17] MUA1 (48)

MMAOL. Further, if that was the case, the Commission could not be satisfied that the employees genuinely agreed to the proposed MMAOL Agreement.

[60] Mr Tracey's evidence, in general, is uncontroversial except his statement that the Master is the employer's representative on board the vessel. Being "senior" in rank on board a vessel does not translate to that person being an "employer's representative". It would be the same as saying a crossbow and an Exocet missile are equivalent weapons in warfare.

[61] Further, the Commission would be dealing with a Master, if that person was the Employee Bargaining Representative, as a bargaining representative, and not in a "chain of command" situation on a vessel.

[62] The Commission cannot approve an enterprise agreement if there are "reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees" pursuant to s.188(c) of the FW Act. In view of the evidence before me, there is nothing for the Commission not to believe that the proposed MMAOL Agreement was not genuinely made, in the event that a Master was a bargaining representative. In my view, a general inference is not a reasonable ground upon which to conclude that the proposed enterprise agreement was not genuinely agreed to by the employees.

[63] The evidence is that all five (5) employees voted to approve the proposed MMAOL Agreement. There is no evidence, or material, to demonstrate that the proposed MMAOL Agreement was not genuinely agreed to on the grounds that if the bargaining representative was a Master, he or she was not free of control or influence of the Employer.

Fairly chosen

[64] In approving an enterprise agreement, the Commission must be satisfied that the group of employees covered by the agreement was fairly chosen.

[65] The evidence of Mr Gillett is that all of the employees covered and who approved the proposed agreement, are either a master, engineer or ratings, and consequently, cover the range of classifications in Clause 5 of the proposed MMAOL Agreement.

[66] When I reflect on the statutory provisions that the Commission, "must be satisfied that the group of employees was fairly chosen, it should be considered within the context of the statutory "heading" which is that the, "*group of employees* ***covered by the [proposed] agreement was fairly chosen***". That is, "fairly chosen" is within the context of the coverage of the proposed agreement. (my emphasis)

[67] In the Fair Work Bill 2009, Explanatory Memorandum (**EM**) the "illustrative example" at paragraph 778 provides an insight into Parliament's intention. The illustrative example reads:

> "778. This subclause allows an agreement to cover a group of employees that is constituted in any fair and appropriate way (e.g., all the electricians employed by the employer or employers).

Illustrative example

A single employer operates five organisationally distinct units within its enterprise. The employer makes an agreement with all of the employees in two organisationally distinct units, as well as ten employees who are the only non-union members within from another organisational unit that has a total of 30 employees. FWA is required to decide whether the group of employees covered by the agreement is fairly chosen.

In this example, the group of employees covered by the agreement is likely to be unfair, particularly as the employees were unfairly chosen.

[68] Translating the illustrative example into the proposed MMAOL Agreement, if MMAOL had chosen five (5) employees of one particular occupational classification, to the exclusion of other occupations, it is likely that that choice would have been open to doubt as to whether the employees had been fairly chosen. The accusation would be, "How can it be a truly 'whole of fleet' agreement, if the Employer has only made an enterprise agreement with, for example, engineers to the exclusion of "masters" or "ratings"?

[69] The Commission is assisted by the provision of s.186(3A) of the FW Act. The Commission "must take into account geographic, operational or organisational" characteristics in determining if a proposed agreement (which does not cover all employees) is distinct.

[70] In this instance, the MMAOL's evidence is clear. The proposed coverage of work to be carried out by the employees is on-hire marine labour as distinct from land based logistics. The entity is organisationally distinct. The coverage is operationally distinct. From this perspective, there is nothing to say that the employees were not fairly chosen.

[71] Despite having acknowledged that the MMAVO and MMAOL are two separate corporate entities, the Union submit:

- "the way in which the applicant made the agreement with the five employees was for the purpose of excluding the MUA from negotiations and denying those to be covered by the agreement of collective bargaining representation by the union and protected action"; and

- "one then needs to go on and consider whether there are legitimate business reasons for the employment of that small group of employees and the making of the agreement in the way in which it was";[18]

and finally, Mr Tracey's evidence,

> "the MUA is concerned that the MMA Offshore Limited and MMAVO will utilise MMAOL and the MMAOL Agreement to avoid bargaining with the MUA and to deny

[18] Transcript PN41 – proceedings 18 July 2016

MMAVO employees an opportunity to bargain, including by taking protected industrial action".[19]

[72] In *John Holland*, his Honour Justice Besanko stated at paragraph [3]:

> "…I think the concept of collective bargaining will have a quite limited role in determining whether the group of employees covered by the agreement was fairly chosen…to my mind that if the concept of collective bargaining has a role in the determination of the issue posed by s.186(3) of the Act, it is quite a limited one".

[73] I will deal with the first point in paragraph [71] above as follows.

[74] It is for employees (including members of a union) to determine who their bargaining representative shall be. If a union is excluded from bargaining by not being appointed as a bargaining representative, that is a matter for the employees. If an employee is a member of a union and does not nominate him or herself, the union is the default bargaining representative.

[75] The way the Applicant made the MMAOL Agreement, is within the scheme of the FW Act.

[76] The MUA has not been denied representation of the employees – simply, the employee(s) have chosen not to be represented by the MUA.

[77] Finally, there is nothing remarkable for employees, even members of a union, to deny themselves of taking protected industrial action. Again, it is a choice for members of a union.

[78] Having considered the totality of the circumstances and the evidence, it would appear that the real substance of the MUA's opposition to approval of the MMAOL Agreement is, in part, because it was not the bargaining representative for employees. Further, if it was the bargaining representative on negotiations for the MMAOL Agreement, it may not have reached agreement with MMAOL because of the impact it would have on bargaining with respect to MMAVO employees (including the employees ability to take protected industrial action). This is best illustrated by Mr Tracey's evidence at paragraph [71] above.

[79] Besanko J's judgement in *John Holland* with respect to the limited role of "collective bargaining" in determining whether a group of employees covered by the agreement was fairly chosen, is reinforced by Buchanan J's statement at paragraph [71] which reads:

> "[71] It has not been suggested that it was impermissible for three employees to be asked to make an agreement or vote to do so. The FW Act permits such an agreement to be made and requires that it be approved if the statutory tests are met. Unless the proposed agreement failed to meet a relevant statutory test there could be no basis for introducing a further, more general, requirement of the kind adopted by the Full Bench."

[80] The "further general requirement" referred to by the Full Bench related to "collective bargaining" in the context of future employees. However, I think it can be readily appreciated

[19] MUA1 (36)

that Buchanan J was referring to collective bargaining generally in the process of agreement making.

[81] In view of the provisions of the FW Act, it would be wrong for the Commission to come to the conclusion that an enterprise agreement cannot be made by employees who have chosen not to have union representation in bargaining.

[82] While the MUA would prefer to be involved in bargaining, its participation in collective bargaining is not mandatory under the FW Act. Further, it is not a statutory requirement which the Commission must consider when determining whether to approve an agreement.

[83] Mr Tracey also refers, as I have stated, in his evidence, to the MUA's concern that MMA Offshore Limited and MMAVO will use the MMAOL Agreement as a "vehicle" to "deny" MMAVO employees the opportunity "to bargain, including by taking protected industrial action".

[84] If the Full Court of the Federal Court of Australia concluded that, "collective bargaining" is not a statutory test in the enterprise agreement process, it is readily conceivable that the consequences of collective bargaining with another entity, is an even more remote consideration, which should be taken into account by the Commission in approving an agreement.

[85] Irrespective of both MMAVO and MMAOL having the same "parent" entity and the collective bargaining taking place with MMAVO, I repeat what I said in my Second Decision. To presume, or second guess, what may or may not happen with MMAVO bargaining, and its employees, should the Commission approve the proposed MMAOL Agreement, is not an appropriate consideration.

[86] To conclude, I now turn to the MUA submission that it is necessary for the Commission to, "consider whether there are legitimate business reasons for the employment of that small group of employees and the making of the agreement in the way it was".

[87] Without repeating myself, there is no evidence or material which evinces that the proposed enterprise agreement was not made in accordance with the provisions of the FW Act.

[88] With respect to the MUA's submission that the Commission needs to "consider whether there are legitimate business reasons for the employment of that small group of employees" – I agree.

[89] It appears that the MUA's submission is reliant on the statements of Buchanan J in *John Holland* at paragraph [33].

[90] Buchanan J acknowledged that, "the group of employees to be covered by the agreement is fairly chosen" is a reference to a choice by the employer and consequentially the potential for manipulation of the procedures is a "real one". Accordingly, it is necessary to consider whether there was a "business rationale" for the choice of employees, as well as unfair exploitation of these employees.

[91] The business rationale was set out in Mr Lofthouse's evidence for employing the employees and making an enterprise agreement. I have no reason to come to any other view than it was a legitimate business decision.

[92] It is also useful to observe in Buchanan J's judgement, in *John Holland*, that an employer, in the ordinary course of making a business decision, is unlikely to propose reaching an agreement with employees at a time where it is vulnerable to industrial action.[20]

[93] Further, Buchanan J observed that an employer is unlikely to propose an enterprise agreement until a substantial number of employees had been employed. Such a business decision brings with it two uncertainties.

[94] Firstly, as the term and conditions of employment have not been settled at the time of the engagement of the employees, the suggestion of employing persons on the conditions contained in a modern award is hardly attractive, particularly in the maritime industry. Secondly, with more employees, bargaining may be more "complicated", and the prospect of protected industrial action is "real".

[95] As his Honour Buchanan J observes, "come the hour" of agreement making, there is a natural inclination for employees (and employers) to act in their self-interest. While others may disagree with that moral inclination, it would be wrong, in my view, to conclude that those employed and who voted on the enterprise agreement, were not "fairly chosen" because of self-interest.

[96] Having considered the case law which I referred to in my Second Decision and the evidence of the Employer, I am satisfied that MMAOL had a legitimate business reason for the decisions it made. Decisions which ultimately led to the proposed enterprise agreement being made.

[97] Accordingly, I find that the group of employees was fairly chosen. The terms and conditions of the proposed enterprise agreement are considerably in excess of the modern award and the employees, it appears, voted accordingly and made the MMAOL Agreement.

[98] For the reasons set out above, I am satisfied, pursuant to s.186(3) of the FW Act, that the group of employees was fairly chosen.

BOOT requirement

[99] Mr Gillett gave evidence with respect to s.186(2)(d) of the FW Act or the "better off overall test" (**BOOT**).

[100] That evidence and assumptions compare, for the purposes of the BOOT, the MMAOL Agreement and the *Maritime Offshore Oil and Gas Award 2010* (**modern award**).

[101] Section 193 of the FW Act sets out when an enterprise agreement passes the BOOT. Having considered Mr Gillett's evidence and reviewed and examined both instruments, I am satisfied that the employees would be better off overall, if the MMAOL Agreement applied rather than if the modern award applied.

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[20] *John Holland* paragraph [48]

Further requirements

[102] Notwithstanding the particular attention paid to s.186(2) and (3) of the FW Act above, I am satisfied that each of the requirements in ss186, 187 and 188 of the FW Act, as are relevant to this application for approval of the MMAOL Agreement have been met.

Further evidence

[103] Following the hearing on 18 July 2016, the MUA sought, on 20 July 2016, to place before the Commission further evidence related to its "fairly chosen" argument. MMAOL responded on the same day and expressed the view that, in the interests "of ensuring that there is no further delay in these proceedings, we confirm that we do not oppose the provision of further evidence", subject to various conditions. That evidence was provided and considered as part of the Second Decision.

[104] Following the hearing on 1 August 2016, the MUA on 3 August 2016 at 9:12 pm, advised the Commission that, "new information has come to hand, relevant to this matter, and supporting a different argument than the one that the Commissioner has dealt with to date". Accordingly, the MUA sought to place before the Commission, further evidence and submissions.

[105] MMAOL responded on 4 August 2016 at 7:26 am, advising that it opposed the MUA putting any further evidence or submissions to the Commission.

[106] I have considered the MUA's request and I have determined to exercise my discretion not to receive any further material in relation to the MMAOL's application for approval of the MMAOL Agreement. In exercising my discretion to refuse the MUA's request, I have considered the following:

- the MUA first opposed approval of the MMAOL Agreement on 6 May 2016 and sought to be heard in relation to the application;
- the MUA have, since 6 May 2016, had ample opportunity to put its case opposing approval of the MMAOL Agreement;
- the MUA do not set out the reason or explanation for the delay on why the "new information has come to hand", except to say that it has just "come to hand";
- the MUA do not say what the new information is, or what the "different argument" is. This unwillingness to set out, even in broad terms, what the information is, and the different argument must tell against the MUA;
- due to the MUA's unwillingness to provide the information/argument, the Commission is being asked to prejudice the Applicant without knowing whether the information is relevant, or material, to the matter before the Commission;
- the MUA has been afforded the opportunity to put its case in seeking to be heard in relation to approval of the MMAOL Agreement and I determined, on 25 July 2016, that any further participation by the Union in the matter should cease; and

- as I mentioned at paragraph [88] of the Second Decision, Parliament's intention is that the Commission will act "speedily and informally" in the approval of enterprise agreements. It is just over two (2) months since MMAOL made application for approval of the MMAOL Agreement. Any further delay is prejudicial to the Employer both in terms of additional time, and presumably cost. This additional time/cost will be due to a request from the MUA in which, neither the MMAOL nor the Commission have no knowledge on what the additional evidence/argument is and why it could not have been provided earlier.

Section 183 of the FW Act

[107] The MUA, in its submissions, have sought to be given the opportunity to make application, pursuant to s.183 of the FW Act, that it was a bargaining representative for the proposed enterprise agreement and wants the MMAOL Agreement to cover the Union.

[108] In seeking to be covered by the MMAOL Agreement, the MUA provided, on a confidential basis, a list of its members in the period 18 March to 30 April 2016.

[109] I have checked the names of all five (5) employees against the MUA's list of members and no employee who is employed by MMAOL, and voted on the MMAOL Agreement, is a member of the MUA. Accordingly, pursuant to s.176 of the FW Act, the MUA was not a bargaining representative for the proposed MMAOL Agreement, and cannot make application to have the MMAOL Agreement cover it.

CONCLUSION

[110] Where the Commission has received redacted documents, it has also received from MMAOL un-redacted documents.

[111] The Commission has received an application for approval of the MMAOL Agreement. The MMAOL Agreement is a single enterprise agreement.

[112] For the reasons set out above, I am satisfied that each of the requirements of ss.186, 187 and 188 of the FW Act, as are relevant to this application for approval, have been met. The MMAOL Agreement does not cover all employees of the Employer, however, taking into account the matters in s.186(3) and (3A), I am satisfied that the group of employees was fairly chosen. I am also satisfied that the employees have genuinely agreed to approve the MMAOL Agreement in accordance with ss.186(2) and 188 of the FW Act.

[113] The MMAOL Agreement is approved of today's date and, in accordance with s.54 of the FW Act will operate from 15 August 2016. The nominal expiry date of the MMAOL Agreement is four years from the date of this Decision.

COMMISSIONER

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