



# DECISION

*Fair Work*

*Act 2009*

s.604 - Appeal of decisions

**EnergyAustralia Yallourn Pty Ltd**

**v**

**Construction, Forestry, Maritime, Mining and Energy Union**

(C2021/4498)

VICE PRESIDENT HATCHER  
DEPUTY PRESIDENT HAMILTON  
DEPUTY PRESIDENT GOSTENCNIK

SYDNEY, 28 OCTOBER 2021

*Appeal against decision [2021] FWC 3681 of Deputy President Mansini at Melbourne on 20 July 2021 in matter numbers AG2020/1734 and C2020/4793.*

## **Introduction and background**

[1] EnergyAustralia Yallourn Pty Ltd (Yallourn) has appealed a decision issued by Deputy President Mansini published on 20 July 2021<sup>1</sup> which determined two applications: first, an application made by Yallourn for the variation of clause 13.2 of the *EnergyAustralia Yallourn Enterprise Agreement 2020*<sup>2</sup> (2020 Agreement) pursuant to s 217 of the *Fair Work Act 2009* (FW Act) and, second, an application made by the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) for the Commission to deal with a dispute concerning clause 13.2 of the 2020 Agreement pursuant to the dispute resolution procedure in clause 29 of the Agreement and s 739 of the FW Act. Both matters had an underlying common issue, being the proper construction of clause 13.2 of the 2020 Agreement. The Deputy President determined that Yallourn's application should be dismissed, and determined the question of construction arising from the CFMMEU's application in the CFMMEU's favour. Yallourn has appealed each such determination by separate notices of appeal. It is not in dispute that permission is required for each appeal.

[2] Clause 13 of the 2020 Agreement concerns public holidays. Clause 13.1 provides:

### **13.1 GENERAL**

An Employee shall be entitled to the following as public holidays without loss of pay:

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<sup>1</sup> [2021] FWC 3681

<sup>2</sup> AE508007

New Year's Day, Australia Day, Good Friday, Easter Saturday, Easter Monday, Labour Day, Anzac Day, Queen's Birthday, Melbourne Cup Day, Christmas Day, Boxing Day and any additional public holidays gazetted by the State or Federal governments.

[3] Clause 13.2, which as stated was the subject matter of the two applications before the Deputy President, provides:

### **13.2 SUBSTITUTE DAYS**

For day work Employees only, a substitute day off will be applied when a public holiday occurs on a weekend. The substitute day will normally be observed on the day declared in the Government Gazette or as otherwise agreed by the Parties.

In the case of shift work Employees, public holidays will be observed on the traditional date they occur, unless they happen to fall on another public holiday, in which case a substitute day will be observed on the following day unless otherwise agreed by the Parties.

[4] Clause 13.3 is entitled "*Public Holidays – Day Work Employee*", and for relevant purposes provides in the first sentence that day work employees shall be entitled to time off without loss of pay "*for all public holidays (including substitute days in lieu thereof) created in accordance with clause 13.1*". Clause 13.4 is concerned with public holidays for shift work employees and, relevantly, clause 13.4(a) provides:

In respect to public holidays created under sub-clause 13.1, shift work Employees shall be entitled to the following in addition to their Normal Rate of Pay:

- (a) Shift work Employees who are 'rostered off' on a public holiday shall, at the Employee's discretion be entitled to either:
  - i. an annual leave credit of eight hours; or
  - ii. payment of eight hours at their Normal Rate of Pay.

[5] Clause 10.2 provides that day-work employees are to work a 9-day fortnight, Monday to Friday. Clause 10.3.1 provides for the following types of shift patterns for shift workers:

The roster cycle varies according to the type of shift and working arrangements employed in each workgroup. Generally there are three types of shift work employed at the Company, twelve hour day and night shifts that cover the seven days of the week (known locally as 2x12 shift), twelve hour day shifts that cover the seven days of the week (known locally as 1x12 shift) and a pattern of 10-hour day shifts on weekdays and 6-hour day shifts on weekends (known locally as 1x7 shift).

[6] Yallourn operates a coal mine and power station in Victoria, and the 2020 Agreement applies to its employees within the classifications in the agreement. So far as the CFMMEU is concerned, it represents the industrial interests of maintenance employees, who are day workers, and operators, who are shift workers.

[7] The dispute which gave rise to the proceedings before the Deputy President concerned the provision of substitute days off for day workers pursuant to the first paragraph of clause 13.2. The dispute first arose in April 2020, at a time when the 2020 Agreement had been “made” under the FW Act but was not yet in effect and the enterprise agreement which preceded it, the *EnergyAustralia Yallourn Enterprise Agreement 2017*<sup>3</sup> (2017 Agreement), still operated. The 2017 Agreement contained a provision in the same terms as clause 13.2 of the 2020 Agreement. In 2020, Anzac Day fell on a Saturday, and the day work employees did not receive any substitute public holiday. As a result, the CFMMEU raised on behalf of its members a complaint that Yallourn had failed to comply with the 2017 Agreement in that it had not provided a substitute public holiday for Anzac Day. The 2020 Agreement took effect on 15 May 2020 and, on 19 May 2020, the CFMMEU filed an application for the Commission to resolve the dispute under the 2017 Agreement. The CFMMEU withdrew this application on 11 June 2020 but, on the same day, a CFMMEU official again complained to Yallourn that it was not complying with clause 13.2 of the 2020 Agreement. On 18 June 2020, Yallourn filed its application pursuant to s 217, which sought that clause 13.2 be varied to add the additional words, underlined, as follows:

### **13.2 SUBSTITUTE DAYS**

For day work Employees only, a substitute day off will be applied when a public holiday occurs on a weekend if a substitute day has been declared in the Government Gazette. The substitute day will normally be observed on the day declared in the Government Gazette or as otherwise agreed by the Parties.

[8] On 19 June 2020, the CFMMEU filed its application pursuant to s 739. This application sought that the Commission determine the following question:

For the purposes of clause 13.2 of the *EnergyAustralia Yallourn Enterprise Agreement 2020*, in what circumstances is a day work Employee entitled to a substitute day off when a public holiday occurs on a weekend?

### **The decision**

[9] In her decision, the Deputy President first dealt at length with the evidence concerning the genesis of clause 13.2, which first appeared in the *EnergyAustralia Yallourn Enterprise Agreement 2013* (2013 Agreement)<sup>4</sup> and was then reproduced in the 2017 Agreement and the 2020 Agreement. This evidence mainly concerned the negotiations for the 2013 Agreement.<sup>5</sup> The Deputy President also referred to the statutory context in respect of public holidays provided by s 115 of the FW Act, the recent history of the operation of the *Public Holidays Act 1993* (Vic) (PH Act) and the industrial context provided by the predecessor instruments to the 2013 Agreement and the *Loy Yang B Enterprise Agreement 2018*.<sup>6</sup>

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<sup>3</sup> AE427914

<sup>4</sup> AE405605

<sup>5</sup> [2021] FWC 3681 at [23]-[43]

<sup>6</sup> Ibid at [44]-[49]; AE500958

[10] The Deputy President then determined that, as a matter of procedure, she would determine Yallourn’s application prior to determining the CFMMEU’s application.<sup>7</sup> In doing so, the Deputy President first found that there was no textual ambiguity or uncertainty in clause 13.2:

“[63] On its face, the drafting of the disputed term at clause 13.2 – SUBSTITUTE DAYS is clear. The first sentence plainly provides that, *For day work Employees only, a substituted day off will be applied when a public holiday occurs on a weekend* and it is these words that on their face establish a right or entitlement to a substituted day for a public holiday that occurs on a weekend, with no express qualification related to government gazettal. The second sentence provides for when the substitute day will be observed – that is, *The substitute day will normally be observed on the day declared in the Government Gazette or otherwise as agreed by the Parties*. The second sentence expressly contemplates observance of a substitute day in an alternate circumstance to the day declared in the Government Gazette – that is, it will “otherwise” be observed as agreed by the defined “Parties” (the Company and the Unions). There is nothing in the plain text by which to read the clause down such that a substituted day will only be applied when a public holiday occurs on a weekend *and* is declared by Government Gazette. The remainder of clause 13.2 provides for shift work Employees with whom these applications are not concerned.”

[11] The Deputy President next considered whether surrounding circumstances, to the extent admissible, assisted in identifying ambiguity or uncertainty. The Deputy President first considered the statutory context, and said:

“[65] ...In my view, the history of the variable or inconstant approach to gazetting of substituted days for certain public holidays together with the objective fact that the day work Employees’ roster is only ever worked on Monday to Friday (and therefore does not ordinarily attract the benefit of a public holiday that occurs on a weekend) is context telling of a reason why day work Employees (or their representative) or an employer could be motivated to seek to secure a particular form of words (whether as an additional benefit or ancillary term) in an enterprise agreement. Further the Agreement clearly provides that it supplements the National Employment Standards and there is nothing in this context to suggest that an additional benefit was not intended to be conferred by clause 13.2 of the Agreement. I do not consider this context to otherwise be of assistance to the present task.”

[12] The Deputy President did not consider the history of public holiday entitlements prior to the 2013 Agreement to be of assistance.<sup>8</sup> In relation to the negotiations for the 2013 Agreement, the Deputy President reviewed the evidence and said:

“[74] At its highest, I accept the evidence indicates that *the Company* did not mean what clause 13.2 plainly provides. This intention does not, however, establish the mutual intention of the relevant parties...”

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<sup>7</sup> [2021] FWC 3681 at [50]-[53]

<sup>8</sup> *Ibid* at [66]

[75] The evidence of the views of a handful of participants in negotiations for the 2013 Agreement, since replaced by 2 subsequent agreements, even where they appear *in parts* to be in common, do not establish a common intention of the employees and the employer to the Agreement. To this end, the Company’s position is not assisted by the absence of any explanation to employees about the provision in question. ...In my view, the absence of such explanation does not tell in favour of a finding that employees understood, or could reasonably have understood, that clause 13.2 of the 2013 Agreement (and the subsequent agreements) meant something other than what the plain words provide.”

[13] The Deputy President said that the most relevant objective facts were those which pertained directly to the 2020 Agreement and that it was not contentious that clause 13 and the matter of substituted public holidays were not raised during negotiations for the 2020 Agreement.<sup>9</sup> The Deputy President accepted that evidence of subsequent conduct was admissible to determine whether an ambiguity or uncertainty exists and found that Yallourn has not since the commencement of the 2013 Agreement applied a substitute day for day work employees for any public holiday that falls on a weekend and that no employee had complained about this prior to the complaint made concerning Anzac Day in 2020. However, the Deputy President did not accept that the absence of complaint amounted to a common understanding but rather was best characterised as common inadvertence in that it was likely no one had thought about the issue.<sup>10</sup>

[14] In relation to Yallourn’s application, the Deputy President concluded that the words of clause 13.2 of the 2020 Agreement were clear, no ambiguity could be identified either from the text or the admissible surrounding circumstances, nor was the disputed provision uncertain. She also did not consider that the rival contentions of the parties gave rise to ambiguity or uncertainty or that there was an arguable case for Yallourn’s contention to be made out.<sup>11</sup> The Deputy President went on to say that, even if the jurisdictional threshold in s 217 of ambiguity or uncertainty were met, she would not exercise her discretion to vary the 2020 Agreement because to do so would be to substantively and fundamentally alter the language of the agreement. On this basis, Yallourn’s application was dismissed.<sup>12</sup>

[15] The Deputy President then turned to the CFMMEU’s application and, again, determined that the meaning of clause 13.2 was plain on its face, and said:

“[84] ... The first paragraph of clause 13.2 of the Agreement does two things:

- In the first sentence, it provides an entitlement under the Agreement that, *For day work Employees only a substitute day off will be applied when a public holiday occurs on a weekend.*

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<sup>9</sup> Ibid at [76]

<sup>10</sup> Ibid at [77]

<sup>11</sup> Ibid at [78]

<sup>12</sup> Ibid at [79]-[80]

- In the second sentence, it provides for when the substitute day will be observed. That is, *The substitute day will normally be observed on the day declared in the Government Gazette or as otherwise agreed by the Parties.*

[85] In the absence of any express definition, the reference to “public holiday” in the first paragraph of clause 13.2 is plainly to be understood by reference to that which immediately precedes it, at clause 13.1, which specifies the public holidays that an Employee (not limited to day worker or shift worker) shall be entitled to under the Agreement, without loss of pay, as New Year’s Day, Australia Day, Good Friday, Easter Saturday, Easter Monday, Labour Day, Anzac Day, Queen’s Birthday, Melbourne Cup Day, Christmas Day, Boxing Day and any additional public holidays gazetted by the State or Federal governments. Beyond the plain and express words of clause 13.2, which refers to a substitute day off being applied when a “public holiday” as defined at clause 13.1 occurs on a weekend, there is no other limitation on or circumstance applicable to the days when a substitute day will be applied. Clause 13.3 of the Agreement provides an entitlement for day work Employees to *time off without loss of pay for all public holidays (including substitute days in lieu thereof) created in accordance with clause 13.1*. The bracketed text clarifies the inclusion of substitute days in lieu of all public holidays and all public holidays are created in accordance with clause 13.1 of which the substitute days conferred at 13.2 are plainly in lieu. I do not find support in the surrounding provisions of the Agreement or the admissible surrounding circumstances for any finding to the contrary.”

[16] On the above basis, the Deputy President answered the question posed for determination in the CFMMEU’s application as follows: “for the purposes of clause 13.2 of the Agreement, day work Employees are entitled to the application of a substitute day when a public holiday as defined in clause 13.1 occurs on a weekend”.<sup>13</sup>

### **Appeal grounds and submissions**

[17] Yallourn contends, in its notice of appeal against the Deputy President’s dismissal of its s 217 application, that the decision was in error because the Deputy President erred by failing to find that clause 13.2 of the 2020 Agreement is ambiguous or uncertain within the meaning of s 217 of the FW Act, by failing to find that the mutual intention of Yallourn and its employees was that a substitute holiday would only be provided to day workers when a substitute holiday was provided for under the PH Act, and by finding that she would not exercise the Commission’s discretion under s 217 to vary the Agreement even if the requisite ambiguity or uncertainty existed. In its notice of appeal against the Deputy President’s determination of the CFMMEU’s s 739 application, Yallourn contends that the Deputy President erred in her construction of clause 13.2 by not finding that the provision’s effect is that day workers are only entitled to a substitute day when a public holiday (as defined by clause 13.1) occurs on a weekend if a substitute day for that public holiday is declared by the Victorian Government or one otherwise applies under Victorian public holidays legislation.

[18] In its submissions with respect to the appeals, Yallourn submitted that the language of clause 13.2, the history of how the provision was originally agreed in bargaining for the 2013

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<sup>13</sup> Ibid at [86]

Agreement, and the conduct of the parties since the 2013 Agreement took effect but prior to the making of the 2020 Agreement, demonstrated at least that there was an arguable case that “*substitute day*” under clause 13.2 means one that has been gazetted under the PH Act and that, accordingly, there was the requisite ambiguity for the purpose of s 217. Additionally, it was submitted, uncertainty arises for the purpose of s 217 because:

- Easter Saturday and Easter Sunday always occur on a weekend, without any substitute day under the PH Act, and day workers only work Monday to Friday, and past practice was not to provide a substitute to day workers;
- ANZAC Day occurs on a weekend twice every seven years, traditionally the Victorian Government does not gazette a substitute day, clause 13.2 does not expressly deal with what happens for day workers, and past practice was only to provide a substitute day to day workers when a substitute day was gazetted; and
- the CFMMEU’s current construction (which it has adopted only since after the 2020 Agreement was made) creates uncertainty as to how the words in clause 13.2 “*as otherwise agreed by the Parties*” are to be applied where there is no substitute day gazetted, and no agreement is reached to provide a substitute day.

[19] Yallourn submitted that the discretion in s 217 ought to have been exercised to make the variation to clause 13.2 which it sought in order to give effect to the parties’ mutual intention at the time the 2020 Agreement was made. Not to make the variation would be to leave in place an ambiguity and uncertainty and produce an unjust result.

[20] As to the proper construction of clause 13.2, Yallourn submitted that the phrase “*substitute day*” took its meaning from s 115(2) of the FW Act, which provides that a day that is, under a law of a State or Territory, substituted for a day that would otherwise be a public holiday, is a public holiday, and s 8 of the PH Act, which provides a mechanism for the Victorian Government to declare by notice published in the Government Gazette that a public holiday listed in s 6 of the PH Act is not a public holiday and that a different day is substituted in its place. Thus, it was submitted, clause 13.2 concerned a day declared by the Victorian Government to be a substitute holiday under the PH Act. Yallourn submitted that clause 13.2 is intended to distinguish between (on the one hand) the position of shift workers (who work a continuous 24/7 roster), who are paid public holiday rates for the traditional day (e.g. 25 December) regardless of any substitute days under the PH Act, and (on the other hand) day workers who receive substitute days under the PH Act unless some other substitute day is agreed. This interpretation is consistent with the circumstances pertaining to the negotiation of the 2013 Agreement and the conduct of the parties since this time and, it was submitted, the Deputy President erred in construing clause 13.2 otherwise.

[21] Yallourn submitted that we should grant permission to appeal, quash the determinations made by the Deputy President with respect to both applications, and redetermine the applications ourselves consistent with its submissions.

[22] The CFMMEU submitted that the decision was not attended by appealable error with respect to its determination of either application. In respect of the appeal concerning the dismissal of Yallourn’s s 217 application, the CFMMEU submitted that Yallourn failed to

adduce any evidence establishing that the mutual intention of Yallourn and its employees was that a substitute holiday would only be provided to day workers when a substituted holiday was provided under the PH Act. Whilst Yallourn had adduced evidence about events in bargaining meetings between it and officials of unions which were bargaining representatives, those meetings did not involve the employees and was therefore not evidence of mutual intention, as the Deputy President recognised. It was submitted that, once Yallourn's claimed mutual intention is rejected, Yallourn's submissions in respect of ambiguity and uncertainty are extremely weak, since clause 13.2 is expressed in plain terms and Yallourn's construction of the provision seeks to read in a proviso for which there is no arguable case. The "traditional industrial approach" derived from other industrial instruments was not permissible as an aid to the construction of the agreement provision which was before the Deputy President. The CFMMEU submitted that Yallourn's grounds of appeal concerning the Deputy President's conclusion that she would not exercise her discretion to vary the 2020 Agreement even if ambiguity or uncertainty was established were founded on its contention concerning mutual intention, and that contention should be rejected for the reasons earlier submitted.

[23] In relation to the appeal against the determination of the s 739 application, the CFMMEU submitted that the evidence of surrounding circumstances relied upon by Yallourn to overcome the "*insurmountable difficulties*" for its construction in the text of clause 13.2 should not be taken into account because it did not concern matters which would be notorious or known to the employees bound by the 2020 Agreement and in any event could not be used to contradict the plain meaning of clause 13.2. As to the text of clause 13.2, the CFMMEU submitted:

- clause 13.2 operates with respect to "*when a public holiday occurs on a weekend*", and on its ordinary meaning this cannot be construed as containing the proviso or limitation that a substitute day has been declared in the Government Gazette in respect of that public holiday;
- as the Deputy President found, the bracketed reference in clause 13.3 to "*substitute days in lieu thereof*" fortifies the inclusion that such substitute days operate with respect to all public holidays; and
- Yallourn's construction has the significant problem that it would render the first sentence of clause 13.2 otiose since, if the provision is limited to those public holidays in respect of which a substitute day has been declared the sentence is simply not necessary because day work employees would automatically receive the benefit of the public holiday.

[24] The CFMMEU submitted that permission to appeal should be refused or, alternatively, that the appeals should be dismissed.

### **Consideration**

[25] It is convenient to deal with Yallourn's appeal against the Deputy President's determination of the CFMMEU's s 739 application first. We grant permission to appeal because we consider that the Deputy President's decision is attended with sufficient doubt such as to warrant appellate reconsideration. That doubt arises from three matters.



[26] *First*, the decision does not address the meaning of the expression “*substitute day off*” in clause 13.2. Both the question posed for determination in the CFMMEU’s application, and the answer to that question given by the Deputy President, proceed on the implicit premise that “*substitute day off*” simply means a day off work in substitution for any public holiday falling on a weekend. However, in the case of day workers, it is inapt to describe a day off work as being provided as a “*substitute*” for a public holiday falling on a weekend, since a day worker obviously cannot have a day off work in respect of such a public holiday. This points to the need to pay closer attention to the intended meaning of “*substitute day off*”.

[27] *Second*, the decision also does not address the use of the word “*applied*” in the first sentence of clause 13.2 in connection with “*substitute day off*”. The relevant meaning of “*apply*” is “*to bring to bear; put into practical operation, as a principle, law, rule, etc.*”,<sup>14</sup> and its use in clause 13.2 is more apt to describe the operation of an exteriorly-derived concept rather than the establishment of a stand-alone entitlement.

[28] *Third*, as submitted by Yallourn, the construction of clause 13.2 advanced by the CFMMEU and preferred by the Deputy President leads to an insoluble problem in the second sentence of clause 13.2. It is clear that, under this construction, the first sentence of clause 13.2 establishes an entitlement to a “*substitute day off*” in respect of public holidays falling on weekends for which there may not be, or never will be, any alternative day “*declared in the Government Gazette*”. Easter Saturday is the most obvious example of this. However, the second sentence of the clause provides, in respect of this putative entitlement, that the day on which the “*substitute day off*” is normally to be observed will be “*the day declared in the Government Gazette or as otherwise agreed by the Parties*”. If the “*substitute day off*” is not declared in the Government Gazette, and the day in which it is to be taken is not otherwise “*agreed by the Parties*”, the clause provides no means by which the relevant day is to be determined. The “*Parties*” are defined in clause 1 to mean Yallourn and the five unions identified in clause 2(b) (of which the CFMMEU is one), so the proposition that the requisite six-way agreement may not be reached is not implausible or merely hypothetical.

[29] The conundrum described points to the existence of an alternative approach to the construction of clause 13.2. The way the phrase “*the day declared in the Government Gazette*” is used in the second sentence of the clause in relation to the “*substitute day*” strongly suggests that the “*substitute day*” will necessarily be the subject of a declaration in the Government Gazette; indeed, it would take a strained reading of the sentence to understand it as contemplating that there may not be such a declaration in respect of a “*substitute day*”. If a declaration in the Government Gazette is a presumed incident or characteristic of any “*substitute day*” with which clause 13.2 is concerned, then the problem in the operation of the second sentence earlier identified is resolved: if there is no agreement as to an alternative day, the default will be that the “*substitute day*” is taken on the gazetted date. Further, the premise of a declaration in the Government Gazette would obviously bear upon the intended meaning of “*substitute day off*” and “*applied*” in the first sentence of clause 13.2.

[30] These matters direct attention to the statutory context relevant to public holiday entitlements at the time the 2020 Agreement was made. Because the 2020 Agreement applies

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<sup>14</sup> Macquarie Dictionary

to an enterprise located in Victoria, the PH Act is of obvious relevance in the first instance. Section 6 of the PH Act identifies 13 days as being public holidays in each year: New Year's Day, Australia Day (26 January *or* on the following Monday when this date falls on a Saturday or Sunday), Labour Day, Good Friday, Easter Saturday, Easter Sunday, Easter Monday, Anzac Day, Queen's Birthday, AFL Grand Final, Melbourne Cup Day, Christmas Day and Boxing Day. In addition, there are *additional* public holidays prescribed by s 6 that are contingent upon New Year's Day, Christmas Day or Boxing Day falling on a Saturday or Sunday. Section 7 provides that the relevant Minister may, by notice published in the Government Gazette, appoint additional days or half-days as public holidays in all or part of the State and/or as referable to all or specified classes of persons or bodies.

[31] Section 8 of the PH Act provides:

### **8 Substituted public holidays**

(1) Subject to section 8A, the Minister, by notice published in the Government Gazette, may—

- (a) declare that a day appointed—
  - (i) as a public holiday under section 6; or
  - (ii) as a public holiday or public half-holiday under section 7(1)(a); or
  - (iii) as a public holiday or public half-holiday under this subsection—

is not in a specified year such a holiday; and

- (b) appoint—
  - (i) in the case of a public holiday, another day or 2 half-days;
  - (ii) in the case of a public half-holiday, another half-day or day;
  - (iii) in the case of 2 public half-holidays, another day—

as a public holiday or public half-holiday in that year.

(2) A notice under subsection (1) may be expressed so as to apply—

- (a) throughout the whole of the State or in a specified part of the State; or
- (b) to all persons to whom and bodies to which this Act applies or to a specified class of person or body; or
- (c) as specified in both paragraphs (a) and (b).

(3) The day, half-day or 2 half-days appointed under subsection (1) replaces or replace the public holiday, public half-holiday or public half-holidays for which the day, half-day or 2 half-days was or were substituted.

[32] Section 8 empowers the Minister to appoint, in a specified year, a day as a public holiday instead of a public holiday prescribed under s 6 or an additional public holiday appointed under s 7. Thus, while s 7 is concerned with the declaration of *additional* public holidays, s 8 is concerned with the *substitution* of public holidays. Two aspects of s 8 are noteworthy; first, the section is entitled "*Substituted public holidays*" and s 8(3) refers to public holidays being "*substituted*" and, second, the mechanism by which the Minister appoints a substituted public holiday is by a notice published in the Government Gazette.

[33] Division 10 of Pt 2-2 of the FW Act establishes a national employment standard (NES) with respect to public holidays that operates in conjunction with State and Territory public holidays legislation, including the PH Act. Section 114 provides for an entitlement for an employee to be absent from work on a public holiday, subject to the right of an employer to make a reasonable request for the employee to work on the public holiday. Section 116 provides for an entitlement for an employee to be paid if absent from ordinary hours of work on a public holiday. Section 115 defines what a public holiday is for the purposes of these provisions. The section relevantly provides as follows:

### **115 Meaning of public holiday**

#### *The public holidays*

(1) The following are **public holidays**:

(a) each of these days:

- (i) 1 January (New Year's Day);
- (ii) 26 January (Australia Day);
- (iii) Good Friday;
- (iv) Easter Monday;
- (v) 25 April (Anzac Day);
- (vi) the Queen's birthday holiday (on the day on which it is celebrated in a State or Territory or a region of a State or Territory);
- (vii) 25 December (Christmas Day);
- (viii) 26 December (Boxing Day);

(b) any other day, or part-day, declared or prescribed by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of the State or Territory, as a public holiday, other than a day or part-day, or a kind of day or part-day, that is excluded by the regulations from counting as a public holiday.

#### *Substituted public holidays under State or Territory laws*

(2) If, under (or in accordance with a procedure under) a law of a State or Territory, a day or part-day is substituted for a day or part-day that would otherwise be a public holiday because of subsection (1), then the substituted day or part-day is the **public holiday**.

#### *Substituted public holidays under modern awards and enterprise agreements*

(3) A modern award or enterprise agreement may include terms providing for an employer and employee to agree on the substitution of a day or part-day for a day or part-day that would otherwise be a public holiday because of subsection (1) or (2).

...

Note: This Act does not exclude State and Territory laws that deal with the declaration, prescription or substitution of public holidays, but it does exclude State and Territory laws that relate to the rights and obligations of an employee or employer in relation to public holidays (see paragraph 27(2)(j)).

[34] The following observations may be made about the effect of s 115 specifically in respect of Victoria:

- (1) Paragraphs (a) and (b) of subsection (1), taken together, render the public holidays established by s 6 of the PH Act as public holidays for the purpose of the NES in the FW Act. Easter Saturday, for example, which is prescribed as a public holiday in s 6 of the PH Act, is picked up by paragraph (b) even though it is not specified as one of the named public holidays in paragraph (a). Paragraph (b) also picks up any additional public holidays prescribed under s 7 of the PH Act.
- (2) Subsection (2) renders any substituted public holiday declared by the Minister in a notice published in the Government Gazette under s 8 of the PH Act as a public holiday for the purpose of the NES.

[35] More broadly, it may be observed that s 115(2) incorporates for the purpose of the NES the concept of “*Substituted public holidays*” declared under a law of a State or Territory. This recognises that State and Territory public holidays statutes in most cases have a provision equivalent to s 8 of the PH Act.<sup>15</sup> The statutory note to the section refers to s 27(2)(j), which provides that State or Territory laws that deal with, *inter alia*, the “*substitution*” of public holidays are not excluded by the FW Act.

[36] Section 55(1) of the FW Act provides that, relevantly, an enterprise agreement must not “*exclude*” any provision of the NES. Section 55(2)(a) permits an enterprise agreement to include any terms permitted to be included by a provision of Pt 2-2; thus, an enterprise agreement may include a provision for “*Substituted public holidays*” in accordance with s 115(3). Section 55(4) also permits enterprise agreements to include terms that are ancillary or incidental to the operation of a NES entitlement or that supplement the NES, and s 55(5) permits an enterprise agreement to include terms that have the same, or substantially the same, effect as provisions of the NES.

[37] We consider that this legislative context guides the proper construction of clause 13.<sup>16</sup> Clause 13.1 provides that an employee “*shall be entitled*” to the identified public holidays without loss of pay, and it essentially repeats the effect of s 115(1) and s 116 of the FW Act and ss 6 and 7 of the PH Act (noting that some of the holidays specifically named in s 115(1)(a) of the FW Act or s 6 of the PH Act would fall under the rubric “*any additional public holidays gazetted by the State or Federal governments*” in clause 13.1). As such, clause 13.1 may be regarded as a provision authorised by s 55(5) of the FW Act.

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<sup>15</sup> *Public Holidays Act 2010* (NSW), s 6; *Holidays Act 1983* (Qld), s 3; *Holidays Act 1910* (SA), s 5; *Public and Bank Holidays Act 1972* (WA), s 8; *Public Holidays Act 1981* (NT), s 7

<sup>16</sup> See *Ancor Ltd v Construction, Forestry, Mining and Energy Union* [2005] HCA 10, 222 CLR 241 at [13] per Gleeson CJ and McHugh J

[38] In respect of clause 13.2, the legislative context suggests that, insofar as the provision is entitled “*Substitute Days*” and both paragraphs of the clause use the expression “*substitute day*”, the subject matter of the clause is substituted public holidays declared under s 8 of the PH Act, as incorporated into the NES by s 115(2) of the FW Act. This is confirmed by the second sentence in the first paragraph of clause 13.2 which, as earlier discussed, conveys on its most natural reading that a declaration in the Government Gazette is a necessary incident of a “*substitute day off*”, consistent with s 8 of the PH Act. Understood this way, the clause is concerned with how substituted public holidays declared under s 8 of the PH Act are to be applied to employees covered by the 2020 Agreement. In this respect, as Yallourn submitted, clause 13.2 distinguishes between day work employees, who are dealt with in the first paragraph, and shift work employees, who are dealt with in the second paragraph.

[39] In respect of day work employees, the first sentence of the clause uses the verb “*applied*” in respect of substitute days off, and this provides further confirmation, consistent with our earlier observation about the ordinary meaning of “*apply*”, that the provision is concerned with the practical operation of substitute public holidays established exteriorly to the 2020 Agreement by s 8 of the PH Act. As also earlier stated, “*applied*” is not suggestive of the establishment of a separate entitlement, and its use in clause 13.2 is to be contrasted to the use of the expression “*shall be entitled*” in clause 13.1, as well as in clauses 13.3 and 13.4. The effect of the first sentence is that, even though day work employees work ordinary hours only from Monday to Friday, a holiday declared under s 8 of the PH Act to be in substitution for any public holiday specified in clause 13.1 occurring on a weekend will be applied to them (presumably on the assumption that the substituted day will be on Monday-Friday). The effect of the second sentence is that the substitute day will be observed on the gazetted day, unless it is agreed between “*the Parties*” that it is to be observed on a different day.

[40] The second paragraph of clause 13.2 provides for a different approach to be taken for shift work employees (who may, unlike day work employees, be rostered to work ordinary hours on weekends). Its effect is that the public holidays specified in clause 13.1 shall be observed on their traditional dates even if a substitute holiday has been declared under s 8 of the PH Act, unless one public holiday coincides with another in which case the following day or another agreed day will be observed.

[41] Clauses 13.3 and 13.4 operate consistently with the construction of clause 13.2 which we prefer. The first sentence of clause 13.3 provides that day work employees will be entitled to time off without loss of pay for all public holidays “*including substitute holidays in lieu thereof*”. The expression “*in lieu*” suggests that a substitute holiday will always be instead of or in replacement for a public holiday identified in clause 13.1 – which is consistent with a substitute holiday being one declared under s 8 of the PH Act, but is not consistent with the approach preferred by the Deputy President whereby a substitute day applies in respect of a public holiday which remains as such but merely falls on a weekend. Clause 13.4(a) provides that a shift work employee “*shall... be entitled to*” an annual leave credit of 8 hours, or 8 hours’ pay, for any public holiday falling on a day that the employee is not rostered to work. Two things may be noted. First, the provision uses clear and unambiguous language of entitlement in conferring this benefit, in contrast to the first sentence of clause 13.2. Second, the rationale for the entitlement is to ensure equal treatment of shiftworkers, so that all shift workers will receive the same degree of public holiday benefits regardless of the roster they are required to work. That rationale is absent for day workers.

[42] Two matters of historical industrial context the subject of findings in the Deputy President’s decision support our preference for the above approach to the construction of clause 13.2 over that adopted by the Deputy President:

- (1) During the negotiations for the 2013 Agreement, the maintenance unions sought that day work employees be entitled to a holiday on Easter Tuesday as a substitute for Easter Saturday. Yallourn initially conceded this, and it formed part of an offer by Yallourn for a new agreement. However, after this offer was rejected in a vote of all employees and industrial action by CFMMEU members followed, Yallourn took this concession “off the table”. A modified proposed agreement was subsequently put to a vote of employees and approved after an in-principle agreement was reached first with the CFMMEU and then the other unions. The explanatory document for the proposed agreement provided to employees pursuant to s 180(5) did not identify clause 13.2 as providing for any new or substantially different entitlement than the preceding agreement (which did not provide any entitlement to “non-gazetted” substitute days for public holidays falling on weekends), nor did the statutory declaration which accompanied the application for approval of the 2013 Agreement identify clause 13.2 as a more beneficial term when compared with the relevant award for the purpose of the better off overall test. This demonstrates that there was never any mutual intention for the equivalent provision in the 2013 Agreement to the current clause 13.2 to provide day workers with public holidays they would not otherwise be entitled to under s 115 of the FW Act (or under the PH Act).
- (2) At all times from the approval of the 2013 Agreement to the date the 2020 Agreement was made (15 March 2020, before Anzac Day that year), Yallourn has applied the predecessor provisions of the current clause 13.2 contained in the 2013 Agreement and the 2017 Agreement in a manner consistent with the construction we prefer and inconsistent with the construction adopted by the Deputy President, without complaint from the CFMMEU or any other union or any employee. This established prior practice and understanding weighs strongly against there having been any mutual understanding that clause 13.2 would operate according to the construction preferred by the Deputy President.

[43] For the above reasons, we consider that the Deputy President’s determination of the CFMMEU’s s 739 application was in error. The correct construction of clause 13.2 is that a “*substitute day off*” in the first paragraph means a substitute day that is declared as such in the Government Gazette pursuant to s 8 of the PH Act and thereby constitutes a public holiday under the NES by virtue of s 115(2) of the FW Act. We will therefore uphold the appeal in respect of the determination of the s 739 application and substitute our construction of clause 13.2 for that of the Deputy President.

[44] A question was raised at the hearing of the appeal as to whether the second sentence of clause 13.2, insofar as it permits the day of the observance of a substitute day to be the subject of agreement of “*the parties*” (that is, Yallourn, the CFMMEU and the other four unions), is permissible to be included in an enterprise agreement under s 115(3) (which refers to agreement

between an employer and an employee) or, alternatively, s 55(4). However, this is a separate issue which is not necessary to be determined in this appeal.

[45] Having regard to the conclusion we have reached concerning Yallourn’s appeal against the Deputy President’s determination of the s 739 application, there is no utility in us considering Yallourn’s appeal against the dismissal of its s 217 application. Permission to appeal is therefore refused in respect of that appeal.

## Orders

[46] In respect of the appeal against the Deputy President’s determination of the application in matter C2020/4793, we order as follows:

- (1) Permission to appeal is granted.
- (2) The appeal is upheld.
- (3) In substitution for the Deputy President’s determination of the application ([2021] FWC 3681 at [86]), the application is determined as follows: The correct construction of clause 13.2 of the *EnergyAustralia Yallourn Enterprise Agreement 2020* is that a “*substitute day off*” in the first paragraph means a substitute day that is declared as such in the Government Gazette pursuant to s 8 of the *Public Holidays Act 1993* (Vic) and thereby constitutes a public holiday under the NES by virtue of s 115(2) of the *Fair Work Act 2009* (Cth).

[47] In respect of the appeal against the Deputy President’s dismissal of the application in matter AG2020/1734, permission to appeal is refused.



VICE PRESIDENT

*Appearances:*

*B Avallone of counsel* for the appellant.

*Y Bakri of counsel* on behalf of the CFMMEU.

*Hearing details:*

2021.

Sydney and Melbourne (via video-link):

[2021] FWCFB 6037

16 September.

*Final written submissions:*

30 September 2021.

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# DECISION

*Fair Work Act 2009*

s.217—Enterprise agreement

s.739—Dispute resolution

## **EnergyAustralia Yallourn Pty Ltd**

(AG2020/1734)

and

## **Construction, Forestry, Maritime, Mining and Energy Union**

v

## **EnergyAustralia Yallourn Pty Ltd**

(C2020/4793)

DEPUTY PRESIDENT MANSINI

MELBOURNE, 20 JULY 2021

*Variation and dispute applications in relation to the EnergyAustralia Yallourn Enterprise Agreement 2020.*

[1] This decision concerns two applications about the same public holidays provision at clause 13 of the *EnergyAustralia Yallourn Enterprise Agreement 2020* (Agreement):

- the first, made by EnergyAustralia Yallourn Pty Ltd (Company) for variation of clause 13.2 of the Agreement under s.217 of the *Fair Work Act 2009* (Cth) (Act) (Variation Application);<sup>1</sup>
- the second, made by the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) for the Commission to deal with a dispute about clause 13.2 in accordance with the dispute resolution process at clause 29 of the Agreement and s.739 of the Act (Dispute Application).<sup>2</sup>

[2] Both applications are concerned with the entitlement of a day work employee to the application of a substitute day off for public holidays that occur on a weekend.

[3] Essentially: the Company contends that the public holiday provision of the Agreement is ambiguous or uncertain and seeks an order that certain words should be inserted in clause 13.2 by way of variation; whereas the CFMMEU contends that there is no ambiguity or uncertainty, the Commission should not be satisfied to order a variation, and its dispute would be resolved by determination of a particular question. The Company proposed an alternate question.

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<sup>1</sup> AG2020/1734 filed on 18 June 2020.

<sup>2</sup> C2020/4793 filed on 19 June 2020.

## The Agreement

[4] The Agreement covers (and is also expressed as applying to):

- a) The Company and/or any successor(s);<sup>3</sup>
- b) All employees of the Company who are members of, or who are eligible to be members of, any of the organisations of employees party to the Agreement and who are employed to work in classifications in Appendix 1 (Employees).<sup>4</sup>

[5] The approval decision notes that the Agreement covers the following unions, also named in the application clause of the Agreement and, together with the Company, defined as “Parties” to the Agreement:

- a) CFMMEU;
- b) “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU);
- c) Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU);
- d) Australian Municipal, Administrative, Clerical and Services Union (ASU);
- e) The Australian Workers’ Union (AWU),  
(together, the Unions).<sup>5</sup>

[6] The Agreement was approved on 8 May 2020. It commenced operating on 15 May 2020 and its nominal expiry date is 1 February 2023.

[7] By clause 2 of the Agreement, it expressly operates to the exclusion of all other industrial instruments which would otherwise apply to the Employees. It replaced the *EnergyAustralia Yallourn Enterprise Agreement 2017* (2017 Agreement) and is the most recent in a relatively long line of industrial instruments.

[8] Clause 2 also provides that the Agreement supplements and contains terms ancillary and/or incidental to the National Employment Standards in the Act (NES) but, where there is an inconsistency between the Agreement and the NES provides a greater benefit, the NES provision applies to the extent of the inconsistency. Here it is also said to settle “all the claims” of the Company, the Unions and the Employees in respect of terms and conditions of employment for its duration.<sup>6</sup>

[9] Clause 13 – Public Holidays is subject of the applications (extracted in full at Annexure A).

## Issues for determination

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<sup>3</sup> Clause 2(a) of the Agreement.

<sup>4</sup> Clause 2 of the Agreement, see also definition of “Parties” at clause 1 which “means the Company and Unions as defined in clause 2”.

<sup>5</sup> [2020] FWCA 2439 at [3]; Clause 2(b) of the Agreement; Clause 1 of the Agreement.

<sup>6</sup> Clause 2 of the Agreement.

[10] By its Variation Application, the Company seeks an order that subclause 13.2 of the Agreement is varied by inserting the following underlined words, effective from the date of commencement of the Agreement:

### 13.2 SUBSTITUTE DAYS

For day work Employees only, a substitute day off will be applied when a public holiday occurs on a weekend if a substitute day has been declared in the Government Gazette. The substitute day will normally be observed on the day declared in the Government Gazette or as otherwise agreed by the Parties.<sup>7</sup>

[11] By its Dispute Application, the CFMMEU asks the Commission to resolve the dispute by determining the following question:

For the purposes of clause 13.2 of the EnergyAustralia Yallourn Enterprise Agreement 2020, in what circumstances is a day work Employee entitled to a substitute day off when a public holiday occurs on a weekend?

(CFMMEU's Question)<sup>8</sup>

[12] The Company contended for an alternate question to be determined:

Is the meaning of clauses 13.1 and 13.2 of the EnergyAustralia Yallourn Enterprise Agreement 2020, as varied by the Commission pursuant to s 217 if at all, that day workers are entitled to a substitute day only when both of the following conditions are satisfied:

- a. a public holiday as defined in clause 13.1 occurs on a weekend; and
- b. a substitute day for that public holiday is declared by the Victorian Government.

(the Company's Question)<sup>9</sup>

[13] As a preliminary matter, it was determined that the matter proceed on the basis of the CFMMEU's Question and that this did not preclude the Company from addressing the Commission about its (narrower) question.

### The evidence

[14] The following witnesses gave evidence to the Commission:

- a) Mr Peter Chapple, former employee of the Company (and its predecessor, the State Electricity Commission) and retired since July 2017;
- b) Mr Branko Alexander Bukarica, National Legal Director for the Mining and Energy Division of the CFMMEU;
- c) Mr Geoffrey Wayne Dyke, Secretary of the Victorian District Branch of the CFMMEU, for the CFMMEU;

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<sup>7</sup> F10 Application at 2.1.

<sup>8</sup> CFMMEU's Proposed Question for Arbitration filed on 17 August 2020.

<sup>9</sup> EnergyAustralia's Proposed Question for Arbitration filed on 17 August 2020..

- d) Mr Geoffrey Thomas Aitken, Organiser with the Victorian District Branch of the CFMMEU (Lodge President from 2012 to 2018);
- e) Mr Stephen Dodd, organiser for the AMWU.

[15] For completeness, a Ms Mitchell and a Mr Hardy filed statements but the CFMMEU ultimately did not rely upon them and I have not had regard to this material.<sup>10</sup>

[16] The evidence before the Commission is summarised in the following paragraphs, and is not contentious except where indicated.

#### *Operational context*

[17] The Company operates a coal mine and power station in Yallourn, in the state of Victoria. The power station operates 24 hours a day, 365 days a year.

[18] Under the Agreement, Employees work either as day workers (a 9 day fortnight Monday to Friday with every second Monday as an RDO) or as shift workers.<sup>11</sup> Maintenance employees are day workers (day work Employees) and operators are shift workers (shift work Employees).<sup>12</sup>

#### *Genesis of the applications*

[19] In 2020, the ANZAC day public holiday fell on a Saturday and the day work Employees did not receive a substitute day. Mr Dyke first became aware of this when the CFMMEU was approached by some of its members following 25 April 2020.<sup>13</sup>

[20] On 30 April 2020, Mr Dyke first raised alleged non-compliance with clause 13 with the Company, under the 2017 Agreement and specifically in relation to ANZAC Day.<sup>14</sup> On 15 May 2020, the Agreement commenced operation. On 19 May 2020 the CFMMEU, not being satisfied with the Company's response, applied for the Commission's assistance to resolve the dispute it had raised under the 2017 Agreement. On 11 June 2020, that application was withdrawn.<sup>15</sup>

[21] Also on 11 June 2020, alleged non-compliance with clause 13 was raised by Mr Dyke with the Company; this time under the Agreement and in relation to public holidays falling on weekends (that correspondence did not specifically confine the issue to ANZAC Day).<sup>16</sup>

[22] On 18 June 2020, the Company filed the Variation Application. On 19 June 2020, the CFMMEU filed the Dispute Application.

#### *Genesis of the provision in question*

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<sup>10</sup> PN26-30 on 17 November 2021.

<sup>11</sup> Clauses 10.2 and 10.3 of the Agreement.

<sup>12</sup> Mr Dodd on Transcript at PN606 on 8 February 2021; Mr Aitken on Transcript at PN328 on 8 February 2021.

<sup>13</sup> First Witness Statement of Mr Peter Chapple at Annexure PC-32; Witness Statement of Mr Geoffrey Dyke at 26.

<sup>14</sup> First Witness Statement of Mr Peter Chapple at Annexure PC-32; Mr Dyke on Transcript at PN161-162 and PN226 on 8 February 2021.

<sup>15</sup> First Witness Statement of Mr Peter Chapple at Annexure PC-34.

<sup>16</sup> First Witness Statement of Mr Peter Chapple at Annexure PC-35.

**[23]** It is common ground that clauses 13.1 and 13.2 of the Agreement first appeared in the *EnergyAustralia Yallourn Enterprise Agreement 2013* (2013 Agreement) and were then replicated in identical form in the 2017 Agreement and the Agreement.<sup>17</sup>

**[24]** Mr Dyke did not raise public holiday substitution for day workers in the negotiations for the Agreement or the 2017 Agreement; nor did Mr Aitken or other union officials raise it with Mr Dyke at those times.<sup>18</sup> There is no evidence before the Commission that the issue was otherwise raised in the negotiations for the Agreement or the 2017 Agreement. There is no evidence that these provisions were explained to the relevant employees in requesting their approval of the Agreement or the 2017 Agreement.

**[25]** The evidence about the negotiations for the 2013 Agreement is summarised in the following paragraphs.

**[26]** Of the witnesses that gave evidence to the Commission, Mr Chapple, Mr Dodd and Mr Aitken were involved throughout the negotiations for the 2013 Agreement, and Mr Bukarica became involved in the latter part of the negotiations.<sup>19</sup>

**[27]** It was not contentious that the AMWU, the CEPU, the AWU and the ASU represented by Mr Dodd, Mr Mooney, Mr Wright and Mr Sharp were bargaining representatives of maintenance workers (day work Employees) employed by the Company at Yallourn during these negotiations.<sup>20</sup> As to the role of the Construction, Forestry, Mining and Energy Union, as it then was (CFMEU): Mr Dyke (who was not involved in the 2013 negotiations) believed that the CFMEU did not have any members who were day workers during the negotiations for the 2013 Agreement;<sup>21</sup> Mr Dodd (of the AMWU) said he thought the bulk of the CFMEU members were operators but there were some others that were CFMEU members, he could not say whether they had maintenance worker members in the 2013 negotiations;<sup>22</sup> and Mr Aitken (then Lodge President of the CFMEU) recalled that initially there were no CFMEU members but by the end of the (bargaining) dispute and in the 2013 negotiations, there were some 3 or 4 maintenance workers who had become members of the CFMEU.<sup>23</sup>

**[28]** One of the claims for day work Employees, and according to Mr Dodd one of the main issues for the AMWU's members in the 2013 negotiations, was a substitute day for Easter Saturday on Easter Tuesday.<sup>24</sup> Mr Chapple recalled that the specific claim by the maintenance unions (not the CFMEU) was for the Easter Tuesday substitute day for Easter Saturday for day work Employees.<sup>25</sup>

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<sup>17</sup> First Witness Statement of Mr Peter Chapple at Annexures PC-2, PC-3 and PC-4.

<sup>18</sup> Witness Statement of Mr Geoffrey Dyke at 29; Mr Dyke on Transcript at PN176, 182, PN205-206, PN34-35, PN212, PN215-217 and PN223-224 on 8 February 2021; Mr Aitken on Transcript at PN329-332 and PN445-446 on 8 February 2021.

<sup>19</sup> First Witness Statement of Mr Peter Chapple; Mr Dodd on Transcript at PN559 on 8 February 2021; Mr Aitken on Transcript at PN299 on 8 February 2021; Mr Bukarica on Transcript at PN680-681 on 17 November 2021.

<sup>20</sup> Mr Aitken on Transcript at PN383-384 on 8 February 2021; First Witness Statement of Mr Peter Chapple at 30.

<sup>21</sup> Mr Dyke on Transcript at PN189 on 8 February 2021.

<sup>22</sup> Mr Dodd on Transcript at PN592 and PN605 on 8 February 2021.

<sup>23</sup> Mr Aitken on Transcript at PN329-334 on 8 February 2021.

<sup>24</sup> Mr Dodd on Transcript at PN555-557 on 8 February 2021; First Witness Statement of Mr Peter Chapple at 36.

<sup>25</sup> Second Witness Statement of Mr Peter Chapple at 22.

[29] The CFMEU's initial log of claims or "starting position" in bargaining for what would become the 2013 Agreement included a different form of words regarding the public holidays provision to that in the 2008 Agreement. The Company responded that its "starting position" in bargaining regarding public holidays was the same wording as clause 17.6 of the 2008 Agreement.<sup>26</sup> The clauses that were proposed as respective "starting positions" are extracted at Annexure B – Evolution of clauses 13.1 and 13.2 in negotiations for the 2013 Agreement. Mr Chapple and Mr Aitken both said there was "not much" discussion about substitute days in their negotiations for the 2013 Agreement. Mr Aitken did not recall the issue of substitute public holidays being a "major issue" in the bargaining. According to Mr Chapple, Mr Aitken was not representing the principal organisations involved in the discussions which led to in-principle agreement on this claim because it was not part of the CFMEU's log of claims.<sup>27</sup>

[30] At some point prior to March 2013, there was in principle agreement reached between the Company and the maintenance unions to include Easter Tuesday as a substitute for day workers.<sup>28</sup> A record of 4 March 2013 reflected such agreement, specific to Easter Tuesday and using the phrase "catch all" which Mr Chapple said was a reference to the intended simplification of the very detailed drafting in the 2008 Agreement.<sup>29</sup> In March 2013, the Company made an offer to the unions which attached a draft agreement. The Company's letter of offer acknowledged this was an alternative to the unions' log of claims and draft agreement and was the Company's view of the best way to give effect to its offer although it was open to "wordsmithing".<sup>30</sup> The relevant clause from that offer is extracted at Annexure B.<sup>31</sup> That offer was subsequently communicated to employees in a bargaining update which said:

***"Tuesday after Easter Monday will be recognised as a Public Holiday in substitute for Easter Saturday for day workers. (New Clause)."***

and this offer was rejected by the CFMEU.<sup>32</sup>

[31] Mr Chapple recalled that during intensive discussions at the CFMEU offices in early April 2013 it was Mr Hardy, a CFMEU bargaining representative (and then Secretary of the Victorian District of the Mining and Energy Division), who suggested that the CFMEU's public holidays clause be adopted as a "*non-controversial amendment*" but with an amendment to pick up the agreement in principle regarding Easter Tuesday.<sup>33</sup> Mr Chapple recalled "*Our focus was on reflecting the Easter Tuesday substitute day*" and there was discussion about the provision of a substitute day to be changed by agreement, which he said was "*in relation to the fact that the substitute day declared in the Government Gazette might not be the most convenient day for EnergyAustralia or the employees*".<sup>34</sup>

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<sup>26</sup> First Witness Statement of Mr Peter Chapple at 33-34 and Annexure PC-10.

<sup>27</sup> Witness Statement of Mr Geoffrey Aitken at 49; Second Witness Statement of Mr Peter Chapple at 8 and 9.

<sup>28</sup> Mr Dodd on Transcript at PN599 on 8 February 2021; First Witness Statement of Mr Peter Chapple at 37 and Annexure PC-11.

<sup>29</sup> Third Witness Statement of Mr Peter Chapple at 31 and 32.

<sup>30</sup> Second Witness Statement of Mr Peter Chapple at Annexure PC-37.

<sup>31</sup> Second Witness Statement of Mr Peter Chapple at Annexure PC-38.

<sup>32</sup> First Witness Statement of Mr Peter Chapple at 44-46.

<sup>33</sup> First Witness Statement of Mr Peter Chapple at 41 and Annexure PC-4; Mr Aitken on Transcript at PN451-452 on 8 February 2021.

<sup>34</sup> First Witness Statement of Mr Peter Chapple at 41 and 42.

[32] Mr Chapple also recalled that, with one exception, there was never any suggestion in the bargaining meetings that he attended that the effect of the proposed clause would be to provide a substitute for public holidays that occurred on a weekend if not gazetted by the Government. The exception, he said, was Easter Tuesday being a substitute for Easter Saturday.<sup>35</sup> Mr Dodd did not recall there being discussion about an ANZAC Day substitute during the negotiations for the 2013 Agreement, the only thing he could remember about public holidays that was discussed in those negotiations was the claim for an Easter Tuesday substitute for Easter Saturday.<sup>36</sup> Mr Aitken also did not recall any discussion about the Easter Tuesday substitute being an example of a broader claim for a substitute day for day workers any time a public holiday fell on a weekend or any suggestion that the effect of the maintenance unions' claim would be to provide a substitute day for day workers any time a public holiday fell on a weekend.<sup>37</sup>

[33] From 8 to 12 April 2013, there were 5 days of intensive negotiations between the Company and the CFMEU. The form of words that was being discussed as at 11 April 2013 is at Annexure B and Mr Chapple said this included Mr Hardy's words plus an addition to reflect the agreement in relation to Easter Tuesday as a substitute day for Easter Saturday.<sup>38</sup>

[34] By 12 April 2013, Mr Chapple considered that bargaining had reached an impasse and the parties were unlikely to reach agreement.<sup>39</sup>

[35] On 24 April 2013, the Company circulated its proposed agreement along with a letter and explanatory document. Mr Chapple's evidence was that the proposed public holidays provision reflected the 2008 Agreement with the new content marked up.<sup>40</sup> The explanatory document explained the proposed changes to the 2008 Agreement in the proposed agreement that employees were being requested to vote on at that time, and relevantly provided:

*"This clause has been amended to provided that for any day workers the Tuesday after Easter Monday will be recognised as a Public Holiday in substitute for Easter Saturday."*<sup>41</sup>

(The relevant clause from the proposed agreement that was put to a vote in May 2013 is at Annexure B.<sup>42</sup>)

[36] The CFMEU rejected the first proposed agreement that was put to a vote on 2 May 2013, campaigned for a "no vote" and it was voted down.<sup>43</sup> On 23 May 2013, the Company proposed to negotiate a separate enterprise agreement with the maintenance unions but also extended the

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<sup>35</sup> First Witness Statement of Mr Peter Chapple at 43.

<sup>36</sup> Mr Dodd on Transcript at PN583-584 and PN586 on 8 February 2021.

<sup>37</sup> Witness Statement of Mr Geoffrey Aitken at 58; Mr Aitken on Transcript at PN371-381 on 8 February 2021.

<sup>38</sup> First Witness Statement of Mr Peter Chapple at 49, 50 and Annexure PC-14.

<sup>39</sup> First Witness Statement of Mr Peter Chapple at 48.

<sup>40</sup> First Witness Statement of Mr Peter Chapple at 54 to 58 and Annexure PC-18.

<sup>41</sup> First Witness Statement of Mr Peter Chapple at Annexure PC-19; Mr Aitken on Transcript at PN407-408 on 8 February 2021.

<sup>42</sup> First Witness Statement of Mr Peter Chapple at PC-18.

<sup>43</sup> Mr Aitken on Transcript at PN411-414 on 8 February 2021; Mr Dodd on Transcript at PN637-639 on 8 February 2021; First Witness Statement of Mr Peter Chapple at 59.

invitation to the CFMEU as a bargaining representative of those of its members who would be covered by a separate maintenance agreement.<sup>44</sup>

[37] Between June and September 2013, the bargaining became difficult involving various legal proceedings and the Company taking industrial action in the form of a lock out of some employees.<sup>45</sup> In this period, after the first proposed agreement was voted down in May 2013, the CFMEU negotiated directly with the Company, and in those direct discussions did not press the maintenance unions' claim for a substitute for Easter Saturday for day workers. The maintenance unions were not part of the negotiation meetings between the Company and the CFMEU between May and October 2013.<sup>46</sup> The CFMEU's focus was on issues to do with the operators at the site, according to Mr Bukarica, primarily because they were the employees who were locked out and "we had to fix that dispute".<sup>47</sup> The CFMEU was not addressing the public holidays provisions in these negotiations because it did not concern the operators.<sup>48</sup>

[38] Mr Chapple recalled that, when bargaining resumed after a period of industrial action, the drafting of what would become clauses 13.1 and 13.2 of the 2013 Agreement largely reverted to the approach taken in the offer that had been put to a vote in May 2013 but with an additional sentence added:

*"If day work employees are required to work on Easter Saturday they will attract normal day rates."*

(The clause from the proposed agreement as at 12 August 2013 is at Annexure B.<sup>49</sup>)

[39] Mr Chapple also recalled that the Company's position after the lengthy industrial action was that it could no longer afford to agree to some of the claims previously agreed in principle with the maintenance unions, some of the "*more minor matters*" such as the claim for Easter Tuesday were now off the table.<sup>50</sup> Mr Aitken was not there every day but did not recall there being a suggestion in the negotiations that led to the proposed agreement being put to a vote in October 2013 that there would be a substitute day for Easter Saturday for day workers, or that there would be a substitute for ANZAC Day, unless it was gazetted.<sup>51</sup>

[40] Once a deal was effectively done in principle between the Company and the CFMEU, Mr Chapple emailed the maintenance unions, on 25 September 2013.<sup>52</sup> The email said that negotiations with the CFMEU had concluded, attached the draft agreement that would be put to the CFMEU members for endorsement and stated that the Company "*has withdrawn any previous offers made and now invite the Maintenance Unions to meet with the Company to*

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<sup>44</sup> Witness Statement of Mr Aitken at 35-36; Second Witness Statement of Mr Peter Chapple at 18.

<sup>45</sup> First Witness Statement of Mr Peter Chapple at 60; Mr Dodd on Transcript at PN596 on 8 February 2021.

<sup>46</sup> Mr Aitken on Transcript at PN415-416 on 8 February 2021; Mr Dodd on Transcript at PN608 on 8 February 2021 ;  
Witness Statement of Mr Branko Bukarica at 13 and 18.

<sup>47</sup> Mr Bukarica on Transcript at PN690 on 17 November 2020.

<sup>48</sup> Mr Bukarica on Transcript at PN685, PN688-689, and PN718 on 17 November 2020; Witness Statement of Mr Branko Bukarica at 18; Mr Aitken on Transcript at PN335-336 and PN349-353 on 8 February 2021; First Witness Statement of Mr Peter Chapple at 37.

<sup>49</sup> First Witness Statement of Mr Peter Chapple at Annexure PC-20.

<sup>50</sup> First Witness Statement of Mr Peter Chapple at 63.

<sup>51</sup> Mr Aitken on Transcript at PN418-419 on 8 February 2021.

<sup>52</sup> First Witness Statement of Mr Peter Chapple at Annexure PC-22.



*discuss the attached with a view to reach an agreement*". When taken to the document in cross examination, Mr Dodd accepted that it was "*pretty clear*" from that email that previous offers made had now been withdrawn and that which had previously been agreed was now "*off the table*" and accepted the proposition that the Easter Tuesday substitute claim was "*lost*".<sup>53</sup> However, when put to him that this was in contradiction to his written evidence that the CFMEU's words meant that day workers were provided with a substitute day for all public holidays that fell on a weekend,<sup>54</sup> Mr Dodd did not accept this, saying he would have liked to see the "Easter Tuesday" words in the agreement, he thought the guys were getting the public holiday, then said that he had become confused and sought to refer to the agreement.<sup>55</sup> After being shown the agreement, Mr Dodd accepted that the words about Easter Tuesday were not in the document, said he was not sure what he said 7 years ago in those negotiations and maintained his belief that the clause gives day work Employees an entitlement to Easter Tuesday.<sup>56</sup> The clause from the proposed agreement as at 25 September 2013 is in the same form as that which was ultimately approved and became the 2013 Agreement (see Annexure B).<sup>57</sup>

[41] On 18 October 2013, the Company circulated a letter and an explanatory statement which explained "*in summary form*" the proposed changes to the 2008 Agreement in the proposed agreement that employees were being requested to vote on. The letter said (among other things) that the proposed agreement reflects the "*agreement-in-principle*" reached between the Company and the CFMEU on Friday 27 September 2013; and the ASU, ETU, AMWU and AWU on Wednesday 2 October 2013. This explanatory statement said only the following in relation to the "Public holidays" provision:

*"45. This provision has been amended to **exclude** shift workers from the requirement to provide a reasonable excuse or have consent from the Company to receive payment for a public holiday if absent from their shift before or after the public holiday. This reflects the current practice."*<sup>58</sup>

[42] The explanatory materials in evidence do not explain the withdrawal of the in-principle agreement to the Easter Tuesday claim or the other changes to the 2008 Agreement in terms of the drafting of the public holidays provision. The clause from the proposed agreement as at 18 October 2013 was in identical form to that which was ultimately approved and became the 2013 Agreement.<sup>59</sup>

[43] The 2013 Agreement was approved by a majority of the employees covered by it in October 2013. Mr Dodd's evidence was that he was not sure all of the AMWU's members would have voted for it and was "*fairly certain that we (the maintenance unions) wouldn't have supported it*" but it was probably immaterial because the maintenance unions did not have the numbers to influence the outcome then.<sup>60</sup> The statutory declaration submitted to the Commission by the Company on application for approval of the 2013 Agreement is in evidence

<sup>53</sup> Mr Dodd on Transcript at PN624-625; 640-642 and 666-670 on 8 February 2021.

<sup>54</sup> Mr Dodd on Transcript at PN685-88 on 8 February 2021.

<sup>55</sup> Mr Dodd on Transcript at PN688-701.

<sup>56</sup> Mr Dodd on Transcript at PN701, 725-733 on 8 February 2021.

<sup>57</sup> First Witness Statement of Mr Peter Chapple at Annexure PC-22.

<sup>58</sup> First Witness Statement of Mr Peter Chapple at Annexure PC-23.

<sup>59</sup> First Witness Statement of Mr Peter Chapple at Annexure PC-23.

<sup>60</sup> Mr Dodd on transcript at PN646-649 on 8 February 2021.

and does not indicate that clause 13 was raised as a more (or less) beneficial term; nor does the CFMEU's declaration indicate that it disagreed.<sup>61</sup>

*Statutory context*

[44] The National Employment Standards in the Act relevantly provide for an entitlement to be absent (subject to a reasonable request to work), and to payment for absence at the employee's base rate of pay for an employee's ordinary hours of work on, on a public holiday (ss.114 and 116). "Public holiday" is defined at s.115 as follows:

**Meaning of public holiday**

The public holidays

(1) The following are *public holidays* :

(a) each of these days:

(i) 1 January (New Year's Day);

(ii) 26 January (Australia Day);

(iii) Good Friday;

(iv) Easter Monday;

(v) 25 April (Anzac Day);

(vi) the Queen's birthday holiday (on the day on which it is celebrated in a State or Territory or a region of a State or Territory);

(vii) 25 December (Christmas Day);

(viii) 26 December (Boxing Day);

(b) any other day, or part-day, declared or prescribed by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of the State or Territory, as a public holiday, other than a day or part-day, or a kind of day or part-day, that is excluded by the regulations from counting as a public holiday.

Substituted public holidays under State or Territory laws

(2) If, under (or in accordance with a procedure under) a law of a State or Territory, a day or part-day is substituted for a day or part-day that would otherwise be a public holiday because of subsection (1), then the substituted day or part-day is the *public holiday* .

Substituted public holidays under modern awards and enterprise agreements

(3) A modern award or enterprise agreement may include terms providing for an employer and employee to agree on the substitution of a day or part-day for a day or part-day that would otherwise be a public holiday because of subsection (1) or (2).

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<sup>61</sup> First Witness Statement of Peter Chapple at 81-88.

### Substituted public holidays for award/agreement free employees

(4) An employer and an award/agreement free employee may agree on the substitution of a day or part-day for a day or part-day that would otherwise be a public holiday because of subsection (1) or (2).

Note: This Act does not exclude State and Territory laws that deal with the declaration, prescription or substitution of public holidays, but it does exclude State and Territory laws that relate to the rights and obligations of an employee or employer in relation to public holidays (see paragraph 27(2)(j)).

[45] Additional statutory context in the State of Victoria is:

- a) New Year's Day, Australia Day, Christmas Day and Boxing Day are all days which have traditionally had a substitute day declared under the *Public Holidays Act 1993* (Vic) when they fall on a weekend.<sup>62</sup> Substitute days that were gazetted for each of these public holidays are detailed (dating back to 1999) in the materials before the Commission and are not repeated here.
- b) ANZAC Day is fixed on 25 April each year and, whilst the Victorian Government has the power to declare substitute holidays it has historically not proclaimed a substitute holiday for ANZAC Day.<sup>63</sup> Exceptions to the historical approach occurred in 2010 (when ANZAC Day fell on a Sunday) and in 2011 (when ANZAC Day fell on Easter Monday), with the Victorian Government declaring a substitute day in each case.<sup>64</sup>
- c) No substitute day was declared by the Victorian Government for ANZAC Day 2020, which fell on a Saturday.
- d) No substitute day was declared by the Victorian Government for ANZAC Day 2021, which fell on a Sunday.

### *Industrial and industry context*

[46] The history of industrial instruments and industrial context at Yallourn that is before the Commission is as follows:

- a) The *Victorian Electricity Industry (Mining and Energy Workers) Award 1998* provided for substitute public holidays for Christmas Day, Boxing Day, New Year's Day and Australia Day in the event of those public holidays falling on a weekend.
- b) In 2001, a s.170 MX Award was made by the Australian Industrial Relations Commission following termination of bargaining and provided for public holidays at clauses 17.6 and 17.7. The relevant clauses are at Annexure C – Historical provisions in industrial instruments previously applicable at Yallourn. During the life of the s.170MX Award, ANZAC Day fell on a Sunday in 2004 and a substitute day was not provided to the Company's day workers at that time.<sup>65</sup>
- c) Under the 2004 Certified Agreement, public holidays were provided at clauses 15.6 and 15.7. The relevant clauses are at Annexure C. During the life of the 2004 Certified

<sup>62</sup> Sections 6-8 of the *Public Holidays Act 1993* (Vic).

<sup>63</sup> Section 6(h) of the *Public Holidays Act 1993* (Vic); *CFMEU and others re Timber and Allied Industries Award and others (Applications to vary the public holiday clause in relation to ANZAC Day)* (PR945919, 20 April 2004, Watson SDP, Kaufman SDP and Mansfield C) at [32].

<sup>64</sup> First Witness Statement of Mr Peter Chapple at Annexure PC-8.

<sup>65</sup> First Witness Statement of Mr Peter Chapple at 13-16.

Agreement, there was a dispute concerning Easter Saturday and day workers which was resolved in conciliation before the Commission. The Company's predecessor entity (TRUenergy Yallourn Proprietary Limited) agreed to pay an additional public holiday credit to the employee annual leave balances and it was agreed that the replacement to the 2004 Agreement would be re-worded to provide clarity as to how the Easter Saturday public holiday would be applied to day workers in future.<sup>66</sup>

- d) Under the 2008 Agreement, public holidays were provided for at clauses 17.6 and 17.7. Clause 44 provided for certain substitute days, specifically for Christmas Day, Boxing Day, Australia Day and New Year's Day. The relevant clauses are at Annexure C. During the life of the 2008 Agreement:
- ANZAC day fell on a Saturday in 2009 and a substitute day was not provided to the Company's day workers at that time.<sup>67</sup>
  - ANZAC day fell on a Sunday in 2010 and on Easter Monday in 2011 and, in both cases, a substitute day was declared by the Victorian Government. The Company provided substitute days to day workers for ANZAC day in 2010 and 2011.<sup>68</sup>
- e) At the time the 2013 Agreement was being negotiated, Mr Dodd was aware that a substitute day for Easter Saturday was not being paid by the Company at Yallourn.<sup>69</sup> As outlined above, this was a key claim of the maintenance unions in the 2013 negotiations and the words of that clause (as they appear in the Agreement) are now in issue in these applications.
- f) Since the 2013 Agreement was in operation, and during the operation of the identical provisions in the subsequent 2017 Agreement and the Agreement:
- A substitute day was gazetted for Christmas Day which fell on a Sunday in 2016, such that Monday 26 and Tuesday 27 December 2016 were both public holidays. The Company's day workers were provided public holiday entitlements on those days.<sup>70</sup>
  - Additional public holidays were gazetted for the day before AFL grand final day in 2015 and 2016. The Company's day workers were provided with public holiday entitlements for those days.<sup>71</sup>
  - Easter Sunday was gazetted as a public holiday in 2016 and 2017 and was treated as a public holiday by the Company.<sup>72</sup>
  - ANZAC Day fell on a weekend in 2015. The Company's day workers were not provided a substitute day that occasion and this was not raised by the union(s) at the time.<sup>73</sup>
  - Easter Saturday has not been raised at any time prior to this dispute. The Company's day work Employees have not been provided a substitute day for Easter Saturday and this has not been raised by the union(s) in that time.<sup>74</sup>

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<sup>66</sup> First Witness Statement of Mr Peter Chapple at 18-21 and Annexure PC-7.

<sup>67</sup> First Witness Statement of Mr Peter Chapple at 22-26.

<sup>68</sup> First Witness Statement of Mr Peter Chapple at 27-28.

<sup>69</sup> Mr Dodd on Transcript at PN566-567 on 8 February 2021.

<sup>70</sup> Second Witness Statement of Mr Peter Chapple at 29-30.

<sup>71</sup> Second Witness Statement of Mr Peter Chapple at 33-34.

<sup>72</sup> Ibid.

<sup>73</sup> First Witness Statement of Mr Peter Chapple at 90; Mr Dodd on Transcript at PN431-432 on 8 February 2021.

<sup>74</sup> First Witness Statement of Mr Peter Chapple at 91.

### *Industry context*

[47] The wording of clauses 13.1 and 13.2 of the Agreement is identical to that at clauses 18.1 and 18.2 of the *Loy Yang B Enterprise Agreement 2018*. This is a separate enterprise agreement which does not apply to the Company or its Employees; and is noted as covering the ASU and the CFMMEU.<sup>75</sup>

[48] Mr Chapple recalled in evidence that Mr Hardy expressed the opinion during the 2013 negotiations that terms and conditions of employment at electricity generators across the Latrobe Valley should be the same for all employers, and that the terms and conditions at Yallourn were behind other sites, but did not recall Mr Hardy raising how public holidays were dealt with at Loy Yang A or Loy Yang B.<sup>76</sup>

[49] Mr Dyke said the same clause is applied at *Loy Yang B* (under a separate enterprise agreement, made with a separate entity) such that day work employees have received, and continue to receive, substitute days for public holidays whether there is a Government gazetted substitute or not - and he had no reason to believe otherwise at Yallourn prior to the issue being raised with him following ANZAC Day in late April 2020.<sup>77</sup> Mr Dyke also acknowledged in evidence that his view about clause 13 of the Agreement was based on his interpretation of the words as they are written, not knowing how the predecessor agreements had been applied since 2013 and not knowing what was said or done in the 2013 negotiations (because he was not there).<sup>78</sup>

### **Procedural approach**

[50] In performing its functions and exercising its powers under the Act, the Commission is required to act in a manner that is fair and just; quick, informal and avoids unnecessary technicalities; open and transparent; and promotes harmonious and cooperative workplace relations.

[51] The applications were filed one day apart. The Variation Application was filed first in time by the Company, however the preliminary steps to the Dispute Application were notified first in time by the CFMMEU. For efficiency, it was jointly requested that evidence be received in relation to both applications.<sup>79</sup> The applications were heard concurrently, over 3 days on 17 November 2020, 8 February and 10 March 2021, with closing submissions filed on 24 February, 3 and 10 March 2021.

[52] Both applicants expressed strong views that their application be determined first. Detailed submissions were made on this issue and are not repeated here. Having regard to all of the circumstances and the precedents drawn to the Commission's attention in this respect, I consider it is appropriate to determine the Variation Application first. The legislature has provided a power for the Commission to vary an agreement to remove an ambiguity or uncertainty, and it is appropriate that such power be exercised first before proceeding to make

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<sup>75</sup> [2018] FWCA 7369.

<sup>76</sup> Third Witness Statement of Mr Peter Chapple at 7.

<sup>77</sup> Witness Statement of Mr Geoffrey Dyke at 20, 21 and 25 and Annexure GD-2.

<sup>78</sup> Mr Dyke on Transcript at PN158-159 and PN228-230 on 8 February 2021.

<sup>79</sup> Transcript of 17 November 2020 at PN26-27.

a determination of rights and entitlements by construing a clause which may be affected by ambiguity or uncertainty. I am satisfied that to do otherwise may produce an unjust result.

[53] For completeness, I note that each of the Unions (as earlier defined) were party to the Variation Application and were invited to make submissions in relation to both applications. Initially, each of the AMWU, the AWU, the ASU and the CEPU indicated their support but there was no formal application to be joined as a party to the CFMMEU's dispute application.<sup>80</sup> Materials were filed by the Company and the CFMMEU, the CFMMEU's materials included one AMWU witness. At the commencement of the hearing, the CFMMEU confirmed that the AMWU had requested and they had agreed to represent the AMWU in "both matters".<sup>81</sup>

## **The Variation Application**

### ***Statutory framework***

[54] The objects of the Act relevantly include to achieve productivity and fairness through an emphasis on enterprise-level collective bargaining and providing laws that are fair to working Australians, flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity.<sup>82</sup>

[55] Division 7 of Part 2-4 provides for an enterprise agreement to be varied. The objects of Part 2-4 are to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits and for the Commission to facilitate the making of enterprise agreements.<sup>83</sup>

[56] An enterprise agreement is a "statutory artefact", not able to be varied other than in compliance with the specific provisions of Division 7.<sup>84</sup> Section 217 is found in Subdivision B "Variations of enterprise agreements where there is ambiguity, uncertainty or discrimination".

[57] The Commission's consideration of an application under s.217 involves two steps:

- a) first, there must be an identification of whether there is an ambiguity or uncertainty in the Agreement; and
- b) only if an ambiguity or uncertainty is identified must the Commission then consider whether to exercise its discretion to remove the ambiguity or uncertainty.

[58] In summary, the first task is to make an objective judgment as to whether the relevant provision(s) of the enterprise agreement are ambiguous or uncertain. Ambiguity exists when a provision in an enterprise agreement is capable of more than one meaning; whereas uncertainty may exist even where the terms are not ambiguous, and may arise from the application of the unambiguous terms to a given set of circumstances.<sup>85</sup> The mere existence of rival contentions is not a sufficient basis to conclude that there is ambiguity or uncertainty; the competing

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<sup>80</sup> AMWU, ASU, AWU and CEPU emails of 6 and 7 July 2020.

<sup>81</sup> Transcript of 17 November 2020 at PN6.

<sup>82</sup> Section 3(a) and (f) of the Act.

<sup>83</sup> Section 171 of the Act.

<sup>84</sup> *Teyes Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees' Union* [2016] FCAFC 122 (*Teyes*) at 19.

<sup>85</sup> *Bianco Walling Pty Ltd v CFMMEU* [2020] FCAFC 50 (*Bianco Walling*) at 74 and 75.

contentions should have merit.<sup>86</sup> In *Bianco Walling* a Full Federal Court rejected the proposition that an examination of context and extrinsic material was not permissible until an ambiguity was first found to exist – the Court in that case held that the Commission is not constrained by agreement interpretation principles and evidence of surrounding circumstances including common intention or objectively established past or current practice may be regarded in assessing whether an ambiguity or uncertainty exists.<sup>87</sup> Further, it endorsed the reasoning in *Tenix* that “the [FWC] will generally err on the side of finding an ambiguity or uncertainty where there are rival contentions advanced *and* an arguable case is made out for more than one contention”.<sup>88</sup>

**[59]** If that objective judgment is in the affirmative, then the Commission may exercise its discretion to decide whether or not the agreement should be varied to remove the ambiguity or uncertainty. The discretion under s.217 is to be exercised having regard to the evident statutory purpose of the provision, read in the context of Part 2-4 and the Act as a whole, and taking into account the circumstances of the relevant application. The discretion afforded by the statute is to “*remove ambiguity or uncertainty*”, as distinct from giving effect to a new and substantive change that was not present when the enterprise agreement was made. Applications that seek the latter are to be made under s.210 of the Act.<sup>89</sup>

**[60]** In the context of s.217 applications under the Act, the decision in *Beltana*, about an application for variation of a certified agreement under s.170MD(6) of the *Workplace Relations Act 1996* (Cth) is often cited. In it, a number of principles were enunciated including that the Commission may not appropriately use its power to rewrite an agreement to install something that was not inherent to the agreement when it was made.<sup>90</sup>

**[61]** Under the current legislation, an enterprise agreement can only be made by an employer and its employees who are employed at the time the agreement is made and will be covered by the agreement (s.172(2)(a)) and is only “made” when the employees to be covered by it have been asked to approve the agreement and a majority of those employees who cast a valid vote approve the agreement (s.182(1)). Against this backdrop, it has been considered that any concept of mutual objective intention that might inform the proper interpretation of an agreement may need to take into account the intention or understanding of employees, being those who make the agreement when by majority they approve it under s.182 of the Act.<sup>91</sup>

### ***Consideration***

**[62]** The Commission has before it an application to vary a single enterprise agreement under s.217. The application was made by the Company as the employer covered by the Agreement.

**[63]** On its face, the drafting of the disputed term at clause 13.2 – SUBSTITUTE DAYS is clear. The first sentence plainly provides that, *For day work Employees only, a substituted day off will be applied when a public holiday occurs on a weekend* and it is these words that on their

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<sup>86</sup> *Tenix Defence Systems Pty Limited Certified Agreement 2001-2004* [2002] AIRC 531 at [49] as cited in *Bianco Walling* at 70; see also *Specialist People* [2019] FWCFB 6307 (*Specialist People*) at [41].

<sup>87</sup> *Bianco Walling* at 87.

<sup>88</sup> *Bianco Walling* at 67-72.

<sup>89</sup> *Specialist People* at [42].

<sup>90</sup> *Beltana No 1 Salaried Staff Certified Agreement 2001* [2003] AIRC 608 at 23.

<sup>91</sup> See, for example, *Specialist People* at [49] and *Tey* at 7-10.

face establish a right or entitlement to a substituted day for a public holiday that occurs on a weekend, with no express qualification related to government gazettal. The second sentence provides for when the substitute day will be observed – that is, *The substitute day will normally be observed on the day declared in the Government Gazette or otherwise as agreed by the Parties*. The second sentence expressly contemplates observance of a substitute day in an alternate circumstance to the day declared in the Government Gazette – that is, it will “otherwise” be observed as agreed by the defined “Parties” (the Company and the Unions). There is nothing in the plain text by which to read the clause down such that a substituted day will only be applied when a public holiday occurs on a weekend *and* is declared by Government Gazette. The remainder of clause 13.2 provides for shift work Employees with whom these applications are not concerned.

[64] Adopting the approach in *Bianco Walling*, it is appropriate to have regard to the surrounding circumstances, to the extent they are admissible, in discerning whether there is an ambiguity or uncertainty for the purposes of s.217. Indeed it was contended that the first paragraph of clause 13.2 only has a plain meaning when interpreted in the context of the admissible surrounding circumstances.

[65] The statutory context, namely the federal minimum standards underpinning the Agreement (and its 2017 and 2013 predecessors) and the history of the Victorian Government’s declaration of substituted days for public holidays, include objective facts to which regard may be had for this purpose. Certainly the National Employment Standards provide, as a minimum, for certain basic entitlements to absence (and for some employees payment) on public holidays and substituted days where so gazetted by the State of Victoria. In my view, the history of the variable or inconstant approach to gazetting of substituted days for certain public holidays together with the objective fact that the day work Employees’ roster is only ever worked on Monday to Friday (and therefore does not ordinarily attract the benefit of a public holiday that occurs on a weekend) is context telling of a reason why day work Employees (or their representative) or an employer could be motivated to seek to secure a particular form of words (whether as an additional benefit or ancillary term) in an enterprise agreement. Further the Agreement clearly provides that it supplements the National Employment Standards and there is nothing in this context to suggest that an additional benefit was not intended to be conferred by clause 13.2 of the Agreement. I do not consider this context to otherwise be of assistance to the present task.

[66] I accept that the historical evolution of an entitlement under an enterprise agreement may tell in favour of an ambiguity or uncertainty. I have analysed the historical provisions. In this case, I consider the industrial instruments that applied at Yallourn prior to the 2013 Agreement to establish nothing more than an evolution of obligations and entitlements, over a relatively long period of time, in which the drafters adopted different expressions and terminology than that in clause 13 of the Agreement. Similarly, past conduct relevant to those previously applicable industrial instruments does not greatly assist in the present task.

[67] The historical evidence establishes that the inclusion of the words at now clause 13 of the Agreement first appeared in the 2013 Agreement and it is mutually contended that some regard may be had to the negotiations for the 2013 Agreement in determining whether there is an ambiguity or uncertainty for the purposes of s.217. Much of this evidence is subjective and does not assist the Commission in the task before it. An obvious limitation is that it is confined to the recollections of a small number of participants in those negotiations, which is not representative of all bargaining representatives and does not go far (if it goes any way at all) to



revealing the intentions or understanding of the employees. Where it exists, and to the extent it is admissible, I have attributed weight to that of a contemporaneous document in preference to bald recollections of some bargaining participants some 7 years after the fact.

[68] It is not contentious that the CFMEU was one of the bargaining representatives ultimately covered by the 2013 Agreement but, for completeness, I consider the evidence to establish that the CFMEU did represent at least 3 or 4 members who were day workers during the course of the negotiations for the 2013 Agreement (who had an interest in what is now the disputed term). Indeed, the Company acknowledged as much when it extended an invitation to the CFMEU to participate in discussions for the proposed separate maintenance agreement in May 2013.

[69] The evidence also establishes that, from the outset of the negotiations, the maintenance unions pressed for Easter Tuesday as a substitute holiday for Easter Saturday for day workers and this was one of their key claims; and the CFMEU sought a form of words as its “starting position” which would entitle day workers to a substitute day off when a public holiday occurs on the weekend (without limitation and, it follows, that claim did not exclude Easter Saturday). The evolution of the drafting is detailed in the summary of evidence above. From this, it is apparent that the form of words which ultimately appeared in the 2013 Agreement (as made and approved by the Commission) originated from the CFMEU’s “starting position” document.

[70] There does not appear to be any dispute that, by March 2013, the Company had agreed in-principle to the maintenance unions’ claim for Easter Tuesday as a substitute day for Easter Saturday. This featured in the offer that the Company put to the unions in March 2013, which specifically referenced the Tuesday after Easter Monday as a substitute for Easter Saturday and ANZAC Day being recognised as a substitute only if gazetted by the Victorian Government. However, an analysis of the words proposed at that time reflects those were the Company’s words (which it was open to “wordsmithing”) and did not represent an agreed form of drafting with any or all of the Unions.

[71] It can be readily understood from the contemporaneous email evidence that, as at 25 September 2013, the Company told the maintenance unions that it intended to withdraw its prior in-principle agreements reached with the maintenance unions. Mr Dodd confirmed in evidence that the email on its face is pretty clear about that withdrawal and accepted the proposition that the maintenance unions’ claim for Easter Tuesday as a substitute for Easter Saturday was “lost”. Much was sought to be made of Mr Dodd’s evidence about this, with the Company submitting it was inconsistent and should not be preferred (or perhaps believed) to the extent of the inconsistency. I did not assess Mr Dodd as a dishonest witness. Even if there was some great contradiction in his recollection of the loss of the Easter Tuesday claim, on a careful analysis of his evidence Mr Dodd did not at any point resile from his belief that the provision as put to a vote entitles day workers to a substitute day for any public holiday that occurs on a weekend.

[72] When regard is had to the wording of the draft agreement (already agreed in-principle with the CFMEU) that was attached to the 25 September 2013 email – it includes clause 13.2 in the same form as was ultimately made and approved as the 2013 Agreement, drafted in clear terms. That the clause appeared in the same form as at 25 September 2013 points to an objective conclusion that there was no further negotiation on this provision between the Company and the maintenance unions after the Company had reached agreement with the CFMEU.

[73] The evidence about the separate negotiations between the Company and the CFMEU which led to its in-principle agreement to the final proposed agreement on 25 September 2013 sheds no light on the mutual objective intention. Mr Chapple and Mr Aitken did not recall much discussion about this provision. Mr Chapple recalled a subjective motivation of the CFMEU may have been common claims across the industry; Mr Chapple recalled the Company's subjective motivation given its view of affordability at the time. The lack of focus on this provision (by the Company and the CFMEU, in their discussions) would appear to be explicable by their mutual focus on bringing an end to the bargaining disputation and, in doing so, addressing the key claims related to the bulk of the CFMEU's membership, the shift work Employees. But the absence of focus or care taken in finalising the agreement to be put to a vote in 2013 does not explain the common intention.

[74] At its highest, I accept the evidence indicates that *the Company* did not mean what clause 13.2 plainly provides. This intention does not, however, establish the mutual intention of the relevant parties. I do not accept the invitation of the Company to find that the absence of evidence or a failure to recall matters to refute some of Mr Chapple's recollections of discussions in the 2013 negotiations answers the question of what was mutual intent; it simply establishes that there was no evidence of a contrary intent. Even if I were to accept Mr Chapple's evidence of discussion about Easter Tuesday as a substitute day - and that there was never any discussion about public holidays falling on a weekend - the fact of a discussion or the absence of a discussion does not mean that the Company's intention was mutually agreed.

[75] The evidence of the views of a handful of participants in negotiations for the 2013 Agreement, since replaced by 2 subsequent agreements, even where they appear *in parts* to be in common, do not establish a common intention of the employees and the employer to the Agreement. To this end, the Company's position is not assisted by the absence of any explanation to employees about the provision in question. That is, notwithstanding the changed drafting to the 2008 Agreement, the explanatory materials given to employees before the vote for the 2013 Agreement did not explain how the new drafting at clause 13.2 was intended to apply to day workers. Prior offers in the 2013 negotiations had included detailed explanations about the Company's position on substituted days for day workers, presumably to highlight its agreement to one of the maintenance unions' key claims. But there is no evidence that the employees covered by the 2013 Agreement were cognisant of the withdrawal of that in-principle agreement, that such withdrawal was ever explained to them, or indeed that the words and effect of the words at clauses 13.1 and 13.2 (which were different to that in the previous, 2008 Agreement) were explained to them at any time during the negotiations for the 2013, 2017 or 2020 Agreements. In my view, the absence of such explanation does not tell in favour of a finding that employees understood, or could reasonably have understood, that clause 13.2 of the 2013 Agreement (and the subsequent agreements) meant something other than what the plain words provide.

[76] The objective background facts which are of most relevance are those which pertain directly to the Agreement and there is limited evidence in this regard. Just as it was not explained, it is not contentious that clause 13 and the matter of substituted public holidays was not raised in the negotiations for the 2020 Agreement and a dispute was first raised under its predecessor only after the 2020 Agreement was "made" and awaiting Commission approval.

[77] Evidence of subsequent conduct was considered by the Full Court in *Bianco Walling* as admissible to determining whether an ambiguity or uncertainty exists. That the Company has not subsequently, since the commencement of the 2013 Agreement, applied a substitute day for

day work Employees for any public holiday that falls on a weekend is reflective of *its* interpretation as put to the Commission in these applications. The evidence is that it was not until 2020 that the claim first was made specific to ANZAC Day (when the 2017 Agreement was still in operation); and that there were no claims pressed for the substitutes for all public holidays occurring on weekends prior to the dispute subject of the Dispute Application filed in 2020. I do not consider the absence of a complaint about non-application of a substitute day on the rare occasions on which they could have arisen since the 2013 Agreement commenced operation to be sufficient to amount to a common understanding or meeting of the minds. Rather, this might best be characterised as common inadvertence in that it would appear more likely that no one had thought about the issue.

[78] In my view, the words of clause 13.2 of the Agreement are clear. I do not identify any ambiguity when considering the plain text of the surrounding provisions or when regard is had to the admissible evidence of surrounding circumstances. Such finding also leads to the conclusion that the disputed provision(s) are not uncertain, in the sense that they are not doubtful or vague and there is nothing in the unambiguous application of the disputed provision(s) which results in any uncertainty. I do not consider that there are rival contentions that may give rise to any ambiguity or uncertainty or that there is an arguable case for the Company's contention to be made out. That the Company is contending for a finding which does not accord with the plain words used is not, in the particular circumstances of this case, a strong indicator of ambiguity or uncertainty.

[79] Even if the jurisdictional threshold were met, and an ambiguity or uncertainty were found to exist, I would not exercise the discretion to vary the Agreement. To vary the Agreement in the manner the Company contends would be to substantively and fundamentally alter the language of the Agreement. The installation of words that were not inherent in the Agreement when it was made, as the Company effectively asks the Commission to do, is not appropriate having regard to the purpose of the provision, read in the context of Part 2-4 of the Act as a whole, or taking into account the relevant circumstances of this particular application. I do not consider the circumstances of this particular application to tell in favour of the exercise of the discretion to vary the Agreement, whether in the form proposed by the Company or in any other form to give effect to the Company's contention.

[80] For the above reasons, the Variation Application is dismissed.

## **The Dispute Application**

### ***Statutory framework***

[81] The principles that apply to the interpretation of an enterprise agreement were summarised by a Full Bench of the Commission in *AMWU v Berri Pty Ltd*,<sup>92</sup> drawing on the earlier Full Bench decision in *AMIEU v Golden Cockerel Pty Ltd*.<sup>93</sup> The Full Bench in *Berri* affirmed that the interpretation of an enterprise agreement, like that of a statute or contract, begins with a consideration of the ordinary meaning of the relevant words. The resolution of a dispute over the interpretation of an enterprise agreement will turn on the language of the agreement, having regard to its context and purpose. Context might appear from the text of the

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<sup>92</sup> [2017] FWC 3005 (*Berri*).

<sup>93</sup> [2014] FWC 7447 (*Golden Cockerel*).

agreement as a whole, the place and arrangement of the disputed provision in the agreement, and the legislative framework under which the agreement was made.<sup>94</sup>

### ***Jurisdiction***

[82] The dispute resolution process at clause 29 provides that it “is to be used to assist in resolving any matter or dispute pertaining to the employment relationship”. The subject matter of this dispute is a “category 1 matter” because it goes to the application or interpretation of the Agreement with matters arising under the NES.

[83] It is not contentious and I am satisfied that: the Agreement covers and applies to the Employees in their work for the Company; the dispute is about a “category 1” matter(s), the parties agreed to expedited referral to the Commission and an attempt at conciliation did not resolve the dispute. Accordingly, I am satisfied that the pre-requisites of clause 29 of the Agreement have been followed, such that there is jurisdiction to resolve the dispute by way of arbitration pursuant to s.739 of the Act and the agreement of the parties in accordance with the term at clause 29 of the Agreement.

### ***Consideration***

[84] Having regard to the evidence outlined above, to the extent that it is admissible, I have concluded that there is no ambiguity in the disputed term. The meaning of the drafting is plain on its face. The first paragraph of clause 13.2 of the Agreement does two things:

- In the first sentence, it provides an entitlement under the Agreement that, *For day work Employees only a substitute day off will be applied when a public holiday occurs on a weekend.*
- In the second sentence, it provides for when the substitute day will be observed. That is, *The substitute day will normally be observed on the day declared in the Government Gazette or as otherwise agreed by the Parties.*

[85] In the absence of any express definition, the reference to “public holiday” in the first paragraph of clause 13.2 is plainly to be understood by reference to that which immediately precedes it, at clause 13.1, which specifies the public holidays that an Employee (not limited to day worker or shift worker) shall be entitled to under the Agreement, without loss of pay, as New Year’s Day, Australia Day, Good Friday, Easter Saturday, Easter Monday, Labour Day, Anzac Day, Queen’s Birthday, Melbourne Cup Day, Christmas Day, Boxing Day and any additional public holidays gazetted by the State or Federal governments. Beyond the plain and express words of clause 13.2, which refers to a substitute day off being applied when a “public holiday” as defined at clause 13.1 occurs on a weekend, there is no other limitation on or circumstance applicable to the days when a substitute day will be applied. Clause 13.3 of the Agreement provides an entitlement for day work Employees to *time off without loss of pay for all public holidays (including substitute days in lieu thereof) created in accordance with clause 13.1*. The bracketed text clarifies the inclusion of substitute days in lieu of all public holidays and all public holidays are created in accordance with clause 13.1 of which the substitute days conferred at 13.2 are plainly in lieu. I do not find support in the surrounding provisions of the Agreement or the admissible surrounding circumstances for any finding to the contrary.

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<sup>94</sup> *Berri* at [114] and *Golden Cockerel* at [41].

[86] The answer to the CFMMEU's Question is: for the purposes of clause 13.2 of the Agreement, day work Employees are entitled to the application of a substitute day when a public holiday as defined in clause 13.1 occurs on a weekend.



DEPUTY PRESIDENT

*Appearances:*

Ms *E.Sarlos* of CFMMEU for the CFMMEU and AMWU.

Mr *B.Avallone* of counsel for EnergyAustralia Yallourn Pty Ltd.

*Hearing details:*

2020.

Melbourne (by Video).

17 November.

2021.

Melbourne (by Video).

8 February, 10 March.

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## **ANNEXURE A – Clause 13 of the Agreement**

### **13 PUBLIC HOLIDAYS**

#### **13.1 GENERAL**

An Employee shall be entitled to the following as public holidays without loss of pay:

New Year's Day, Australia Day, Good Friday, Easter Saturday, Easter Monday, Labour Day, Anzac Day, Queen's Birthday, Melbourne Cup Day, Christmas Day, Boxing Day and any additional public holidays gazetted by the State or Federal governments.

#### **13.2 SUBSTITUTE DAYS**

For day work Employees only, a substitute day off will be applied when a public holiday occurs on a weekend. The substitute day will normally be observed on the day declared in the Government Gazette or as otherwise agreed by the Parties.

In the case of shift work Employees, public holidays will be observed on the traditional date they occur, unless they happen to fall on another public holiday, in which case a substitute day will be observed on the following day unless otherwise agreed by the Parties.

#### **13.3 PUBLIC HOLIDAYS – DAY WORK EMPLOYEE**

Day work Employees shall be entitled to time off without loss of pay for all public holidays (including substitute days in lieu thereof) created in accordance with clause 13.1.

A day work Employee shall be remunerated at the rate of double time and a half for all work done on a public holiday.

Where work is performed on a public holiday and payment is due, one day off in lieu may be substituted for a portion of the payment due with the balance paid.

Subject to the NES, where a day-work Employee is absent from work on any part of the working day before or after a public holiday without reasonable excuse or without consent of the company, the Employee shall not be entitled to payment for such holiday.

#### **13.4 PUBLIC HOLIDAYS – SHIFT WORK EMPLOYEE**

Where a shift commences before midnight on a public holiday, the time so worked before midnight shall not entitle the Employee to the holiday rate; provided that the time worked by an Employee on a shift commencing before midnight on the day preceding a holiday and extending into a holiday shall be regarded as time worked on such holiday.

In respect to public holidays created under sub-clause 13.1, shift work Employees shall be entitled to the following in addition to their Normal Rate of Pay:

- (a) Shift work Employees who are 'rostered off' on a public holiday shall, at the Employee's discretion be entitled to either:
  - i. an annual leave credit of eight hours; or

- ii. payment of eight hours at their Normal Rate of Pay.
- (b) Shift work Employees who were ‘rostered off’ but work overtime on a public holiday shall, at the Employee’s discretion be entitled to:
- i. in respect to the public holiday – an additional eight hours pay at their Normal Rate of Pay or eight hours annual leave credit in lieu of the public holiday; and
  - ii. in respect to the overtime – double time and a half of their Base Rate of Pay for all time worked, plus the applicable daily proportion of the Yallourn Allowance at single time.
- (c) Shift-work Employees who are ‘rostered on’ and work ordinary time on a public holiday shall, at the Employee’s discretion, be additionally entitled to either:
- i. an annual leave credit of one and a half times the period of the shift worked; or
  - ii. an annual leave credit of one times the period of the shift worked plus half times the period of shift worked in pay (at their Normal Rate of Pay).
  - iii. payment at the rate of one and a half times their Normal Rate of Pay for the shift worked.
  - iv. an annual leave credit of one half shift plus an additional one shift pay (at their Normal Rate of Pay)

**ANNEXURE B - Evolution of clauses 13.1 and 13.2 in negotiations for the 2013 Agreement**

**Company's "starting position" (extracted from the TRUenergy Yallourn Proprietary Limited Workplace Agreement 2008)**

**17.6 Public Holidays**

Employees shall be entitled to the following Public Holidays without loss of pay- New Year's Day, Australia Day, Good Friday, Easter Saturday, Easter Monday, Labour Day, Anzac Day, Queen's Birthday, Melbourne Cup Day, Christmas Day and Boxing Day. For day workers only, where New Year's Day, Australia Day, Christmas Day or Boxing Day fall on a weekend a substitute day will be granted. Anzac Day "substitute day" will be recognised if gazetted by the Victorian Government.

**17.7 Shift Workers - Public Holidays**

For the purposes of penalty payments, shift workers will recognise the public holiday on the day it falls on the calendar.

**CFMEU's "starting position" (extracted from PC-9)**

**13.1 GENERAL**

Employees shall be entitled to the following as public holidays without loss of pay:

- i. New Year's Day, Australia Day, Good Friday, Easter Saturday, Easter Monday, Labour Day, Anzac Day, Queen's Birthday, Melbourne Cup Day;
- ii. a half day public holiday will be observed for Moe Cup Day; and
- iii. Christmas Day, Boxing Day and any additional days gazetted by the State or Federal governments.

**13.2 SUBSTITUTE DAYS**

For day workers only, a substitute day off will be applied when a public holiday occurs on a weekend. The substitute day will normally be observed on the day declared in the Government Gazette or as otherwise agreed by the Parties.

In the case of shift work employees, public holidays will be observed on the traditional date they occur, unless they happen to fall on another public holiday, in which case a substitute day will be observed on the following day unless otherwise agreed by the Parties.

**Company's March 2013 offer to all unions (the SBU) (extracted from PC-37)**

**17.6 Public Holidays – General**



Employees shall be entitled to the following Public Holidays without loss of pay – New Year’s Day, Australia Day, Good Friday, Easter Saturday, Easter Monday, Labour Day, Anzac Day, Queen’s Birthday, Melbourne Cup Day, Christmas Day and Boxing Day.

#### **17.6.1 – Day Workers – Public Holidays**

For day workers only, where New Year’s Day, Australia Day, Christmas Day or Boxing Day fall on a weekend a substitute day will be granted. The Tuesday immediately following Easter Monday will be recognised as the substitute day for Easter Saturday. If day work employees are required to work on Easter Saturday they will attract normal Saturday rates. Anzac Day “substitute day” will be recognised if gazetted by the Victorian Government.

**Circulated during 5 day intensive negotiations between Company and CFMEU and as at 11 April 2013 (extracted from PC-14)**

### **13 PUBLIC HOLIDAYS**

#### **13.1 GENERAL**

An employee shall be entitled to the following as public holidays without loss of pay:

- (a) New Year’s Day, Australia Day, Good Friday, Easter Saturday, Easter Monday, Labour Day, Anzac Day, Queen’s Birthday, Melbourne Cup Day; and
- (b) Christmas Day, Boxing Day and any additional days gazetted by the State or Federal governments.

#### **13.2 SUBSTITUTE DAYS**

For day work employees only, a substitute day off will be applied when a public holiday occurs on a weekend. The substitute day will normally be observed on the day declared in the Government Gazette or as otherwise agreed by the Parties. In this regard Easter Tuesday has been agreed as the substitute for Easter Saturday.

In the case of shift work employees, public holidays will be observed on the traditional date they occur, unless they happen to fall on another public holiday, in which case a substitute day will be observed on the following day unless otherwise agreed by the Parties.

**Company’s proposed agreement as at 24 April 2013/went to vote on 2 May 2013 (extracted from PC-18)**

#### **17.6 Public Holidays – General**

Employees shall be entitled to the following Public Holidays without loss of pay – New Year’s Day, Australia Day, Good Friday, Easter Saturday, Easter Monday, Labour Day, Anzac Day, Queen’s Birthday, Melbourne Cup Day, Christmas Day and Boxing Day.

### **17.6.1 Day Workers - Public Holidays**

For day workers only, where New Year's Day, Australia Day, Christmas Day or Boxing Day fall on a weekend a substitute day will be granted. The Tuesday immediately following Easter Monday will be recognised as the substitute day for Easter Saturday. If day work employees are required to work on Easter Saturday they will attract normal Saturday rates. Anzac Day "substitute day" will be recognised if gazetted by the Victorian Government.

## **Yallourn Power Station Enterprise Agreement 2013 (as at 12 August 2013, extracted from PC-20)**

### **13.1 GENERAL**

An employee shall be entitled to the following as public holidays without loss of pay:

- (a) New Year's Day, Australia Day, Good Friday, Easter Saturday, Easter Monday, Labour Day, Anzac Day, Queen's Birthday, Melbourne Cup Day; and
- (b) Christmas Day, Boxing Day and any additional days gazetted by the State or Federal governments.

### **13.2 SUBSTITUTE DAYS**

For day work employees only, a substitute day off will be applied when a public holiday occurs on a weekend. The substitute day will normally be observed on the day declared in the Government Gazette or as otherwise agreed by the Parties. In this regard Easter Tuesday immediately following Easter Monday has been agreed as the substitute for Easter Saturday. If day work employees are required to work on Easter Saturday they will attract normal Saturday rates.

In the case of shift work employees, public holidays will be observed on the traditional date they occur, unless they happen to fall on another public holiday, in which case a substitute day will be observed on the following day unless otherwise agreed by the Parties.

## **EnergyAustralia Yallourn Enterprise Agreement 2013 as at 25/9/13 (extracted from PC-22), 18/10/13 (PC-23) and approved by vote**

### **13.1 GENERAL**

An employee shall be entitled to the following as public holidays without loss of pay:

New Year's Day, Australia Day, Good Friday, Easter Saturday, Easter Monday, Labour Day, Anzac Day, Queen's Birthday, Melbourne Cup Day, Christmas Day, Boxing Day and any additional public holidays gazetted by the State or Federal governments.

### **13.2 SUBSTITUTE DAYS**

For day work employees only, a substitute day off will be applied when a public holiday occurs on a weekend. The substitute day will normally be observed on the day declared in the Government Gazette or as otherwise agreed by the Parties.

In the case of shift work employees, public holidays will be observed on the traditional date they occur, unless they happen to fall on another public holiday, in which case a substitute day will be observed on the following day unless otherwise agreed by the Parties.

**ANNEXURE C – Historical provisions in industrial instruments previously applicable at Yallourn**

**Yallourn 170MX Award**

**17.6 Public Holidays**

Employees shall be entitled to the following Public Holidays without loss of pay: New Year's Day, Australia Day, Good Friday, Easter Saturday, Easter Monday, Labour Day, Anzac Day, Queen's Birthday, Melbourne Cup Day, Christmas Day and Boxing Day. For day workers only, where public holidays, except for Anzac Day, fall on a weekend a substitute day will be granted.

**17.7 Shift Workers – Public Holidays**

For the purposes of penalty payments, shift workers will recognise the public holiday on the day it falls on the calendar.

**Yallourn Energy Proprietary Limited Certified Agreement 2004 (2004 Certified Agreement)**

**15.6 - Public Holidays**

Employees shall be entitled to the following Public Holidays without loss of pay - New Year's Day, Australia Day, Good Friday, Easter Saturday, Easter Monday, Labour Day, Anzac Day, Queen's Birthday, Melbourne Cup Day, Christmas Day and Boxing Day. For day workers only, where public holidays, except for Anzac Day, fall on a weekend a substitute day will be granted. Anzac Day "substitute day" will be recognised if gazetted by the Victorian Government.

**15.7 Shift Workers - Public Holidays**

For the purposes of penalty payments, shift workers will recognise the public holiday on the day it falls on the calendar.

**TRUenergy Yallourn Proprietary Limited Workplace Agreement 2008**

**17.6 Public Holidays**

Employees shall be entitled to the following Public Holidays without loss of pay- New Year's Day, Australia Day, Good Friday, Easter Saturday, Easter Monday, Labour Day, Anzac Day, Queen's Birthday, Melbourne Cup Day, Christmas Day and Boxing Day. For day workers only, where New Year's Day, Australia Day, Christmas Day or Boxing Day fall on a weekend a substitute day will be granted. Anzac Day "substitute day" will be recognised if gazetted by the Victorian Government.

**17.7 Shift Workers - Public Holidays**

For the purposes of penalty payments, shift workers will recognise the public holiday on the day it falls on the calendar.



# DECISION

*Fair Work Act 2009*  
s.185—Enterprise agreement

**EnergyAustralia Yallourn Pty Ltd**  
(AG2020/886)

## **ENERGYAUSTRALIA YALLOURN ENTERPRISE AGREEMENT 2020**

Electrical power industry

DEPUTY PRESIDENT YOUNG

MELBOURNE, 8 MAY 2020

*Application for approval of the EnergyAustralia Yallourn Enterprise Agreement 2020.*

[1] EnergyAustralia Yallourn Pty Ltd (the Employer) has made an application for approval of an enterprise agreement known as the *EnergyAustralia Yallourn Enterprise Agreement 2020* (the Agreement) pursuant to s 185 of the *Fair Work Act 2009* (the Act). The Agreement is a single-enterprise agreement.

[2] On the basis of the material contained in the application, and the accompanying statutory declaration, I am satisfied that each of the requirements of ss 186, 187, and 188 as are relevant to this application for approval have been met.

[3] The “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU), The Construction, Forestry, Maritime, Mining and Energy Union, the Australian Municipal, Administrative, Clerical and Services Union, The Australian Workers’ Union, and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, being bargaining representatives for the Agreement, have given notice under s 183 of the Act that they seek to be covered by the Agreement. In accordance with s 201(2) and based on the statutory declarations provided by the organisations, I note that the Agreement covers the organisations.

[4] The Agreement was approved on 8 May 2020 and, in accordance with s 54, will operate from 15 May 2020. The nominal expiry date of the Agreement is 1 February 2023.

A circular seal of the Fair Work Commission is positioned over a handwritten signature. The seal features the Australian coat of arms in the center and the text 'THE SEAL OF THE FAIR WORK COMMISSION' around the perimeter. The signature is written in black ink and appears to be 'R. Young'.

DEPUTY PRESIDENT

[2020] FWCA 2439

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***EnergyAustralia  
Yallourn Enterprise  
Agreement 2020***



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## **1 TITLE AND DEFINITIONS**

This Agreement shall be referred to as the *EnergyAustralia Yallourn Enterprise Agreement 2020 (Agreement)*.

**Parties:** means the Company and Unions as defined in clause 2;

**Base Rate of Pay:** means an employee's base salary, which does not include any applicable Shift Allowance, Yallourn Allowance, Weekend Penalty, or other loadings, allowances or penalty payments;

**Normal Rate of Pay:** means an employee's rate of pay including the following elements (as defined in clause 8.12) – Base Rate of Pay, Yallourn Allowance, plus any applicable Shift Allowance, Weekend Penalty and Availability Allowance normally received.

## **2 APPLICATION OF AGREEMENT**

This Agreement covers and applies to:

- (a) EnergyAustralia Yallourn Pty Ltd ACN 065 325 224 and/or any successor(s) (**Company**); and
- (b) Subject to Fair Work Commission (**FWC**) approval in accordance with the *Fair Work Act 2009* (Cth) (**FW Act**) the following unions (collectively the Unions):
  - i. Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**);
  - ii. Automotive Food, Metals, Engineering, Printing and Kindred Industries Union, also known as Australian Manufacturing Workers Union (**AMWU**);
  - iii. Communication, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**);
  - iv. Australian Municipal, Administrative, Clerical and Services Union (**ASU**); and
  - v. Australian Workers' Union (**AWU**).

This Agreement applies to all Employees of the Company who are members of, or who are eligible to be members of, any of the organisations of Employees party to this agreement and who are employed to work in the classifications in Appendix I (the **Employees**).

This Agreement operates to the exclusion of all other industrial instruments, which would otherwise apply to the Employees. It supplements the National Employment Standards (**NES**) and contains terms that are ancillary and/or incidental to the NES. Where there is an inconsistency between the Agreement and the NES, and the NES provides a greater benefit, the NES provision will apply to the extent of the inconsistency. The Company will only employ persons covered by this Agreement in accordance with its terms and conditions.

This Agreement settles all the claims of the Parties and the Employees in respect of terms and conditions of employment for the duration of this Agreement. The Parties will endeavour to commence negotiations on a replacement agreement at least three months before the nominal expiry date of this Agreement.

## **CONFIDENTIALITY**

All business information which is the property of the Company, whether directly related to this Agreement or not, shall be treated as confidential by the Parties to this agreement including the Employees. A person bound by this Agreement may not disclose such information to any person except as authorised in writing by the Company. All business information considered 'confidential' by the Company shall be clearly identified as such.

Failure to comply with this obligation may, consistent with Clause 30 Discipline Procedure, result in dismissal.

## **3 DATE & PERIOD OF OPERATION**

This Agreement shall commence operation seven days after the Agreement is approved by the FWC and shall remain in force until its nominal expiry date of 1 February 2023.

It is the intention of the Parties that this Agreement shall continue to apply after its nominal expiry date until replaced by a new Agreement.

## **4 DISPLAY OF AGREEMENT**

The Company shall make copies of this Agreement available to all Employees.

## **5 TYPES OF EMPLOYMENT**

### **5.1 ENGAGEMENT**

Employment shall be full-time and permanent except that employment may be part-time in accordance with clause 5.2, casual in accordance with clause 5.3, or maximum term in accordance with clause 5.4.

New Employees will be employed for a qualifying / probationary period not exceeding six months.

### **5.2 PART-TIME EMPLOYMENT**

A part-time Employee:

- (a) Works an average of less than the full-time hours of 36 per week;
- (b) Has reasonably predictable hours of work; and
- (c) Subject to the NES, receives, on a pro rata basis, equivalent pay and conditions to full-time Employees in the same classification.

At the time of engagement the Company and the part-time Employee will agree in writing on a regular pattern of work including the hours to be worked and the starting and finishing times on each day. Any agreed variation to the regular pattern of work will be recorded in writing. All time worked in excess of the hours as mutually agreed will be overtime and paid for at overtime rates.

For each ordinary hour worked, a part-time Employee will be paid no less than one thirty-sixth of the weekly rate of pay for the relevant classification plus any applicable allowances.

Where a part-time Employee works on a roster, the Employee will receive a minimum number of days off over the roster cycle being a minimum of two days multiplied by the number of weeks in the roster cycle.

Part-time Employees shall receive full health benefits as prescribed in clause 8.6.2.

Part-time work shall not be utilised in such a way as to achieve reductions in overall staffing levels. Part-time posts are to be counted on the basis of their full-time equivalent with regard to utilisation of staffing levels.

No Employee will be forced to convert from full-time employment to part-time employment or vice versa.

### **5.3 CASUAL EMPLOYMENT**

The Company may employ persons on a casual basis for the purpose of meeting particular and/or short term needs.

A Casual Employee is one engaged by the hour and paid as such. Casual Employees will be entitled to a salary loading in accordance with this clause.

Casual Employees shall be provided with a minimum period of 8 hours/full shift employment on each engagement or will be paid for a minimum of eight hours/7 hours 12 mins/full shift at the appropriate casual rate.

A Casual Employee for working ordinary time shall be paid per hour one thirty-sixth of the weekly Base Rate of Pay prescribed in this Agreement for the classification of work performed plus a casual loading of 25% of that hourly Base Rate of Pay. A Casual Employee is entitled to penalty rates applicable to rostered shifts worked by the Casual Employee based on the Base Rate of Pay and casual loading (for the avoidance of doubt, penalty rates are applied on a rate of pay including the casual loading), plus the applicable daily proportion of the Yallourn Allowance at single time (as per clause 8.14 i.e. the casual loading is not applied on the Yallourn Allowance). Applicable penalty rates for Casual Employees working rostered shifts referred to above are set out as follows:

- For Casual Employees engaged in a work area where the normal pattern of work is shiftwork (i.e. 1x7, 1x12 or 2x12): refer to clauses 10.3.2 – 10.3.4 (for the avoidance of doubt, casual loading is *not* applied on the applicable Shift Allowance); and
- For Casual Employees engaged in a work area where the normal pattern of work is *not* shiftwork, but they are appointed to temporary shift: refer to clause 10.3.9 (for the avoidance of doubt, casual loading is *not* applied on the applicable Shift Allowance).

The casual loading is in lieu of all paid leave, paid personal/carer's leave, compassionate leave, public holidays not worked, notice of termination and the other attributes of full time and part time employment. Nor are Casual Employees entitled to parental leave, except in circumstances prescribed by the FW Act.

Casual Employees shall be paid overtime for all hours worked in excess of ordinary hours on any day (i.e. 8 hours/7 hours 12 minutes per day/shift length). Except as provided by Clause 13 - Public Holidays of this agreement, all time worked which is in excess of ordinary daily hours shall be paid at double the Base Rate of Pay and casual loading (for the avoidance of doubt, overtime rates are applied on a rate of pay including the casual loading), plus the applicable daily proportion of the Yallourn Allowance at single time (as per clause 8.14 i.e. the casual loading is not applied on the Yallourn Allowance).

Notwithstanding anything to the contrary appearing elsewhere in this Agreement, the services of a Casual Employee may be terminated by one day's/shift's notice (by either the Company or the Casual Employee) or by the payment or forfeiture of one day's/shift's salary as the case may be.

Pay slips shall be provided to Casual Employees via the company's self-service Employee kiosk.

Casual Employees are not entitled to redundancy pay.

### **5.4 MAXIMUM TERM**

A maximum term Employee is an Employee who is employed by the Company for a specified period of time, a specific task or the duration of a specified project as a result of long service leave, parental leave, long term personal / carer's leave or special leave, a career break or special project. Maximum term Employees will be employed under the terms and conditions of this Agreement. The term of a maximum term contract must not be less than 4 months' and shall not exceed two years unless otherwise agreed between the Company, the relevant Employee and/or his or her union.

## **5.5 SECONDMENTS**

Secondment of Employees to other positions covered by this Agreement shall only occur on the following basis:

- (a) secondments are voluntary;
- (b) secondments, both internal to the site and to other EnergyAustralia sites will be via 'expression of interest';
- (c) rotation of personnel through the role may occur;
- (d) the individual returns to their normal role and work arrangements after the secondment;
- (e) the individual is not financially disadvantaged by such secondment;
- (f) the individual's continuity of employment and service is not affected by the secondment; and
- (g) secondments, other than to cover long-term illness, injury or parental leave shall not normally exceed six months. If a secondment period greater than 6 months is contemplated appropriate consideration is to be given to the impact on the secondee's originating work group.

A movement from one Yallourn-based work team to another Yallourn-based work team, working in the same role and classification, is not regarded as a secondment.

## **5.6 FLEXIBILITY & MOBILITY**

Employees shall perform such work as the Company shall from time to time reasonably require, including all work that they are trained and competent to perform, or work which they are required to perform for the purposes of training. All work shall be performed in a safe, legal and competent manner.

The Company may, after consultation with affected Employees, transfer Employees between work areas at the Company site to meet business needs on both a temporary and/or permanent basis.

For the avoidance of doubt, this clause 5.6 is subject to clause 33.18 (Career Path) for Operations Employees.

## **6 EMPLOYMENT SECURITY**

The Parties are committed to the long term viability of the business which, in turn, maximises job security for its permanent Employees.

Any reduction in the number of Employee positions will be achieved through either redundancy or natural attrition. Natural attrition shall mean planned retirement by the Employee, voluntary resignation by the Employee, Employee promotion or voluntary redeployment of the Employee.

Contractors and labour hire companies may be used for the performance of work on the Power Station and associated infrastructure from time to time to meet workloads provided that the job security of Employees is not affected.

Whilst this Agreement remains in operation the Company will not retrench, make redundant, or otherwise terminate the employment of an Employee covered by this Agreement in order to replace such Employee(s) with a contractor.

The Company will require all contractors and sub-contractors to:

- Observe all site safety and other requirements.
- Have all relevant permits, licences or certificates.
- Observe all legislation, statutory requirements or other legal instruments applicable to them.
- Where practicable have relevant terms and conditions of a current Enterprise Agreement that provides the appropriate scope to be applied to their Employees, registered with the FWC.

This clause does not apply to contractors undertaking work of a specialist nature.

## **6.1 TERMINATION NOTICE**

Employees may terminate their employment at any time by giving two weeks' notice to the Company or immediately by forfeiting the payment of two weeks' salary in lieu of notice.

Where permanent employment is terminated by the Company, the Employee shall be given four weeks' notice or equivalent payment in lieu of all or part of the notice period except an Employee who has not completed their probationary/qualifying period in which case the Employee will receive two weeks' notice.

Employees' with at least one year's continuous service to the date of termination of employment and who are forty-five years of age or over, shall receive one additional week's notice or pay in lieu.

This shall not affect the right of the Company to dismiss any Employee summarily for serious and wilful misconduct and in such cases salary shall be paid up to the time of dismissal only. No notice or payment in lieu of notice shall be made.

An Employee who, without reasonable cause, has been absent from duty for a period of 72 hours or more without prior notification to the Company or authorisation by his or her Team Leader/Supervisor, will be deemed to have abandoned his or her employment and therefore the contract of employment may be at an end at the Company's discretion. On the elapse of 72 hours the Company will make a reasonable attempt to contact the Employee prior to finalising termination. Notwithstanding the terms of this clause 6.1, the Company will provide notice or payment in lieu of notice where the termination of an Employee's employment is at its initiative as a matter of law.

## **6.2 REDUNDANCY**

Redundancy shall not occur unless as a result of clause 27 'Consultation' being applied.

Redundancies may occur including when:

- (a) The Company has made a decision to sell or contract out all or part of its business.
- (b) The function performed by an Employee or group of Employees is no longer required to be performed by anyone within the Company.
- (c) The introduction of new technology.
- (d) Reorganisation or changed work processes.
- (e) The Company no longer requires the person's job to be performed by anyone because of changes in the operational requirements of the Company.

### **6.2.1 SELECTION**

Wherever possible an Employee that volunteers for redundancy shall be selected for redundancy in preference to an Employee that has not volunteered for redundancy.

Where redundancies are to occur, the Company shall seek expressions of interest from Employees to determine whether any Employee wishes to be considered for voluntary redundancy. All expressions of interest received by the Company will be considered.

The Company will determine whether any Employee who has expressed an interest, is to receive an offer of voluntary redundancy having regard to the following factors:

- (a) The number of positions which have been determined to be redundant;
- (b) The skill mix of the Employees who have expressed an interest in accepting voluntary redundancy; and
- (c) The skill mix required by the Company to maintain its ongoing operations.

### **6.2.2 ACCEPTANCE**

Once the Company has selected the Employees who are to be offered a voluntary redundancy, the Company will advise those Employees of the offer in writing. The offer will also include:



- (a) The date by which the offer must be accepted;
- (b) The date on which employment will terminate if the offer is accepted; and
- (c) An estimate and break down of the total termination payments (including the redundancy payment) that the Employee will receive on termination of employment.

An offer of voluntary redundancy shall not be enforceable unless accepted by the Employee in writing.

### **6.2.3 COMPULSORY REDUNDANCIES**

Where the voluntary redundancy process cannot meet the Company's requirements the Company will determine which Employees will be declared compulsorily redundant. The selection will be based on merit with the aim of retaining the most appropriate personnel for the business.

The merit-based selection process will focus on objective job related competencies and will include an assessment based on performance, knowledge, skills and behaviour.

The Company will provide reasonable assistance with redeployment assistance for Employees declared redundant.

### **6.2.4 REDUNDANCY BENEFITS**

Employees declared redundant and whose employment is terminated under this Agreement shall be paid or provided with the following payment and support opportunities:

- (a) Benefits payment, (including notice) calculated in accordance with Appendix 2 (the 'Severance Payment').
- (b) Outplacement/training services up to the value of \$4000, to be taken up within 12 months of the termination date.
- (c) The appropriate benefit available under the Equisuper Superannuation Scheme.
- (d) All unused and accrued annual leave and long service leave inclusive of pro rata and day in lieu (**DIL**) balance.

The benefits payments set out in this clause are not payable by the Company to any particular Employee if the Company arranges acceptable alternative employment for that Employee.

In the event that there is a dispute between the Company and the Employee as to whether the Company has arranged acceptable alternative employment in his or her particular case, the dispute resolution procedure at Clause 29 Dispute Resolution Process will apply.

### **6.2.5 ALTERNATE EMPLOYMENT**

Where reasonably practical, and subject to suitability, the Company will use its best endeavours to offer alternative employment within the business or arrange alternative employment opportunities with new or other employers.

The Company is not obliged to make payment under Clause 6.2.4 of this Agreement or pay any other redundancy benefit set out in any other instrument if an Employee is offered acceptable alternative employment by:

- (a) the Company; or
- (b) another employer (where such offer is made substantially as a result of the efforts of the Company), prior to the termination of his or her employment with the Company.

If, after receiving notice of termination for redundancy under Clause 6.2.6, an Employee obtains employment with another employer (whether or not that employment is acceptable alternative employment), then:

- (a) At the request of the Employee the Company may subject to operational requirements:
  - i. not require the Employee to work out the remainder of the notice given under Clause 6.2; and

- ii. agree to terminate the employment on an earlier date than that given in the notice under Clause 6.2.6 to allow the Employee to take up the new employment;

If the Company has not offered (or arranged for another employer to offer) the Employee acceptable alternative employment, the Company will pay the Employee his or her redundancy benefit under this clause.

For the avoidance of doubt, the Company is not obliged to pay the Employee the balance of the notice period under Clause 6.2.6 if a request under this sub-clause is made.

Alternative employment means a position that, objectively assessed, provides for the Employee to be no worse off in an overall sense and would include assessment against the following elements:

- (a) Comparable to that currently held by the Employee in terms of duties, hours of work, work arrangements and remuneration; and
- (b) Within a 50km radius of the Employee's current workplace.

An Employee must not unreasonably refuse to accept an offer of suitable alternative employment. If an Employee unreasonably refuses to accept an offer of suitable alternative employment the Company is not obliged to make payment under Clause 6.2.4 of the Agreement or any other redundancy benefit set out in any other instrument.

#### **Disputes Concerning Offers of Alternative Employment**

Any dispute about whether:

- (a) an Employee has unreasonably refused to accept an offer of alternative employment; or
- (b) the offer of alternative employment is an offer of alternative employment; or
- (c) the offer of alternative employment was made substantially as a result of the efforts of the Company, shall be dealt with in accordance with Clause 29 'Dispute Resolution Process' of this Agreement.

If an Employee's employment is terminated in connection with a transmission of the business or part of the business of the Company to another employer where that other employer makes an offer of employment to an Employee on substantially similar terms to the employment of the Employee with the Company, the Company will use its best endeavours to ensure that Employees employed at the time of transmission shall not be the subject of a probationary/qualifying period with the new employer. In such cases, where employment offers are made by the other employer, these offers are deemed to be acceptable alternative employment and no redundancy payment will be made.

### **6.2.6 NOTICE PERIOD**

An Employee having been given written notice of redundancy (i.e. that their specific role is redundant) may provide the Company with two days' notice of their intention to leave and shall be paid their redundancy payments and shall be paid for the balance of the notice period. The Company may advise the Employee of the need to terminate prior to the expiry of the notice. In these circumstances the Employee will be paid their redundancy payments and shall be paid for the balance of the notice period.

An Employee having been given notice of redundancy may, during the notice period, have reasonable time off to attend employment interviews and shall be paid for the absence. Advance notice of the absence is required.

If an Employee is provided written notice of termination on the basis their role is redundant due to power station closure, the Employee may request to cease employment with the Company within 3 months of their notified last day of employment if they have successfully obtained alternative employment with another employer (as demonstrated by a signed letter of offer or contract). The Company may only refuse an Employee's request to cease early on the grounds it is not operationally practicable. In assessing what is operationally practicable, the company may not take into account the need to cover overtime shifts or the need to engage a Casual Employee to cover their absence.

If an Employee (**First Employee**) obtains alternative employment with another employer (as demonstrated by a signed letter of offer or contract) within 3 months of the notified date of power station closure, however they have not yet been provided with written notice of termination due to redundancy, a suitably qualified and competent Employee (**Second Employee**) who has already received written notice of termination on

the basis of redundancy due to power station closure may be substituted (to allow the First Employee to accept their employment offer) on the conditions below:

- (a) The Second Employee must agree to the substitution; and
- (b) The Second Employee's termination for redundancy must be due to take effect on or before the date on which the First Employee wishes to commence employment with their new employer.

If any Employee is released early in accordance with this clause, the remaining provisions of clause 6.2 will still apply, including the entitlement to severance pay.

If the Company declines to release an Employee early in accordance with this clause, an Employee may dispute the matter in accordance with clause 29 (Dispute Resolution Process).

## **6.2.7 STATEMENT OF EMPLOYMENT**

Redundant Employees will be provided with a statement detailing the service period with the Company, the Employee's classification and comment stating the termination was caused by redundancy.

## **6.3 POWER STATION CLOSURE**

### **6.3.1 NOTICE OF CLOSURE**

The Company will provide each permanent Employee affected by the closure of the Yallourn Power Station with a minimum of three (3) years' notice of power station closure. If a permanent employee is not provided with 3 years' notice of power station closure, the Company will count as service for redundancy purposes (in addition to the employee's actual period of continuous service) the balance of the period between 3 years and the actual amount of notice that was provided (on the basis that the employee's role is made redundant and the employee's employment ceases in accordance with clause 6.2.) This clause does not increase the cap on severance pay (inclusive of payment in lieu of notice of termination) in Appendix 2.

This clause does not apply for Force Majeure events or State or Federal legislation changes requiring a closure with less than three years' notice.

For the avoidance of doubt, notice under this clause will not constitute notice of termination / redundancy.

### **6.3.2 EDUCATION AND RETRAINING ASSISTANCE**

To assist permanent Employees with transitioning into new careers after power station closure, the Company will provide financial assistance to permanent Employees undertaking eligible studies offered by accredited educational institutions, leading to recognised qualifications, including: Bachelor's degrees, Diplomas and Certificates. This clause will operate once formal notice of power station closure is provided. Reimbursement is capped at \$15,000 over a 3-year full-time or up to 6-year part-time study period, Employees are eligible to have a maximum of \$5,000 of their tuition fees reimbursed annually (whether for one course/qualification or multiple courses/qualifications), subject to obtaining a "Pass" grade or higher. If an Employee's course/s remains ongoing after that Employee's employment has terminated (on the basis of redundancy) due to power station closure, the Company will reimburse the Employee for tuition fees (as above) until the end of the study semester period applicable at the time.

### **6.3.3 FINANCIAL ADVICE**

Following formal notice of power station closure, the Company will provide all permanent Employees performing a role which will be redundant due to power station closure with three (3) sessions of independent financial advice to assist them to manage their personal finances, leading into closure.

## **7 STAND DOWN OF EMPLOYEES**

Any Employee who is stood down under this clause shall be treated for all purposes (other than payment of wages) as having continuity of service and employment. Notwithstanding anything contained in this Agreement, the Company shall have the right to deduct payment of remuneration for any day or portion thereof during which any Employee cannot be usefully employed because of:

- a) any strike or other industrial action, including protected industrial action, as defined by the FW Act; and/or
- b) any breakdown in machinery or equipment or any stoppage of work by any cause for which the Company cannot reasonably be held responsible.

Prior to the Company implementing the stand down provision processes consistent with those to be followed with Clause 27 – Consultation are to be followed.

- c) However, any stand down of an Employee due to the circumstances described above is subject to the following conditions:
  - i. An Employee may only be stood down when there is no work available in his or her usual classification, including reasonable alternate duties.
  - ii. During a period of stand down, an Employee, who has been stood down, shall be entitled to access any paid leave which they have accrued.
  - iii. An Employee stood down under this clause shall be treated for all purposes (other than payment of wages) as having continuity of service and employment.
  - iv. Five days' notice will be given before any stand down commences.

## **8 SALARIES & OTHER BENEFITS**

### **8.1 RATES OF PAY**

Employees shall be paid in accordance with the relevant classification shown in Appendix 1, with salary increases effective from the first full pay period on or after the following dates:

- 29 November 2019 (2.5% increase);
- 1 April 2020 (2.5% increase);
- 1 February 2021 (2.5% increase); and
- 1 February 2022 (2.5% increase).

### **8.2 SIGN ON BONUS**

Upon a successful vote for this Agreement all permanent and maximum-term employees employed by the Company as at the last day of the vote will be paid an up-front single lump-sum payment of \$1500.

Casual Employees who are employed by the Company as at the last day of the vote will be paid an up-front single lump-sum payment of \$1500, pro-rata, based on the proportion of the available ordinary hours that they have worked for the Company between 29 November 2019 and the last day of the vote.

The above payments will be paid in the next available pay period following the vote.

### **8.3 PAYMENT OF SALARY**

Employees shall be paid every second Friday by electronic funds transfer. Overtime, higher duties, penalties and allowances will be paid within the fortnight in which they become an entitlement, provided it has been applied for and approved in the payroll system within necessary time limits. If time limits are not met, payment

for overtime, higher duties, penalties and allowances will be made in the following pay cycle. The Company shall facilitate the disbursement of Employee salaries to Employee nominated entities via electronic funds transfer, provided such entities are willing to receive it.

Payment during paid leave shall be at the Normal Rate of Pay which the Employee is being paid immediately prior to the time of commencing the leave so that there shall be no deduction from the Normal Rate of Pay by reason of such leave.

An Employee receiving an allowance or loading on a continuous basis shall continue to receive the allowance or loading on all authorised paid absences, subject, in the case of higher duties, to the Employee resuming higher duties on completion of the leave.

## **8.4 TIME & SALARY RECORD**

The Company shall provide access via Company's intranet to each Employee their fortnightly salary record that will include:

- (a) the amount of salary to which the Employee is entitled;
- (b) the Employee's classification;
- (c) all payments received inclusive of a description of the payment and the date of the entitlement;
- (d) all deductions made inclusive of the description of the deduction and its effective date; and
- (e) all leave balances (inclusive of time in lieu) and the details of any leave taken during the pay period.

No deductions will occur to an Employee's pay that are not specifically authorised by the Employee unless by order of an Australian Court with jurisdiction or for reimbursement of any overpayments made incorrectly. The latter of which will be advised in advance to the Employee. Any proposed deduction from an Employee's pay as a result of an overpayment by the Company shall be subject to an agreed schedule of repayment agreed to by the affected Employee and the Company.

Reasonable time occupied by an Employee in filling in any time record or cards or in the making of records shall be treated as working time.

## **8.5 SALARY PACKAGING**

Subject to relevant Australian Taxation Office guidelines, the Company shall facilitate salary packaging for Employees. Salary packaging will be made available on the basis that Employees are advised to obtain and are solely responsible for independent financial advice in relation to salary packaging. The salary sacrifice rate of pay is applicable for all periods whilst on leave.

The sacrificing of salary shall not reduce the salary used for the purposes of superannuation.

### **8.5.1 NOVATION LEASING**

Employees shall be entitled to salary sacrifice for Novation Leasing of vehicles through a choice of the two Company nominated providers (currently nlc Pty Ltd, and Lease Plan Australia).

### **8.5.2 MEMBERSHIP SUBSCRIPTIONS**

Employees shall be entitled to salary sacrifice for membership subscriptions of organisations or associations (e.g. Employee organisations).

## **8.6 NON-SALARY BENEFITS**

### **8.6.1 ENERGY BILLS**

The Company will provide permanent Yallourn Employees a 25% discount off usage and supply charges on their primary household EnergyAustralia gas and electricity accounts. All Employees (permanent, maximum

term and casuals) may elect to have their gas and electricity accounts subject to the company-wide scheme (called 'Family, Friends and You' at the commencement of this Agreement), and if they do so, shall not be able to revert to the 'Yallourn' discount available in accordance with this clause.

### **8.6.2 SUBSIDISED PRIVATE HEALTH INSURANCE**

The Company will subsidise Private Health Insurance through Latrobe Health Services to the extent that Employees can gain top Hospital cover for the cost of the lowest Hospital Table premium. The Company currently gives effect to this benefit by paying an Employee's hospital excess (including specialist 'out of pocket charges for in-patients). The Company may elect to give effect to this benefit via an alternative mechanism, in consultation with the Parties.

## **8.7 HIGHER DUTIES**

An Employee directed by the Company to carry out the duties of a position (whether an existing position or a newly created short-term position) classified at a higher pay level for a continuous period of not less than one working day/shift shall be paid for the day or shift at the rate for the higher position, once the Employee has demonstrated competency performing in the higher position. An Employee on higher duties shall continue to be paid for such higher duties whilst on paid leave subject to the Employee resuming duties in the higher classification on completion of such leave.

## **8.8 TRAVEL, ACCOMMODATION & INCIDENTAL EXPENSES**

All reasonable travelling, meal and accommodation expenses incurred by an Employee whilst on endorsed Company business shall be reimbursed upon presentation of appropriate receipts wherever practicable.

An Employee who is required to use a private motor vehicle for other than travel to and from the normal place of work, shall, in addition to being reimbursed for all tolls and parking fees, be paid per kilometre travelled an allowance equal to the maximum Australian Taxation Office guideline for car expenses.

Time required to travel to and from an alternate work destination that is in excess of that time required to travel to and from the normal place of work shall be considered time worked.

## **8.9 LICENCES & TICKETS**

For permanent and maximum term Employees, the Company shall reimburse the cost of licences and tickets (including their renewal) where the licence/ticket is deemed, by the Company, to be required by the Employee to perform his or her duties. Employees must disclose to the Company as soon as practicable any loss or suspension of any licence/ticket that is required.

For Casual Employees, the following will apply:

- Where a Casual Employee is required by the Company to attend training while engaged by the Company, the Company will pay the Casual Employee his/her Normal Rate of Pay while attending that training, in addition to relevant training fees and the licence/ticket cost resulting from the course; and
- Where a Casual Employee is required by the Company to have a particular licence/ticket prior to being re-engaged by the Company, the Company will reimburse the Casual Employee for the cost of the licence/ticket (but not tuition fees or wages for time spent in training while not engaged by the Company) provided that the Casual Employee:
  - (a) Has incurred the cost in the last 6 months; and
  - (b) Provides a copy of a paid tax invoice and can demonstrate that the cost of the licence/ticket has not been paid by an employer other than the Company; and
  - (c) Has been engaged by the Company for at least 50% of the available ordinary working hours in the preceding 3 month period.

## **8.10 EYEWEAR**

The Company will pay all reasonable costs associated with an Employee's prescription eyewear as safety glasses or in use of screen based equipment, including their repair/replacement if damaged while being used at work and any out of pocket expenses for eye examination and consultation.

## **8.11 MEAL ALLOWANCE**

Where an Employee works overtime and meal allowances are payable (see sub-clauses 12.4, and 12.5 & 12.6), the Company shall pay the Employee meal allowances as shown in Appendix 1.

## **8.12 NORMAL RATE OF PAY**

Unless otherwise defined in this Agreement, Normal Rate of Pay includes:

Base Rate of Pay and Yallourn Allowance, and where applicable:

- Shift Allowance;
- Weekend Penalty; and
- Availability Allowance.

## **8.13 AVAILABILITY ALLOWANCE**

Where the Company requires an Employee to be available for duty after normal working hours in accordance with an availability roster (see clause 10.4) the Employee shall be paid the availability allowance shown in Appendix 1 appropriate for the number of persons sharing the availability duty.

## **8.14 YALLOURN ALLOWANCE**

This allowance is applicable to Employees covered by this Agreement who work on the Company site at Yallourn. This allowance will be paid to new site-based Employees and existing Employees who previously attracted, on an ongoing basis, either the mine allowance or power station allowance. The Yallourn Allowance as shown in Appendix 1 is paid as a flat rate allowance to all site-based Employees for each hour worked and replaces all incidental allowances excluding availability, shift allowances, travel and meal allowance.

## **8.15 OUTAGE ALLOWANCE**

The following outage allowance for planned Major and Integrity outage work for the period of the outage only after 1 January 2018:

- Payment will be for all work performed on the relevant unit only and will be paid for each hour worked as a flat rate allowance.
- For Maintenance Employees working on major outages, two weeks prior to desynchronization and one-week post resynchronisation of the Unit, work shall attract the outage allowance for specified scaffold works, turbine/generator works and de-lagging / lagging of plant for access only.
- For Operations Employees, an Outage Allowance is included within their Base Rate of Pay.

For other planned outages the Outage Allowance will be paid to Maintenance employees for outages shown on the approved station outage schedule (based on the approved business plan) as being longer than 10 days in duration. This includes planned outages that are re-scheduled to a different time but does not include where a unit is 'parked'.

In the mine, whenever a large machine (dredger, stacker etc.) or a system is taken out of service for greater than 10 days to enable planned major works to be carried out, the outage allowance is payable for works associated with the outage program. Mine outages do not attract the pre or post outage allowance. Mobilisation of huts, supply and connection services, procurement, preparation and delivery of materials,

planning and overhaul works, do not attract pre-outage allowance. Employees who are taken off works attracting outage allowance to attend to emergency works will not be disadvantaged.

## **9 SUPERANNUATION**

The Company shall abide by the rules of the *Equisuper* Superannuation Fund including any amendments thereto except where there is any inconsistency between the *Equisuper* Superannuation Fund rules and the superannuation provisions of this Agreement, the superannuation provisions of this Agreement shall prevail to the extent of the inconsistency.

For the avoidance of doubt, it is not intended that the provisions of this Agreement reduce or remove any benefit provided by the *Equisuper* Superannuation Fund rules.

The *Equisuper* Superannuation Fund shall continue as the default superannuation fund for the Employees, unless the Employee nominates, in writing, an alternate complying superannuation fund.

### **9.1 MEMBERSHIP OPTIONS**

Employees who are currently members of *Equisuper* Superannuation Fund Division B (Division B) shall have the option of remaining in Division B or at any future stage, transferring to *Equisuper* Superannuation Fund Division C (Division C).

Employees that are members of *Equisuper* Superannuation Division B or Division C shall have the option of supplementary membership of Division D.

### **9.2 SALARY SACRIFICING**

Employees shall have the option to salary sacrifice their superannuation contributions, regardless of the contribution rate (6% or 3%) or Fund Division.

Employees shall have the right to vary their superannuation salary sacrifice arrangements, and/or contribution rates up to four times per calendar year.

### **9.3 FUND SALARY**

The Fund Salary (or superannuation salary) of Employees for superannuation benefit purposes shall be equal to their salary shown in Appendix 1 plus normally received shift allowance and weekend penalties.

Except where payments are in relation to overtime, and provided an Employee is in regular receipt of such payment, the Yallourn Allowance, Shift Allowance, and Weekend Penalties shall be included as part of the salary used to calculate:

- (a) Superannuation Fund Salary; and
- (b) Final Average Salary; and
- (c) the Company's Superannuation Guarantee (Administration) Act obligation.

### **9.4 FINAL AVERAGE SALARY**

"Final Average Salary (also known as the Final Average Remuneration) for Division B and Division C members shall be the Employee's average superannuation salary over his or her last year of membership (or the actual period of membership if less than one year). In the case of an Employee on a Leave of Absence without pay, or at a reduced rate of pay, their Fund Salary shall be an amount equal to the rate of their Fund Salary immediately prior to that Leave of Absence.

### **9.5 ACCRUAL RATES**

Benefits for Division B and Division C members are defined in the *Equisuper* Superannuation Fund Rules. However, for the purpose of calculating benefits other than Death Benefit and Temporary Total Disablement Benefit, the benefit multiple accrual rates shall be in accordance with the following tables.



For the avoidance of doubt, whilst the tables below show per annum rates, it is not intended that the rates apply to whole years only, but rather the periods shown in tables 9.5.1 and 9.5.2 or parts thereof.

### 9.5.1 DIVISION B – PENSION MULTIPLE

Membership Period	Pension Rate (% pa)
First 30 Years (per year)	2.2222R
Subsequent 5 Years (per year)	0.6666R

Where "R" means recurring number.

### 9.5.2 DIVISION C – ACCRUED BENEFIT MULTIPLE

Member Contribution Rate	Accrual Rate (pa)				
	Prior to 1-Jul-1993	From 1-Jul-93 to 31-Dec-00	From 18-Aug-06 to 17-Jul-07	From 18-Jul-07 to 31-Dec-09	From 1-Jan-10
6 %	0.21	0.185	0.195	0.205	0.21
3 %	0.15	0.13	0.14	0.15	0.15
0 %	0.09	0.0775	0.08375	0.09	0.09

### 9.5.3 DIVISION D ONLY MEMBERS

From 1st January 2014 Employees whom are members of *Equipsuper* Superannuation Fund Division D, but not Division B or Division C, the Company shall make contributions to the Employee's superannuation account equal to twelve percent (12%) of their superannuation salary or two percent more than the Federal Government Superannuation Guarantee, whichever is the greater.

## 9.6 COMPANY CONTRIBUTION RECORDS

The Company shall provide each Employee with precise details of all superannuation contributions made in the Employee's name. This information shall be made available in a timely manner to enable Employees to manage their total annual contribution tax effectively.

## 9.7 MAINTENANCE OF FAS

In circumstances where the Company requires an Employee to change shift patterns or moves to day work which would reduce his or her superannuation salary, the Final Average Salary (**FAS**) will be maintained at the level immediately prior to the change until such time as the substantive FAS pertaining to the new work arrangements reach the sustained FAS.

## **10 HOURS OF WORK**

### **10.1 GENERAL**

An Employee shall not be compelled to work for more than five hours without a break for a meal. If an Employee is compelled to work longer than five hours without a meal break then they will be paid at double their Normal Rate of Pay rate until such time as they receive their meal break.

Subject to clause 33, Shift Operations Group, the Company may implement roster systems that meet the needs of the business. These may include but are not limited to:

- Seven day coverage – day shift only
- Nine day fortnight coverage
- 5 panel 12 hour continuous roster
- 5 panel 12.5 hour continuous roster
- 4 panel 12 hour roster\*
- Flexible shift lengths

\* The Company will not introduce rosters with built in overtime in the Power Station Operations without agreement of the majority of the Operations group.

Employees will be required to undertake any work for which they have the appropriate competencies and training.

### **10.2 DAY-WORK**

Day-work Employees will work a nine day fortnight Monday to Friday with every second Monday being a Rostered Day Off (RDO).

Where an RDO falls on a public holiday or a substitute public holiday, the RDO will be moved to the nearest working day (or otherwise as agreed by the Parties). Workgroups that require Monday to Friday coverage of certain roles will divide in two for the purpose of taking their RDOs on alternate Mondays.

An RDO may be moved to another day by mutual agreement between the individual Employee and the supervisor or manager. In the absence of such mutual agreement, where an Employee is requested to work their RDO, normal overtime provisions shall apply.

#### **10.2.1 SPAN OF HOURS – DAY WORKERS AND 1 X 7 SHIFT WORKERS**

The average hours of work shall be 36 per week. The spread of hours will be between 6.00 am and 6.00 pm Monday to Friday for day-workers and 6.00 am to 6.00 pm on any day for 1 X 7 shift workers. Meal breaks and start / finish times within the span of hours may be altered following consultation between the Company and the affected Employees.

### **10.3 SHIFT WORK**

#### **10.3.1 GENERAL**

The ordinary hours of work for shift workers are thirty-six hours per week; averaged across the roster cycle.

The roster cycle varies according to the type of shift and working arrangements employed in each workgroup. Generally there are three types of shift work employed at the Company, twelve hour day and night shifts that cover the seven days of the week (known locally as 2x12 shift), twelve hour day shifts that cover the seven days of the week (known locally as 1x12 shift) and a pattern of 10-hour day shifts on weekdays and 6-hour day shifts on weekends (known locally as 1x7 shift).

Shift worker meal breaks shall be paid and counted as time worked.

### **10.3.2 SHIFT ELECTRICIANS ROSTER**

The Shift Electricians work a 1x12, 3-leg roster with one person allocated to each leg of the roster and working from 7am to 7pm. The roster is arranged such that there is no overlap of the legs on Saturdays or Sundays and the roster cycle runs for 10 weeks. The shift attracts a 21% weekend penalty but does not attract any shift allowance or compensating days off.

Legs of the shift are not backfilled when someone is on leave unless it is assessed as necessary to do so by the Company.

### **10.3.3 1x7 SHIFT**

An Employee rostered to work a 1x7 shift currently works 10-hour day shifts on weekdays and 6-hour day shifts on weekends. The current roster pattern is 5 on, 4 off, 6 on, 3 off, 5 on, 5 off, averaging 36 hours per week (144 hours over 28 days).

The shift attracts a 12.5% weekend penalty based on the current shift pattern but does not attract any shift allowance or compensating days off.

The Technical Officer (Scientific), Technical Services Officer (Chemical Team) and Chemical Team Non-Technical Assistant currently work a 1x7 shift. New employees performing these roles may be engaged to perform Day Work. Existing employees performing these roles may be transferred to Day Work in accordance with the consultation/notice provisions of this Agreement.

### **10.3.4 2x12 SHIFT**

An Employee rostered to 2x12 shift shall be paid weekend penalties of 21% of their Base Rate of Pay shown in appendix 1, plus the shift allowance shown in Appendix 1, on a continuous basis including when the Employee is absent on paid leave. The 2x12 shift roster cycle shall be either ten days and consist of two 12-hour night shifts followed by one rostered day off followed by two 12-hour day shifts, followed by five rostered days off (RDOs) or ten days and consist of two 12-hour day shifts followed by one day off followed by two 12-hour night shifts followed by six days off as agreed between the Parties.

In addition to the roster cycle, two additional day shifts (known as RDs) shall be rostered in each ten week period.

There is a 12-hour break between consecutive night shifts or consecutive day shifts and 24 hours between a day shift and a night shift.

Night shifts shall commence at 7 PM on the evening of the day marked as "N" on the roster and day shifts shall commence at 7 AM on the day marked as "D" on the roster. A shift hand-over of fifteen minutes shall take place and be counted as time worked. Employees may mutually agree to vary these times in accordance with sub-clause 10.3.5.

Excluding overtime shifts, not more than five twelve hour shifts shall be rostered in any ten consecutive days.

Handover time (other than for overtime shifts) referred to above, is compensated within the Base Rate of Pay of 2x12 shift employees (i.e. no compensating days off (CDOs) apply).

Any CDOs which accrued between 29 November 2019 and commencement of this Agreement, will be forgone (as the equivalent number of CDOs has been included in the Base Rate of Pay). In the event that an Employee has taken one or more CDOs which accrued between 29 November 2019 and commencement of this Agreement (and has no remaining CDO balance), the Employee must elect for one or more of their following leave balances to be reduced by the same number of hours owing: Annual Leave (including public holiday credits) or Days in Lieu of overtime.

Any unused CDOs which accrued up to (and including) 28 November 2019, will not be affected and will continue to be available to be taken by an Employee. Alternatively, an Employee may elect to cash out any (or all) existing unused CDOs following commencement of this Agreement.

### **10.3.5 ROSTER VARIATION OR NEW ROSTERS**

The type of roster, shift duration, shift commencement time and/or roster pattern worked by Employees shall not be changed and new shift rosters, of a type not in use at the date of approval of this Agreement by FWC, shall not be implemented unless agreed by the Parties, and such change has been presented in writing for consideration by the affected Employees for at least four weeks and is subsequently approved by a majority of the affected Employees. Such agreement shall include an appropriate rate of remuneration.

Subject to the approval of the appropriate supervisor which shall not be unreasonably withheld, Employees may, by agreement, exchange shifts and days off or parts thereof but in these circumstances pay shall be as if the work had proceeded according to the roster.

### **10.3.6 DIRECTED OFF SHIFT WORK**

Where an Employee is directed off shift work by the Company, the following shall apply:

- (a) The Employee's shift payments (shift allowance and weekend penalties) will be sustained for ten years from the date of moving off shift or until the date of leaving the Company, whichever is sooner.
- (b) Shift allowance and weekend penalties will be frozen at the point of coming off shift.
- (c) Three months' notice is to be given to persons moving off shift onto day work.
- (d) No annual leave loading is payable because of shift change compensation arrangements.
- (e) The Employee's superannuation salary shall not reduce even after the ten year period of sustained shift payments.

### **10.3.7 SHORT NOTICE CHANGE OF SHIFT**

An Employee who is transferred:

- (a) From a rostered day off (RDO) to a rostered shift; or
- (b) From a rostered shift to an RDO; or
- (c) In the case of a 2x12 shift work Employee:
  - i. from a night shift to a day shift; or
  - ii. from a day shift to a night shift,

shall be paid a penalty of an additional 50% of his or her Normal Rate of Pay for any shift worked after the transfer of which the Employee did not receive seventy-two hours' notice or an additional 100% of his or her Normal Rate of Pay for any shift worked after the transfer of which the Employee did not receive forty-eight hours' notice.

The penalty shall be paid in addition to any shift allowance payable, or to any penalty rate applicable to weekend or public holiday work.

Before requiring an Employee to change shift at short notice, the company shall first ask for volunteers.

### **10.3.8 DAYLIGHT SAVING**

- (a) Notwithstanding anything contained elsewhere in this Agreement, in any area where by reason of legislation, summer time is prescribed as being in advance of the standard time, the length of the shift:
  - i. commencing before the time prescribed by the relevant legislation for the commencement of a summer time period; and
  - ii. commencing on or before the time prescribed by such legislation for the termination of a summer period;

shall be deemed to be the number of hours represented by the difference between the time recorded by the clock at the beginning of the shift and the time so recorded at the end, the time of the clock in each case is to be set to the time fixed pursuant to the relevant legislation.

- (b) In this subclause, the expressions standard time and summer time shall have the same meaning as prescribed by the relevant legislation.

### **10.3.9 TEMPORARY SHIFT WORK**

An Employee required to transfer from day work to temporary shift work shall be paid the appropriate shift allowance and, in addition:

- at the rate of time and a half for the first four hours and double time thereafter for each afternoon or night shift; and
- at the rate of double time and a half for each shift worked on a public holiday.

Other shifts shall be paid for at the Normal Rate of Pay, provided that twelve hour periods shall be paid as afternoon and night shifts, as provided above. For the duration of the temporary shift roster, all overtime worked shall be paid for at the rate of double the Base Rate of Pay (refer to clause 5.3 for applicable overtime rates for Casual Employees).

A shift roster to cover the period of temporary shift work shall be posted. The duration of the roster shall not exceed eight weeks.

For permanent and maximum-term Employees, at least 72 hours' notice of the working of temporary shift shall be given; otherwise 50% of the Normal Rate of Pay shall be paid for all time worked of which an Employee did not receive 72 hours' notice. Where an Employee did not receive at least 48 hours' notice of the working of temporary shift an additional 100% of the Normal Rate of Pay shall be paid for all time worked for which the 48 hours' notice was not received.

## **10.4 AVAILABILITY DUTY**

Availability duty means that an Employee is continuously available outside normal working hours. An Employee on availability duty shall not be required to remain at home, but shall ensure contact, by telephone or other means, is available to enable duty to be taken up within thirty minutes.

An Employee on availability duty who performs work at home or any place away from normal work places, in response to a telephone call or an alarm signal concerning faulty conditions or interruptions to supply, shall be regarded as being on overtime for the period or periods concerned.

Work shall include the making of necessary arrangements for other Employees to attend to or otherwise deal with the said faulty conditions or interruptions to supply, or to give directions and/or instructions to other Employees who are at work.

Overtime payment shall be made for a minimum of one hour for such work performed provided that for subsequent calls within one hour of a qualifying call, only one minimum payment shall apply.

## **10.5 ABSENCES**

An Employee, who without reasonable cause promptly communicated to the Company, reports for duty after the appointed starting time or fails to attend for duty or ceases duty before the appointed finishing time, shall lose pay for the time of such non-attendance, calculated to the nearest quarter of an hour.

## **10.6 TEA OR REST BREAKS**

Paid morning tea breaks of seven and a half minutes shall be allowed for day-work Employees.

Shift workers shall be entitled to paid tea breaks as operational or plant needs permit.

## **11 FACILITIES & PROVISIONS**

The Company shall provide clean and hygienic facilities for Employees to heat meals and make hot drinks during meal and or tea breaks, during which time the Company will provide milk, sugar, tea, Milo, chilled drinking water and coffee (decaffeinated and regular).

Amenities shall be in accordance with the Work Safe compliance code "Workplace amenities and work environment" of September 2008.

## **12 OVERTIME**

### **12.1 GENERAL**

All time worked in excess of the ordinary hours of work shown in clause 10 shall be remunerated at the rate of double the Employee's Base Rate of Pay except when worked on a public holiday (which shall be remunerated at the rate of double time and a half of an Employee's Base Rate of Pay), plus the applicable daily proportion of the Yallourn Allowance at single time.

For the avoidance of doubt, overtime rates for Casual Employees are provided for in clause 5.3 of this Agreement.

In computing overtime, each day's work shall stand alone and overtime shall be paid rounded up to the next quarter of an hour.

No greater than four hours overtime in addition to a normal twelve hour rostered shift shall be required of any 2x12 shift work Employee. Every effort shall be made to confine such overtime to two hours in order for a ten hour rest to be observed.

The criteria which the Company shall apply to determine the allocation of overtime will be based upon the matching of the job skill and ability requirements of the task to the Employee or Employees able to perform the work effectively and efficiently. Within these criteria the Company shall support a system for the equalisation of overtime opportunities and transparency regarding overtime hours. The system, process and rules will be developed through consultation between the Parties.

### **12.2 REQUIREMENT TO WORK REASONABLE OVERTIME**

Subject to the paragraph below, the Company may require an Employee to work reasonable overtime at overtime rates.

An Employee may refuse to work overtime in circumstances where the working of such overtime would result in the Employee working hours which are unreasonable having regard to:

- (a) fatigue or any other risk to Employee health and safety that might reasonably be expected to arise if the Employee worked the overtime;
- (b) the Employee's personal circumstances (including family responsibilities);
- (c) the operational requirements of the workplace or enterprise;
- (d) any notice given by the Company of the requirement or request that the Employee work the overtime;
- (e) any notice given by the Employee of the Employee's intention to refuse to work the overtime;
- (f) whether any of the overtime is on a public holiday;
- (g) the Employee's hours of work immediately before the Employee is required or requested to work the overtime; and
- (h) any other relevant matter.

## **12.3 TIME OFF IN LIEU OF OVERTIME (DILs)**

Where overtime is worked and payment is due in the terms of this clause, time off in lieu may be granted on the following basis:

One day off in lieu may be substituted for a portion of the payment due with the balance of the payment being made in money where:

- (a) at least a full shift of overtime is worked on a rostered day off by a shift work Employee, or where a shift work Employee works a double shift in the absence of the incoming shift relief.
- (b) Where a maintenance worker on arranged overtime or overtime continuous with normal hours and a minimum of 4 hrs has been worked the Employee shall have the option to be paid the actual hours worked at single time and 'bank' the equivalent time in off in lieu.

Maintenance Employees will be required to clear their 'banked' time off in lieu within 12 months of its accrual. Where the time off in lieu has been accrued for a period of 12 months or more, this accrual will be paid out on the 31 January of each year of the operation of this Agreement.

For all Employees, a maximum of ten such days off shall be granted in any year. The year period for the granting of the maximum of ten days will be the leave year for each Employee. The taking of time is subject to operational requirements.

Operations Employees cannot bank days in lieu once their bank reaches 144 hours at any point in time. For any Operations Employee with a bank which exceeds 144 hours upon commencement of this Agreement, the Employee:

- a) Is unable to bank any additional time in lieu until their bank falls below 144 hours; and
- b) Any existing balance above 144 hours must be taken by the nominal expiry date of this Agreement (or will be cashed out at the Employee's Base Rate of Pay in the next available pay period following that nominal expiry date).

In the event that an Employee's employment ends after they have been granted a request to take time off in lieu of overtime (DILs) pursuant to this clause 12.3, but before some or all of the time off is taken, the balance of the overtime entitlement that was to be taken as time off in lieu will be paid out at the Base Rate of Pay.

## **12.4 WORK CONTINUOUS WITH ORDINARY TIME**

An Employee who is required to work overtime for not less than two hours but not more than four hours before or after working ordinary rostered hours shall receive during such overtime a meal break of twenty minutes which shall count as time worked and a meal provided by the Company (or in place of the provided meal, a meal allowance).

Where the overtime is to continue after the fourth hour (and after each subsequent four hours) the Employee shall receive a meal break of twenty minutes which shall count as time worked and a meal provided by the Company (or in place of the provided meal, a meal allowance).

## **12.5 CALL IN**

Employees called in to work, whether notified before or after leaving the workplace, shall be entitled to a minimum of four hours overtime for such work. Note that attending meetings at the request of the Company is work and subject to this minimum entitlement. Periods of overtime worked immediately prior to or at the conclusion of the normal working day or shift will not be eligible for such minimum payment.

An Employee who is required to return to work outside ordinary hours or on a Saturday, Sunday, public holiday, RDO shall receive, after the fourth hour and after each subsequent four hours, a meal break of twenty minutes which will count as time worked; and a meal provided by the Company (or in place of the provided meal, a meal allowance).

Except in the case of an Employee rostered for availability duty, overtime worked in the circumstances specified in this sub clause shall not be regarded as overtime for the purpose of 12.7 – 'Minimum Break Between Work On Successive Days' hereof, when the actual time worked is less than three hours on such recall or on each of such recalls.

In the case of an Employee called-in to cover a shift absence, the Employee shall be entitled to payment for the full shift.

## **12.6 MEAL ALLOWANCE GUIDELINES**

Meal Allowances for Overtime worked in conjunction with normal working hours are payable as follows:

A	Less than 2 hours	Nil
	2 – 4 hours	1
	After 4 hours	2
	After 8 Hours	3
	After 12 hours	4

Meal Allowances for overtime NOT worked in conjunction with normal working hours, i.e. Weekends, Public Holidays, Special Day Off, Rostered Day Off or call back.

B	Less than 4 hours	Nil
	After 4 hours	1
	After 8 hours	2
	After 12 hours	3
	After 16 hours	4

The entitlement in both A and B also apply to Employees rostered on Availability:

NOTE: Meal allowance is not payable for hours worked at penalty rates, temporary shift, no 10 hours break.

## **12.7 MINIMUM BREAK BETWEEN WORK ON SUCCESSIVE DAYS**

When overtime work is required it will, wherever reasonably practicable, be arranged so that Employees have at least ten consecutive hours off work between work on successive working days or shifts.

An Employee shall be entitled to ten consecutive hours off duty without loss of pay for ordinary working time occurring during such absence in the following circumstances:

- (a) where an Employee works so much overtime between the termination of ordinary work on one day and the commencement of ordinary work on the next day that the Employee has not had at least ten consecutive hours off duty between those times; or
- (b) where an Employee, not engaged on continuous shift work, works overtime on a Sunday, Public Holiday or RDO which continues after 9.00 p.m.

If an Employee is instructed by the Company to resume or continue work without having had such ten consecutive hours off duty, the Employee shall be paid at double time until released from duty and shall be entitled to be absent until the Employee has had ten consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

The provisions of this subclause are subject to those contained in "Call In" provisions.

## **12.8 TRANSPORT OF EMPLOYEES**

Where an Employee, after having worked overtime in conjunction with their normal day/shift, is suffering from fatigue or concern exists for his or her ability to safely travel home or the Employee finishes work at a time when that Employee's normal mode of transport is not available (e.g. a car pool), the Company shall provide conveyance of the Employee (and their vehicle if applicable or arrange storage of vehicle) to the Employee's home.



## **12.9 CANCELLATION OF ARRANGED OVERTIME**

Where an Employee arrives on site for arranged overtime and the Company no longer requires the Employee to work the overtime, then at the discretion of the Employee, the Employee may immediately depart the site and be entitled to four hours overtime and a meal allowance or work the arranged overtime.

## **12.10 STANDBY**

An Employee required by the Company to standby for call back shall be paid at the Normal Rate of Pay from the time standby commences until released. This provision does not apply to Employees rostered on availability duty.

## **12.11 TRAVEL ALLOWANCE ON CALL BACK**

Maintenance Employees required to make extra trips, such as call-back after the completion of their ordinary hours of work or on a non-workday, shall be paid a travel allowance (in accordance with Appendix 1 Allowances). This allowance shall be paid no more than once per day.

# **13 PUBLIC HOLIDAYS**

## **13.1 GENERAL**

An Employee shall be entitled to the following as public holidays without loss of pay:

New Year's Day, Australia Day, Good Friday, Easter Saturday, Easter Monday, Labour Day, Anzac Day, Queen's Birthday, Melbourne Cup Day, Christmas Day, Boxing Day and any additional public holidays gazetted by the State or Federal governments.

## **13.2 SUBSTITUTE DAYS**

For day work Employees only, a substitute day off will be applied when a public holiday occurs on a weekend. The substitute day will normally be observed on the day declared in the Government Gazette or as otherwise agreed by the Parties.

In the case of shift work Employees, public holidays will be observed on the traditional date they occur, unless they happen to fall on another public holiday, in which case a substitute day will be observed on the following day unless otherwise agreed by the Parties.

## **13.3 PUBLIC HOLIDAYS – DAY WORK EMPLOYEE**

Day work Employees shall be entitled to time off without loss of pay for all public holidays (including substitute days in lieu thereof) created in accordance with clause 13.1.

A day work Employee shall be remunerated at the rate of double time and a half for all work done on a public holiday.

Where work is performed on a public holiday and payment is due, one day off in lieu may be substituted for a portion of the payment due with the balance paid.

Subject to the NES, where a day-work Employee is absent from work on any part of the working day before or after a public holiday without reasonable excuse or without consent of the company, the Employee shall not be entitled to payment for such holiday.

## **13.4 PUBLIC HOLIDAYS – SHIFT WORK EMPLOYEE**

Where a shift commences before midnight on a public holiday, the time so worked before midnight shall not entitle the Employee to the holiday rate; provided that the time worked by an Employee on a shift commencing before midnight on the day preceding a holiday and extending into a holiday shall be regarded as time worked on such holiday.

In respect to public holidays created under sub-clause 13.1, shift work Employees shall be entitled to the following in addition to their Normal Rate of Pay:

- (a) Shift work Employees who are 'rostered off' on a public holiday shall, at the Employee's discretion be entitled to either:
  - i. an annual leave credit of eight hours; or
  - ii. payment of eight hours at their Normal Rate of Pay.
  
- (b) Shift work Employees who were 'rostered off' but work overtime on a public holiday shall, at the Employee's discretion be entitled to:
  - i. in respect to the public holiday – an additional eight hours pay at their Normal Rate of Pay or eight hours annual leave credit in lieu of the public holiday; and
  - ii. in respect to the overtime – double time and a half of their Base Rate of Pay for all time worked, plus the applicable daily proportion of the Yallourn Allowance at single time.
  
- (c) Shift-work Employees who are 'rostered on' and work ordinary time on a public holiday shall, at the Employee's discretion, be additionally entitled to either:
  - i. an annual leave credit of one and a half times the period of the shift worked; or
  - ii. an annual leave credit of one times the period of the shift worked plus half times the period of shift worked in pay (at their Normal Rate of Pay).
  - iii. payment at the rate of one and a half times their Normal Rate of Pay for the shift worked.
  - iv. an annual leave credit of one half shift plus an additional one shift pay (at their Normal Rate of Pay).

## **14 MOE CUP**

Subject to operational requirements, Company Employees rostered to work on the scheduled Moe Cup Day will be released for the half day to attend the Moe Cup.

Company Employees who cannot be released on that day, due to work or operational requirements, will be provided a 4-hour leave credit that can be utilised by the Employee at a mutually accepted time.

Employees required to work on the afternoon of the Moe Cup (whether or not the Moe Cup is a declared public holiday) will be paid at the ordinary rate of pay.

If Moe Cup event is not conducted on the scheduled day, (regardless of whether the event is cancelled or postponed), then a leave credit will be made to relevant Employees' balance.

This provision does not apply to Employees who are either rostered-off or on some form of leave absence on the scheduled afternoon of the Moe Cup.

## **15 MAINTENANCE EMPLOYEES FAMILY PICNIC DAY**

All Maintenance Employees (including Casual Employees engaged on-site on the Friday or weekend prior to and/or the day after Picnic Day) will be entitled to the day off (without loss of pay) on the first Monday of December each year (Family Picnic Day), provided that proof of attendance is given to the Company (Picnic ticket supplied).

Where the Company requires an Employee to work on the first Monday of December to meet operational requirements, an additional payment of 8 hours (at the Employee's Normal Rate of Pay) will be made.

## **16 SERVICE**

Except in the case of long service leave, 'service' means continuous employment with the Company including continuous employment with the State Electricity Commission of Victoria, Generation Victoria, and/or Yallourn Energy without a termination of engagement and includes:

- (a) any period of approved leave without pay up to six months;
- (b) any period of absence under the income maintenance scheme up to six months;
- (c) any period of absence up to fifty-two weeks as a result of an injury by accident arising out of and in the course of employment for which the WorkCover Authority or any successor or agent accepts liability to make regular payments;
- (d) any period which the Company may declare, in respect of any Employee, to be additional service.

Any absence from work that is not approved leave shall not count as service.

## **17 PERSONAL/CARER'S LEAVE**

### **17.1 PERSONAL/CARER'S LEAVE ENTITLEMENT**

An Employee shall be credited with sick/carer's leave on the following basis:

9 Day Fortnight

- each twelve months service up to four years' service – 88 hours at the Normal Rate of Pay;
- On completion of each twelve months service after four years' service – 108 hours at the Normal Rate of Pay.

Shift Workers – 1x7

- On engagement and on completion of each twelve months service up to four years' service – 92.16 hours at the Normal Rate of Pay;
- On completion of each twelve months service after four years' service – 115.2 hours at the Normal Rate of Pay.

Shift Workers – 1x12 and 2x12

- On engagement and on completion of each twelve months service up to four years' service – 96 hours at the Normal Rate of Pay;
- On completion of each twelve months service after four years' service – 120 hours at the Normal Rate of Pay.

Personal/carer's leave not taken will accumulate without limit.

### **17.2 PERSONAL LEAVE**

An Employee shall be entitled to paid leave of absence up to the accumulated period of personal leave applicable without loss of pay, subject to the following conditions and limitations:

- (a) An Employee may take paid personal leave if the leave is taken because the Employee is not fit for work because of a personal illness, or personal injury, affecting the Employee.
- (b) An Employee shall not be entitled to paid leave of absence under this clause for any period in respect of which the Employee is entitled to workers' compensation.
- (c) An Employee shall inform the Company of the taking of personal leave and the expected period of that leave as soon as reasonably practicable (which may be a time after the leave has started). In areas of 2x12 shift work it is preferable that this notification should occur prior to the commencement of the shift.

- (d) An Employee who has given the Company notice of the taking of personal leave must, if required by the Company, give the Company evidence that would satisfy a reasonable person (such as a medical certificate, certificate of attendance or statutory declaration) that the leave is taken because the Employee is not fit for work because of a personal illness, or personal injury.
- (e) For Personal Leave (inclusive of Carer's Leave) absences of up to two days no evidence is required if such absences do not exceed five days in the case of day work Employees or four shifts in the case of shift work Employees in any one year of service.
- (f) In the event that an ill or injured Employee exhausts his or her personal leave, the Employee may elect to access the following provisions:
  - i. Annual leave and/or long service leave in place of personal leave; or
  - ii. Subject to meeting the pre-requisites, the Income Maintenance Insurance Policy (refer to clause 23.5) and where applicable, the temporary total disability provisions of the superannuation fund.
- (g) Where an Employee displays a consistent pattern of absenteeism, or chronic absenteeism, which could be regarded by a reasonable person as unsatisfactory, the appropriate manager will meet with the Employee and their representative (as nominated by the Employee) and discuss the issues that may be causing the Employee's absenteeism. As a result of this meeting the Employee may be required to:
  - i. access the Employee Assistance Program; and/or
  - ii. furnish a satisfactory medical certificate or a letter of support from a registered health practitioner in respect of any or all leave absences.; and/or
  - iii. undergo a medical assessment by a mutually acceptable, independent medical practitioner to determine whether the Employee is able to continue employment in their inherent position.

Provided the Employee's pattern of absence improves over a 6-month period, the manager will review whether it is necessary for certificates from a qualified medical practitioner to be provided for each absence.

### **17.3 CARER'S LEAVE**

Carer's leave enables Employees to provide care and support for an immediate family member or a member of the Employee's household in the event of illness or injury of the member or an unexpected emergency affecting the member.

The Employee must provide the Company evidence that would satisfy a reasonable person (such as a medical certificate, certificate of attendance or statutory declaration) that the leave is taken because the Employee's immediate family or household member had, has or will have a personal illness or injury or an unexpected emergency and that the illness or injury is such as to require care by another or, where applicable, that the unexpected emergency affected the person requiring care during the period.

The Employee must as soon as practicable (which may be a time after the leave has started), give their supervisor/manager notice of the taking of carer's leave and the period, or expected period, of the leave.

An Employee who has exhausted their paid personal/carer's leave entitlement is entitled to up to two days unpaid carer's leave for each occasion when a member of the Employee's immediate family or household member requires their care or support because of personal illness, injury or an unexpected emergency.

Employees also have the option of using annual leave, unpaid leave or time off in lieu of overtime, for carer's leave purposes.

## **18 PARENTAL LEAVE**

### **18.1 GENERAL CONDITIONS**

An Employee with twelve months of continuous service is entitled to twelve months of unpaid parental leave if the leave is associated with the birth of a child of the Employee or the Employee's spouse or de facto partner, or the placement of a child up to 16 years with the Employee for adoption, and the Employee has or will have a responsibility for the care of the child (provided the Employee has complied with the notification and documentation requirements in this clause).

An Employee may request, in writing, an extension of unpaid parental leave for a further period of up to twelve months, four weeks before the end of the initial twelve-month parental leave period. The Company must respond in writing within 21 days, stating whether they grant or refuse the request. The Company may only refuse if there are reasonable business grounds to do so, and must detail their reasons in writing. The company must not refuse a request for an extension to parental leave, up to a further 12 months, unless the employer has given the Employee a reasonable opportunity to discuss the request.

An Employee's employment shall not be terminated on the grounds of pregnancy or their absence on parental leave.

An Employee returning to work after the expiration of parental leave shall be entitled to the position which they held immediately before proceeding on parental leave. Where the position no longer exists, the Employee shall be placed in a position for which they have the appropriate skills and qualifications, at a level no less than and at no less pay to that of the former position. In the case of an Employee who was transferred to a safe position or commenced working part-time due to her pregnancy, prior to commencing maternity leave, she is entitled to return to the position which she held immediately before being transferred to a safe position or commencing part time work respectively.

Once parental leave has commenced, the Employee may, subject to paragraph (b), extend or shorten the period of unpaid parental leave by giving written notice at least four weeks in advance.

An Employee who has not completed at least one year of continuous service with the Company immediately before the expected date of birth or placement may apply for a period of leave without pay. The Company may approve such leave at its discretion. If no safe job is available and the Employee has an entitlement to unpaid parental leave, the Employee is entitled to paid parental leave for the risk period.

Any period of paid leave, or part-time employment, taken in conjunction with leave granted under clause 17 shall be counted as continuous service with the Company.

After using all types of paid leave, the Employee has applied for, including paid parental leave, annual and long service leave entitlements (where applicable), further leave entitlements shall cease to accrue after 150 hours' unpaid absence, with the exception of long service leave which shall continue to accrue up to 12 months of unpaid absence.

Subject to the part-time provisions of this Agreement, an Employee may work part-time to meet parental responsibilities and/or a female Employee may work part-time where this is necessary or desirable because of her pregnancy.

For the avoidance of doubt, the parental leave and related entitlements provided for in the NES prevail to the extent that any aspect of this Agreement relating to parental leave would otherwise be detrimental to an Employee.

## **18.2 PAID PARENTAL LEAVE**

i. An Employee (with at least 12 months service before the expected date of birth or adoption) who is to be the primary carer of the child from its birth or adoption, shall upon providing the relevant evidence, such as the production of a medical certificate, be granted parental leave on full pay for a period of 504 hours (14 weeks). This may also be taken as half-pay for twice the period.

ii. Periods of annual leave and/or long service leave may also be taken once the paid parental leave period has been completed, subject to a maximum period of two years absence, inclusive of all leave types.

Any public holiday or other statutory holiday which may fall within the period of 504 hours paid parental leave shall be counted as a day of such paid parental leave.

Absences on paid parental leave shall count as service for personal leave, annual leave and long service leave purposes.

Where the pregnancy of an Employee terminates earlier than twenty weeks prior to the expected date of delivery, her entitlement to any leave under this sub-clause shall cease.

Where, in the opinion of a registered medical practitioner, illness or risks arising out of pregnancy or hazards connected with the work assigned to the Employee make it inadvisable for her to continue at her present job, she shall, where practicable, be transferred without loss of pay or conditions to an appropriate job that is without the above, or other unacceptable risks/hazards, until the commencement of parental leave.

Paid leave will be provided where a registered medical practitioner is of the view that illness or risks arising out of a pregnancy or hazards connected with the job make it inadvisable for a pregnant Employee to continue in her current position, and it is not practicable for the Employee to be transferred to a safe job, the Employee may access their personal leave entitlements or in the event that no entitlement exists, the paid maternity leave entitlement in (a) above.

Where the pregnancy of an Employee not then on parental leave terminates other than by the birth of a living child, then the Employee may take unpaid special maternity leave of such periods as a registered medical practitioner certifies as necessary or paid personal leave entitlements.

Where an Employee is suffering from an illness not related to the direct consequences of the pregnancy, an Employee may take any paid personal leave to which she is entitled in lieu of, or in addition to, special maternity leave.

Where an Employee not then on parental leave suffers illness related to her pregnancy, she may take any paid personal leave to which she is then entitled and such further unpaid special parental leave as a registered medical practitioner certifies as necessary before her return to work.

## **18.3 PAID PARTNER LEAVE**

An Employee who has completed at least twelve months service with the Company immediately before the expected date of birth or adoption and who makes a statutory declaration that they are the partner of, or has accepted responsibility for the care of a child, shall be granted leave of absence on full pay for a cumulative period paid partner leave of two weeks for day workers, two blocks of five shifts for 1x7 shift workers, or two blocks of four shifts for 2x12 workers, provided that such paid partner leave shall commence not more than:

- one week prior to the expected date of the birth of the child; or
- five weeks after the birth of the child.

The Employee taking paid partner leave may elect to take double the amount of leave at half the rate of pay.

Absence on paid partner leave shall count as service for personal leave, annual leave and long service leave purposes.

An Employee who has accessed paid partner leave cannot subsequently access paid parental leave (in clause 18.2) and vice versa.

## **19 ANNUAL LEAVE**

### **19.1 ENTITLEMENTS**

Day work Employees shall be entitled to paid annual leave which shall accrue progressively at the annual rate of 160 hours. Shift work Employees shall be entitled to paid annual leave which shall accrue progressively at the annual rate of 215 hours.

A "shift worker" is defined for the purposes of the NES as an employee who:

- (a) Works a roster and who, over the roster cycle, may be rostered to work ordinary time shifts on any of the seven days of the week; and
- (b) Is regularly rostered to work on Sundays and public holidays.

A shift work Employee temporarily engaged on day work shall not suffer any reduction in the annual leave accrual.

### **19.2 MAIN CONDITIONS**

- (a) Applications for annual leave shall be made electronically and must be approved before leave is taken.
- (b) Applications for annual leave shall be processed such that applicants receive confirmation of the granting or rejecting of the application within fourteen days of the application being submitted except in the case of shift work groups during a leave preference period.
- (c) The Company must not unreasonably refuse to agree to a request by an Employee to take annual leave.
- (d) Any public holiday to which an Employee is entitled without loss of pay occurring during a period of paid leave shall not be regarded as part of the leave.
- (e) Annual leave shall continue to accrue during all forms of paid leave with the exception of any period in excess of six months on Income Maintenance.
- (f) Employees shall be entitled to utilise annual leave in increments of one hour.
- (g) Any period of personal/carer's leave taken in accordance with clause 17 or special leave taken in accordance with clause 20, occurring during a period of paid annual leave, shall not be regarded as part of the annual leave.

### **19.3 EXCESS LEAVE MANAGEMENT**

The Company shall have the right to direct an Employee to take leave accrued after the commencement of this Agreement in the following circumstances:

- (a) where the Company shuts down the business, or any part of the business in which the Employee works, and the Employee has accrued sufficient days of annual leave to cover the shut down; and
- (b) where an Employee has accrued Excess Leave.

For the purpose of leave accrued Excess Leave is defined as more than:

- (a) 288 hours for day workers; and
- (b) 360 hours for shift workers, regardless of duration of shift.

Unless specific arrangements have been agreed to by the Company and the relevant Employee the following process shall apply to excess leave:

- (a) The Employee will be notified by the Company that his or her leave is in excess and be requested to rectify the situation by submitting appropriate leave application(s);
- (b) If the Employee fails to submit the required leave application(s) within two weeks of the notification, the Company will warn the Employee in writing of the requirement to act accordingly;
- (c) Should the Employee fail to submit the required leave application(s) after a further four weeks has passed and provided that the Employee is given a minimum of one month advance notice; the appropriate manager may force the Employee to take the amount of leave in excess.

## **19.4 ANNUAL LEAVE LOADING**

An Employee shall be entitled, in respect of leave, to a sum equal to 17.5 per cent of the weekly rate per week of leave including appropriate allowances (excluding shift penalties and weekend penalty payments) to a maximum amount based on the average weekly earnings of "all males (Australia)" for the September quarter of the year preceding the year in which the leave falls due.

Provided that where an Employee would have received a shift allowance, or weekend penalty according to the roster or the projected roster had the Employee not been on leave during the relevant period and such payments would have entitled the Employee to a greater amount than the loading of 17.5 per cent, then the shift allowance and the weekend penalty shall be in lieu of the 17.5 per cent loading.

The method of paying annual leave loading may be varied by agreement between the Company and the affected Employees.

## **19.5 PAYMENT FOR LEAVE**

Payment for leave shall be at the Normal Rate of Pay as shown in Appendix 1 so that there shall be no deduction by reason of such leave.

An Employee receiving an allowance on a continuous basis shall continue to receive the allowance on all authorised paid absences on annual leave. An Employee performing Higher Duties at the time of taking leave is subject to conditions at clause 8.7.

Shift work Employees shall not receive a loading in respect to annual leave though instead shall continue to receive shift allowances and weekend penalties during all forms of leave.

## **19.6 CASHING OUT ANNUAL LEAVE**

Employees may request to cash out accrued annual leave to the extent and in conjunction with taking the equivalent time as annual leave provided the combination of approved leave and cashed out leave would result in the Employee's remaining accrued entitlement being not less than 4 weeks. If an Employee wishes to cash out accrued annual leave, the Employee must provide the Company with a written request to do so. Each cashing out of a particular amount of paid annual leave must be by a separate agreement in writing between the Company and the Employee. The Company may, in its discretion, authorise the Employee to cash out the requested amount of accrued annual leave.

If the Company authorises the Employee to cash out annual leave, the Employee will be entitled to be paid in lieu of the amount of annual leave foregone at a rate that is no less than the Employees' Normal Rate of Pay at the time that the election is made. The amount of annual leave that is foregone will then be deducted from the amount of the accrued annual leave that is credited to the Employee.



## **19.7 PAYMENT ON TERMINATION OF SERVICE**

An Employee whose service is terminated for any reason whatsoever, shall be paid for any accrued but untaken annual leave, provided, that to the extent permitted by law any debts owing to the Company by the Employee will be offset against any payment in lieu of leave due to that Employee.

Payment in lieu of leave shall be made at the Normal Rate of Pay applicable to the Employee on the date when employment is terminated including any loading provided in subclause 19.4. Shift workers shall be paid shift allowance and weekend penalties for accrued annual leave on termination.

## **20 SPECIAL LEAVE**

### **20.1 COMPASSIONATE LEAVE**

An Employee is entitled to a period of 2 days/shifts of paid compassionate leave for each occasion when an Employee's immediate family member defined as:

- (a) a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the Employee; or
- (b) a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the Employee.
  - I. Contracts or develops a personal illness that poses a serious threat to his or her life; or
  - II. Sustains a personal injury that poses a serious threat to his or her life; or
  - III. Dies.

Where the spouse or child of an Employee is concerned the Company will, as a minimum, grant five days or four shifts of compassionate leave.

Individual cases in which this limit may operate harshly will be considered on their merits in respect to additional compassionate leave.

Compassionate leave is also available for an Employee on annual leave or long service leave.

An Employee taking compassionate leave may be required by the Company to provide evidence that would satisfy a reasonable person in relation to the reason for the leave.

### **20.2 JURY DUTY**

An Employee called for jury service shall be granted leave without loss of pay.

### **20.3 ATTENDANCE AT COURT**

An Employee subpoenaed to attend Court as Crown witnesses shall be granted leave without loss of pay.

An Employee subpoenaed to attend Court as other than Crown witnesses shall be granted:

- (a) leave without pay or, at their option and provided they have sufficient leave accrued, be granted annual leave for the period involved;
- (b) leave without loss of pay where such Employees are required to give evidence because of their expertise in connection with employment by the Company.

### **20.4 ATTENDANCE AT WORKCOVER CASES**

An Employee who is required to attend **WorkCover** cases at the request of the Company shall be regarded as being on duty for the period concerned. In the case of a rostered shift work Employee required to attend on their rostered day off, arrangements shall be made to grant a shift in lieu of payment for attendance on that day (unless the duration of attendance is one hour or less; in which case half a shift shall be granted).

## **20.5 DEFENCE FORCE RESERVES**

An Employee undergoing defence force training shall be granted leave without loss of pay of two weeks per year with an additional week being granted upon certification of the commanding officer of the particular service unit if required.

## **20.6 INFECTIOUS DISEASE**

When an Employee is compulsorily isolated in relation to a notifiable infectious disease, they may be granted leave without loss of pay for the period of compulsory isolation, subject to the appropriate medical evidence being provided to the Company.

## **20.7 CITIZENSHIP CEREMONY**

Leave without loss of pay will be granted to Employees for the purpose of attending ceremonies to receive Citizenship.

## **20.8 DEPARTMENT OF VETERANS' AFFAIRS ATTENDANCE**

Leave up to one twelve-hour shift without loss of pay for shift workers and one day for day workers may be granted for attendance at the Department of Veteran Affairs.

## **20.9 COUNCILLORS**

Local Government Councillors shall be entitled to paid leave to a maximum of six hours per month and Mayors a maximum of twelve hours per month.

## **20.10 VOLUNTEER LEAVE**

Absences for volunteer work with the CFA, SES, St John, Red Cross or any organisation approved by the Company, may be granted as paid leave by the Company dependent on operational requirements.

## **20.11 MEDICAL DONORS**

On production of evidence of attendance, leave without loss of pay shall be granted to Employees who are registered:

- (a) blood donors for the time lost donating blood during working hours;
- (b) organ donors for the time lost donating organs during working hours (to a limit of five days or four shifts per occasion);
- (c) with the Australian Bone Marrow Donor Registry for the purposes of undergoing bone marrow donation procedures during working hours.

## **20.12 UNION REPRESENTATIVE TRAINING LEAVE**

Each Employee representative, with formal endorsement of the relevant union and upon application in writing, shall be granted up to 3 days leave with pay to attend courses conducted by the relevant union or a training provider nominated by that union, for initial delegate training, that are designed to provide skills and competencies that will assist the Employee representative to perform their functions including contributing to the prompt resolution of disputes and or grievances in the workplace.

Refresher or further training of up to 1 day per subsequent calendar year shall be granted to existing Employee representatives.

The application to attend training must be in writing, include the nature and duration of the course to be attended, and provide at least 14 days' notice of the proposed training. The granting of leave pursuant to this clause shall be subject to operational requirements; however the Company shall not unreasonably refuse such application.

Applications for additional time off for training i.e. greater than 3 days (for initial training) or 1 day (refresher) respectively will be at the Company's discretion.

Union training leave shall count as service for all purposes.

## **20.13 DOMESTIC VIOLENCE LEAVE**

An Employee who is a victim of domestic violence as defined in the FW Act may access up to 10 days paid special leave per annum for medical appointments, legal proceedings and other activities related to family violence.

Additional support, including additional paid leave or changes to working arrangements may be granted at the discretion of the company. Such additional support will not be unreasonably withheld. An Employee experiencing domestic violence will be offered referral to the Employee Assistance Programme (EAP). All personal information about domestic violence will not form part of the Employee records and will be kept confidential

An Employee may be required to produce suitable evidence such as documents issued by the Police, a Court, a Medical Practitioner, a Domestic Violence Support Service, a Lawyer or Counselling Professional.

## **21 LONG SERVICE LEAVE**

### **21.1 DEFINITIONS**

"LSL" means Long Service Leave unless otherwise specified.

For the purposes of LSL, "Service" means continuous employment with the Company, including continuous employment with the State Electricity Commission of Victoria, Generation Victoria and/or Yallourn Energy, without a termination of engagement, and includes:

- (a) service with the Defence Forces which interrupts otherwise continuous employment;
- (b) any period spent on loan to other employers;
- (c) any period of approved leave without pay up to six months which was taken **before** 1 November 2018;
- (d) any period of approved leave without pay up to 52 weeks which is taken after 1 November 2018;
- (e) any period of absence under the income maintenance scheme up to six months;
- (f) any period of absence as a result of an injury by accident arising out of and in the course of employment up to fifty-two weeks;
- (g) any period which the Company may declare in respect of any Employee to be additional "service" and that Employee's service shall be considered to include the period so declared (e.g. Company Scholarship holders who, on completion of the Scholarship, become Company Employees, would have the period of the Scholarship treated as 'additional service');

Provided that:

- (h) when leave of absence from work is approved without pay any period of such absence shall not break the continuity of the employment;
- (i) any absence from work without the approval of the Company shall not count as service and as such will result in the extension of the due date.

### **21.2 LSL ENTITLEMENT**

Employees shall be entitled to LSL as follows:

- (a) 9.1 weeks LSL on completion of seven years' service; and

- (b) Additional LSL at the rate of 1.3 weeks LSL per year of service beyond the first seven years.

Leave will become due only on completion of the periods of service set out above.

### **21.3 MAIN CONDITIONS**

- (a) Provided that the application for LSL is submitted no earlier than 2 years from the date of the proposed leave the applications for LSL shall be processed such that applicants receive confirmation of the granting or rejecting of the application within fourteen calendar days of the application being submitted.
- (b) Unless otherwise approved by the Company, any period of absence in respect of LSL shall be not less than one day and shall be in respect of not less than one day of the Employee's accrued entitlements.
- (c) An Employee may, upon notifying the Company before the LSL is commenced, convert the period of their LSL credit or part thereof which the Employee is taking into a period of LSL equal to double the period of the LSL credit or part thereof that the Employee desires to take with half the Employee's Normal Rate of Pay for the period of approved absence. For an Employee who is a member of a defined benefit superannuation fund, his/her superannuation benefit is not affected during a period of LSL at half pay.
- (d) Any public holiday to which an Employee is entitled that occurs during the period of LSL shall not be regarded as part of the LSL.
- (e) All forms of leave will accrue in respect of the period absent on LSL.

### **21.4 PAYMENT FOR LSL**

Except as stated in sub-clause 21.3(c), payment of salary during any period of LSL shall be made to an Employee at the Employee's Normal Rate of Pay in the same manner as if they had continued working provided that any variation in the rate of pay shall be taken into account from time to time as it occurs.

An Employee receiving an allowance or penalty on a continuous basis, shall continue to receive the allowance or penalty during absences on LSL. An Employee who, on commencement of LSL, is performing Higher Duties will continue to receive associated payment subject to provisions at sub-clause 8.6.

Payment in lieu of LSL will not be made except to give effect to sub-clause 21.5.

### **21.5 PAYMENT ON TERMINATION OF EMPLOYMENT**

Should an Employee have an LSL entitlement at the time that employment is terminated, payment in lieu of LSL will be made at the Employee's Normal Rate of Pay applicable on the day when employment is terminated.

An Employee whose service is terminated by retirement on account of age and who had completed at least three years' service but less than seven years' service shall be entitled to pro rata LSL on the basis of such service.

An Employee whose service is terminated due to total and permanent disability or by death, payment in lieu of LSL at the Employee's Normal Rate of Pay will be made to the Employee or their estate, for:

- (a) pro rata LSL if that Employee had not completed seven years' service; or
- (b) any LSL to which that Employee had become entitled and which had not been taken.

LSL entitlement on termination of employment will be calculated to the last day of service at the rates shown in sub-clause 21.2.

To the extent permitted by law, any debts owing to the Company will be offset against the payment in lieu of LSL.

Payment in lieu of LSL shall be made at the Normal Rate of Pay applicable to the Employee on the date when employment is terminated. Shift workers shall be paid shift allowance and weekend penalties for accrued long service leave on termination.

## **21.6 PERSONAL/CARER'S LEAVE DURING LSL**

Personal/Carer's leave will be granted to Employees absent on LSL provided that a satisfactory medical certificate from a registered health practitioner is produced or a statutory declaration where it is not reasonably practicable for the Employee to provide a medical certificate.

An equivalent period of LSL shall be re-credited or the Employee's period of absence extended.

## **21.7 PART-TIME EMPLOYMENT**

Part-time Employees will accrue long service leave in accordance with the provisions of this clause; however, payments will be made on a pro rata basis according to hours worked during the service period.

## **22 PROTECTIVE APPAREL**

All protective apparel shall be selected via consultation and as a minimum be in accordance with Australian Standards. The Company shall supply such apparel, including to Casual Employees.

All reasonable costs associated with the use of prescription glasses as safety glasses, or the repair/replacement if damaged while being used at work, will be paid by the Company. Costs of consultation will be paid after the application of any medical fund benefit.

The Company shall supply and make provision for the launder of overalls for the Employees.

## **23 ACCIDENTS & INJURY**

### **23.1 GENERAL**

Superannuation benefits and Company contributions shall not be diminished by virtue of an Employee being on WorkCover, Transport Accident Commission (**TAC**) or within the first six months of Income Maintenance payments for the capped period identified in sub clauses below.

The Company shall ensure that Employees who have suffered a work-related injury are not financially disadvantaged in terms of their Normal Rate of Pay to the extent of the application of sub-clause 23.2.

### **23.2 MAKE-UP PAY**

Subject to this sub clause, Employees who are in receipt of WorkCover payments under the Accident Compensation Act 1985 shall be paid the difference between such payments and their Normal Rate of Pay.

Make-up pay is tied to receipt of WorkCover benefits. The Company will make up the pay to the pre-injury Normal Rate of Pay for 130 weeks including incorporation of any annual pay increases.

The Company shall ensure that Employees are reimbursed for all recognised out of pocket expenses related to the injury in accordance with the Accident Compensation Act.

### **23.3 NON WORK-RELATED JOURNEY ACCIDENT**

Persons injured in accidents involving registered vehicles unrelated to work (i.e. not covered by WorkCover) may claim payments from the TAC. To maintain income while away from work, Employees shall be entitled to access personal leave payments up to their accrued entitlements such that the Employee effectively receives a mixture of TAC payments and partial personal leave to equal their Normal Rate of Pay.

If an Employee's personal leave is exhausted at any stage within the first 104 weeks, the Company shall make-up the difference between the TAC payment and Normal Rate of Pay for the 104 weeks.

Make-up pay is tied to receipt of TAC benefits.

## **23.4 WORK-RELATED JOURNEY ACCIDENTS**

Where an Employee is injured as a result of an accident either on the way to work or on the way home, which causes the Employee to incur time off work, after the first week of absence the Company shall provide the Employee fully paid leave for up to one hundred and four weeks, at the Employee's Normal Rate of Pay.

Should the Employee receive TAC or WorkCover payments the Company shall only be required to pay the Employee the difference between those payments and the Employee's Normal Rate of Pay.

## **23.5 INCOME MAINTENANCE**

The Company will provide a group salary continuance insurance that gives additional salary protection for up to 2 years to Employees who are absent due to a long-term illness, carer's leave (at the discretion of the Company) or injury and are not in receipt of other benefits as described at sub-clauses 23.2, 23.3 and 23.4 (100% of the Employee's Normal Rate of Pay).

The application of this provision, whilst the Company continues to self-insure, will be subject to the terms and conditions of the Income Maintenance Insurance Policy as it stands at the commencement of the operation of this Agreement. The terms and conditions of the Policy will remain 'fixed' for the nominal term of this Agreement. This will not prevent the Parties continuing to review the Policy and applying any agreed further improvements to current terms and conditions. Within 6 months of commencement of this Agreement, the Company and employee representatives will develop a separate Income Maintenance Insurance Policy to apply to Casual Employees, which will include a continuous 'waiting period' of no more than 14 days.

## **24 HEALTH & SAFETY**

### **24.1 COMPLIANCE**

The Company shall comply with the *Occupational Health and Safety Act 2004 (Vic)* and *Occupational Health and Safety Regulations 2007*.

### **24.2 FIRST-AID**

The Company shall make available to Employees and their partner/immediate family Level 2 First-Aid training (including refresher training as required) and the use of a defibrillator at no cost. Training will be Employee's own time, out of normal hours and will be an unpaid attendance. Training will be arranged subject to the number of attendees to warrant conducting classes.

All Employees that are required, as a part of their duties, to operate or perform work on electrical switchgear or apparatus shall as a minimum be trained in cardio-pulmonary resuscitation and the use of a defibrillator.

### **24.3 ALCOHOL & OTHER DRUGS**

The policies and procedures pertaining to alcohol and other drugs shall be in accordance with the EnergyAustralia Yallourn Drug and Alcohol Procedure.

### **24.4 EMERGENCY RESPONSE**

The Company shall ensure that an effective emergency response capability is on site at Yallourn at all times and supply and maintain semi-automatic external defibrillation units in appropriate locations around the work site.

All Employees shall be appropriately trained in fire-fighting techniques and equipment appropriate to their work environment.

## **25 EMPLOYEE PRIVACY**

The Power Station represents Critical Infrastructure and as such, its security and that of its workers may require surveillance or monitoring. However, the Company also recognises the right of Employees to be able to work free from unreasonable intrusions into their personal privacy.

To this end electronic installations for site gate access, Cardax and security cameras, shall not be used for timekeeping or Employee surveillance other than to investigate any reasonable suspicion of serious misconduct or unlawful activity.

The Company will display signage in areas of the workplace where there are overt or covert surveillance devices in operation.

The IT environment and its usage will be physically and electronically monitored to ensure legal, ethical and operational compliance.

## **26 EMPLOYEE REPRESENTATIVES**

Sections of the workforce, workgroups, and/or shifts may elect Employee representatives to represent their interests in respect to matters associated with their employment.

Employee representatives shall be allowed the necessary time and resources (e.g. telephone, photocopier, e-mail, facsimile, notice board and stationery) to properly communicate with and represent Employees of the Company.

Employees shall be entitled to have a Union delegate or official present to represent them in any matter of dispute with the Company.

Appropriate notice boards will be made available for accredited Employee representatives for the purpose of displaying notices dealing with employment related matters. Existing notice boards may be used in accordance with this clause.

An Employee, representing the interests of Employees, and having direct involvement in the preparation and attendance of matters before industrial tribunals and courts will be granted leave without loss of pay.

## **27 CONSULTATION**

This term applies if:

- (a) the Company proposes to introduce a major change to production, program, organisation, structure, or technology in relation to its business and the change is likely to have a significant effect on Employees;
- (b) the Company proposes to introduce a change to the regular roster or ordinary hours of work of Employees; or
- (c) another clause in this Agreement requires that a matter (for the purpose of this clause, 'the change') be the subject of consultation between the Company, Employee(s) and/or their union(s).

As soon as practicable, and prior to any definite decision being made, the Company must discuss with the relevant Employees (inclusive of any representative(s) nominated by the relevant Employees) the introduction of the change and the effect the change is likely to have on the Employees. The Company must discuss measures to avert or mitigate any adverse effect of the change on the Employees.

The relevant Employees may appoint a representative for the purposes of the procedures in this term. If:

- (a) a relevant Employee appoints, or relevant Employees appoint, a representative for the purposes of consultation; and
- (b) the Employee(s) advise the Company of the identity of the representative; the Company must recognise the representative.

For the purposes of the discussion, the Company will provide the relevant Employees (inclusive of any representative(s) nominated by the relevant Employees) in writing:

- (a) all relevant information about the change including the nature of the change proposed;
- (b) information about the expected effects of the change on the Employees; and
- (c) any other matters likely to affect the Employees.

However, the Company is not required to disclose confidential information.

In relation to any change about rosters or ordinary hours of work, the Company must invite the relevant Employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities).

The Company must give prompt and genuine consideration to matters raised by the relevant Employees about the proposed change, including any impact the change will have on the Employees' family or caring responsibilities.

In this clause, a major change is likely to have a significant effect on Employees if it results in:

- (a) the termination of the employment of Employees;
- (b) major change to the composition, operation, or size of the Company's workforce or to the skills required of Employees;
- (c) the elimination or diminution of job opportunities (including opportunities for promotion or tenure);
- (d) the alteration of hours of work;
- (e) the need to retrain Employees;
- (f) the need to relocate Employees to another workplace; or
- (g) the restructuring of jobs.

The Parties must act in good faith in relation to the consultation process provided in this clause. In this clause, 'good faith' includes obligations to meet, disclose relevant information, genuinely consider proposals, and respond with reasons, and to refrain from capricious or unfair conduct that undermines consultation.

In this clause, 'relevant Employees' mean the Employees who may be affected by the change.

For the avoidance of doubt, except as specifically provided for in this Agreement, this clause does not allow the Company to vary matters expressly provided within this Agreement.

## **28 INDIVIDUAL FLEXIBILITY ARRANGEMENTS**

- (a) The Company and an Employee covered by this Agreement may agree to make an individual flexibility arrangement to vary the effect of terms of the Agreement, provided that:
  - i. The individual flexibility arrangement deals with arrangements about when work is performed (including transition to retirement); and
  - ii. The individual flexibility arrangement entered meets the genuine needs of the Company and the Employee in relation to that matter; and
  - iii. The individual flexibility arrangement is genuinely agreed to by the Company and the Employee.
- (b) The Company must ensure that the terms of the individual flexibility arrangement:
  - i. Are about permitted matters under section 172 of the FW Act; and
  - ii. Do not contain unlawful terms within the meaning of section 194 of the FW Act; and
  - iii. Result in the Employee being better off overall than the Employee would be if no arrangement was made.
- (c) The Company must ensure that the individual flexibility arrangement:
  - i. is in writing; and
  - ii. includes the name of the Company and Employee; and



- iii. is signed by the Company and Employee and if the Employee is under 18 years of age, signed by a parent or guardian of the Employee; and
- include details of:
- iv. the terms of the Agreement that will be varied by the arrangement; and
  - v. how the arrangement will vary the effect of the terms; and
  - vi. how the Employee will be better off overall in relation to the terms and conditions of his or her employment as a result of the arrangement; and
  - vii. states the day on which the arrangement commences.
- (d) The Company must give the Employee a copy of the individual flexibility arrangement within 14 days after it is agreed to.
  - (e) The Company or Employee may terminate the individual flexibility arrangement:
    - i. by giving no more than 28 days written notice to the other party to the arrangement; or
    - ii. if the Company and Employee agree in writing — at any time.

## 29 DISPUTE RESOLUTION PROCESS

The DRP is to be used to assist in resolving any matter or dispute pertaining to the employment relationship.

For matters that are in dispute, that go to the application or interpretation of this Agreement or with matters arising under the NES, this clause facilitates access to the FWC for conciliation and, if necessary, arbitration ('category 1 matters').

For all other matters pertaining to the employment relationship that do not go to the application or interpretation of the Agreement or are not matters arising under the NES ('category 2 matters'), the steps set out below shall apply, except that the FWC shall only be empowered to exercise conciliation powers.

### 29.1 INITIAL PROCESS

- (a) In the event of any dispute arising the following procedure will apply.
  - STEP 1** The matter will, in the first instance, be discussed between the Employee(s), and the Team Leader involved.  
If the matter remains unresolved it shall be elevated to STEP 2 as soon as practicable;
  - STEP 2** The matter may be referred in writing, by the Employee(s) to the relevant Line Manager. The Line Manager will provide a written response to the issue within three working days.  
If the matter remains unresolved;
  - STEP 3** It will be referred for discussion between the appropriate Union Official or other Employee representative and the Head of Yallourn, or their nominated delegate. The Head of Yallourn will provide a response to the issue as soon as practicable.  
If the matter remains unresolved;
  - STEP 4** It may be referred to the FWC for conciliation or arbitration (for 'category 1 matters') or conciliation only (for 'category 2 matters').

Employees may bring a support person or the appropriate union representative to any meeting held under this clause with the Parties being able to elect to bring representatives of their own choosing to any matter referred to conciliation or arbitration.

- (b) The dispute may be referred to FWC at any stage by agreement of the Parties in the interest of speedy resolution of the dispute.

- (c) For 'category 1 matters', during the entire period, from the time when the dispute first arises until the time of its resolution (whether by discussion or negotiation, or by proceedings before the FWC), the status quo or 'normal work' shall continue, unless the maintenance of status quo or performance of normal work would place at risk the health or safety of the Employee(s) concerned. No party to the dispute shall suffer any prejudice as to the resolution of the matter by reason only that normal work continues as required by this paragraph.
- (d) In respect to category 2 matters, either party may notify the FWC of a dispute and seek to have the matter dealt with on an expedited basis, provided that the notifier has satisfied steps 1 and 2 of the initial process. The status-quo shall apply to category 2 matters in the same way as category 1 matters unless one party argues successfully before FWC that the status-quo should be altered or removed. Any such application shall not occur until at least 14 days has elapsed since the first conciliation hearing of the notified matter. The dispute and status-quo provision ends when the FWC determines that the conciliation process is concluded.
- (e) 'Normal work' means the work normally performed by an Employee and "status quo" means the circumstances existing immediately prior to the change or circumstance leading to the proposed change which resulted in the dispute arising.

## **29.2 STEP 4 PROCESS**

- (a) Upon referral of the matter, the FWC shall conciliate. If the dispute remains unresolved after conciliation, the FWC may resolve category 1 matters by arbitration. Either party may be legally represented during arbitration.
- (b) In exercising its role under this clause, the FWC shall exercise any of its powers under the Act.
- (c) It is a term of this Agreement that the parties to the dispute will be required under this dispute settlement procedure to:
  - i. Attend conciliation conferences and hearings;
  - ii. Produce relevant documents and other material (subject to appropriate safeguards for commercial-in-confidence documents); and
  - iii. Make available any witness that the FWC believes is reasonably necessary.
- (d) Without limiting the generality of the foregoing, the FWC may exercise any powers reasonably incidental to the exercise of conciliation and/or arbitration functions under this clause, having regard to the category of the matter.
- (e) Where the FWC has issued a decision, determination or direction under this clause, it shall be final and binding on the Parties, subject to the appeal process in accordance with sub-clause 29.3.

## **29.3 APPEAL PROCESS**

- (a) A party may seek an appeal of the FWC's decision within fourteen days of receipt of decision or the provision of reasons for decision which ever comes later.
- (b) An application for an appeal of the FWC's decision will be provided to the Parties and the FWC in writing detailing the grounds for appeal.
- (c) Unless agreed otherwise by the parties to the dispute, the appeal will be conducted according to the principles applying to an appeal under the Act, including where a stay is sought.
- (d) The parties to the dispute and the appeal panel of the FWC will use their best endeavours to ensure that the appeal process is expedited.
- (e) The decision of the appeal panel of the FWC is final, subject to any other legal right of appeal that might exist.

## **29.4 COSTS & EXPENSES**

Where a matter has been notified pursuant to this clause, the Company shall provide leave without loss of pay for any Employee directly involved in the preparation of the case or required as a witness. In the event that the Parties fail to agree on the identity or number of persons who qualify under this clause, the question shall be determined by the FWC as part of the dispute.

Each party to the dispute will meet their own costs.

## **30 DISCIPLINE PROCEDURE**

The discipline procedure will be invoked in cases where unacceptable Employee performance and/or conduct require follow-up action.

The discipline procedure aims to correct/address poor conduct, work behaviour or performance.

Disciplinary action can be commenced at any of the four steps after an investigation has been conducted.

This clause does not prevent summary dismissal on account of serious misconduct.

<b>STEPS</b>	<b>LOCATION</b>	<b>WHO'S INVOLVED</b>	<b>PAPERWORK</b>	<b>EFFECTIVE FOR</b>
1. Oral Warning	Workplace or Office	Employee* Team Leader	Diary note.	Up to 3 months
2. First Written Warning	Office	Employee* Team Leader	Note to file, signed by both Employee and Team Leader, detailing the reason for the disciplinary action. An Employee may refuse to sign note.	Up to 12 months
3. Final Written Warning	Office	Employee* Team Leader Line Manager	Note to file, signed by both Employee and Team Leader, detailing the reason for the disciplinary action. An Employee may refuse to sign note.	Up to 24 months
4. Dismissal	Office	As above plus Senior Manager	Note to file detailing the reasons for dismissal.	

Written documentation will be recorded on file and will include dates for the disciplinary action to be reviewed. Reviews shall occur at 3 monthly intervals if required. The parties (referred to in the "Who's Involved" column above) will determine whether a future review date is required. If no further review is required, a note will be placed in the Employee's file stating that the disciplinary letter in question, no longer has effect.

The Employee may choose to involve his or her support person/representative at any or all the steps of this Discipline Procedure. The Company shall allow reasonable advance notice of any meetings or interviews to allow the Employee to arrange for their support person to attend but will not unnecessarily delay proceedings if such support cannot be arranged.

## **31 ROLES & RESPONSIBILITIES**

The classification, duties and responsibilities of an Employee shall not be changed unless agreed between the Employee and the Company.

### **31.1 TRAINING**

The Company shall provide such information, instruction, training and supervision as is necessary to enable Employees to perform their work in a way that is safe and without risks to health.

Employees are expected to fully participate in all Company provided training.

Training undertaken by Employees will be recorded by the Company and where practicable, will be Nationally accredited training. The Company will pay all reasonable costs associated with training.

The Company shall aim to provide training during ordinary working hours. However, where training occurs outside of ordinary working hours Employees shall be compensated in accordance with the overtime provisions of clause 12.1.

In addition to generic training, Employees will undertake such training as required under a specific training plan discussed and agreed with their Team Leader or supervisor.

Employees will fully utilise their recognised skills provided the Employee is deemed competent in the skill and it is considered both safe and legal.

### **31.2 PERSONAL DEVELOPMENT**

All permanent Employees covered by this Agreement shall participate in a Personal Development Plan (PDP) in conjunction with their team leader or supervisor. PDPs describe training and personal development objectives.

The Company will provide competency based training in accordance with each individual's Personal Development Plan.

PDPs will involve an annual discussion between the Employee and their Team Leader, which shall be reviewed on a six monthly basis. The discussion will assess the training needs of the Employee, their performance, knowledge, skills and behaviours against mutually agreed Key Result Areas.

To ensure a fair and equitable application of the PDP program, it will be overviewed by management external to an individual Employee's section.

Progression will be self-paced with no defined time frames for progression, removing any perceived pressure on individuals; however the Company will undertake to provide quality training and progression in a timely manner.

Where it becomes apparent that an Employee will not reach his or her PDP scheduled objectives; a remedial plan will be developed to assist the individual Employee.

### **31.3 APPRENTICES**

The Company will directly employ any new apprentices over the life of the Agreement. The minimum of 14 positions will be held in total across power station and mine maintenance for the period of the agreement "

Existing apprentices will attract the following % of AM2 rate of pay.

<b>YEAR OF APPRENTICESHIP</b>	<b>PERCENTAGE</b>
Fifth Year	100%
Fourth Year	88%
Third Year	75%
Second Year	55%
First Year	45%

### **31.4 PERSONNEL SELECTION**

Appointments shall be on merit with the objective of choosing the best person for the position. Criteria for selection will be based upon objective job-related competencies, including appropriate qualifications and licences and will include assessment based on performance, behaviour, knowledge, skills and attitude.

Recruitment and selection processes will be consistent with applicable Company policies. Every effort shall be made to ensure that all Company site personnel are given the opportunity to apply for vacant positions.

## **32 CLOTHING, EQUIPMENT & TOOLS**

An Employee, whose personal tools, clothes, spectacles or hearing-aids have been accidentally spoilt by deleterious substances or otherwise damaged, shall be paid by the Company such an amount of money to cover the loss or damage thereby suffered.

An Employee shall be reimbursed by the employer to the extent of the damage sustained:

- (a) for loss of tools or clothes by fire or breaking and entering whilst securely stored at the employer's direction in a room or building on the employer's premises, job or workshop; or
- (b) to tools or clothing while in a lock-up; or
- (c) if the tools are lost or stolen while being transported by the Employee at the employer's direction; or
- (d) if tools are lost or stolen during an Employee's absence after leaving the job because of injury or illness; and
- (e) provided that an Employee transporting tools shall take all reasonable care to protect those tools and prevent theft or loss.

Where an Employee is absent from work because of illness or accident and has advised the Company as required, the Company shall ensure that the Employee's tools are securely stored during the absence.

The Company will make available a car window cleaning chemical (in the Stores) to all Employees.

## **33 SHIFT OPERATIONS GROUP**

This Shift Operations clause is designed to provide an appropriate level of certainty and adequate leave coverage for Operators employed by the Company, whilst balancing the need of the Company to respond to changing operational requirements.

At all times the Operations Team Leaders are responsible for group management and staffing, in accordance with this clause.

### **33.1 GROUP MEMBERS**

The Parties agree that the Operations group, applicable to normal 4-unit running operation, will consist of 75 positions with a nominal mix of the following classifications:

<b>CLASSIFICATION</b>	<b>PER SHIFT TEAM</b>	<b>TOTAL</b>
Unit Controller	6	30
Assistant Unit Controller	3	15
Unit Attendant (1 or 2)	3	15
Power Worker	3	15
<b>Total</b>	15	75

Classifications will "bump-down" in accordance with bump-down sub-clause 33.14.

## **33.2 SKILLS MIX**

Under normal 4-unit running operation the Operations Group consists of a mix of the following classifications:

1 x Operations Team leader, 4 x Unit Controllers, 2x Assistant Unit Controllers, 2 x Unit Attendants, 3 x Power Workers - Total 12.

Skills mix can be achieved by utilising bump-down in accordance with sub-clause 33.14.

A shortfall in a lower category classification, down to Unit Attendant, can be covered by having a higher number of personnel in a higher category.

Everything practicable will be done so that the skill mix above is maintained.

Contractors and labour hire companies may be used for the performance of work provided that Operations Employees are fully utilised.

However, the Parties recognise that there may be times when this is not practicable and in those circumstances the skills mix may be changed. For example, a Unit may be under the control of an AUC provided supervision is available through a UC; or when a Unit is out of service staffing requirements may alter and be reduced on those numbers associated with "normal" running conditions.

Where, under normal 4 unit running conditions the skills mix is not able to be achieved, the OTL, in consultation with the senior operators will make whatever arrangements are necessary to safely operate the units.

Notes:

- (a) In the context of this clause the requirement for an OTL to call in an operator on overtime does not constitute 'impracticality'. Similarly, the OTL must make every reasonable effort to call in an appropriately skilled operator to cover any shortfall.
- (b) In the context of this clause "consult" means that the OTL will discuss operational staffing/workload issues with relevant senior operator/s and will give proper consideration to any views expressed prior to making a decision.

## **33.3 FILLING OF VACANCIES**

Unless otherwise agreed by the CFMMEU Operations representative and the Company, every reasonable endeavour will be made to ensure that all Operations Group vacancies shall be filled or training where required, commences within 12 weeks of the vacancy being created. If a vacancy cannot be filled after 12 weeks for whatever reason, the company will advise the CFMMEU Operations representative via email as to the reason.

## **33.4 ROSTERING**

Shift Operations 2 x 12 hour rosters are to be run on a 10 week cycle where the cycle is 2 nights, 1 off, 2 days, 5 off. The cycle may be altered to 2 days, 2 nights, 6 off by agreement between the Company and a majority of the operators affected by the change of cycle. These options result in 7 rounds of shifts, per 10 week cycle. In order for the hours to add up to a 36 hour week on average over the 10 week cycle, an additional 2 x 12 hr RD's shall be rostered per Employee per 10 weeks.

All shifts are to be rostered as far ahead of time as the roster system practically allows and the roster is to be accessible by all operators electronically.

### **33.5 ROSTERED DAYS**

Unless otherwise agreed by the Employee concerned, RDs shall not be:

- (a) rostered without seventy days advance notice;
- (b) rostered on a night shift;
- (c) rostered on a weekend or public holiday.

An RD can be moved within the same 10 week roster by mutual agreement between an Employee and OTL.

RDs are not to be moved outside their original 10-week roster.

### **33.6 CHANGING ROSTER TEAMS**

Maintaining a balance of skills across the roster teams may, from time to time, necessitate moving personnel between teams. These moves may be permanent or temporary. Team moves shall be discussed with affected Employees and wherever possible be done on a voluntary basis. However, in the absence of appropriate volunteers being available an Employee may be directed to change teams. Any leave already planned will be honoured.

### **33.7 STAFFING FOR UNIT SHUTDOWNS, RUN UPS AND OUTAGES**

Outage Permit Coordinators with the appropriate skills must be appointed for all outages, with their role outlined in an Operation's Role Descriptor.

Appropriate time off the roster will be given for the coordinator to perform the pre and post outage components of the task. While working as an Outage Permit Coordinator, an employee:

- Will receive a Higher Duties Allowance. This will be paid by increasing the employee's Base Rate of Pay to the UC3 level plus an additional 2.5%;
- Will work a 9-day fortnight day-work roster for planned outages with more than 1 weeks' notice or any outage of a duration of greater than 7 days (however will retain their usual shift penalty and weekend penalty). During high work periods to facilitate work and allow continuity of handovers, hours worked by the Outage Permit Coordinator will be in consultation with the OTL and Outage Manager.

When a unit is being shut down or returned to service, extra staffing may be required. The OTL will consult with the Outage Permit Coordinator, and the unit controller on the unit to determine the extra staffing required. Where a unit (or units) is OOS then lower staffing requirements may be possible, freeing up people to cover for leave. Again, the OTL will consult with the Outage Permit Coordinator to determine the staffing requirements.

### **33.8 OVERTIME CALL-INS**

The OTL will approve all operations overtime.

Where it has been deemed that overtime is necessary to cover for a staff shortfall the call-in will fill the vacant post classification rather than the classification of the person creating the vacancy. This is to maintain a stage staffing skill mix of 2 UCs, 1 AUC and 1 UA.

EG:- If the stage staffing was to be 3 UCs and 1 UA and one of the UCs is absent and the vacancy needs to be covered and there is no spare personnel to cover, then the vacancy will be replaced by a suitably qualified AUC to achieve the preferred team skill mix. If no AUC is available then a UC can be called.

Call-ins shall only occur between 7am and 9:30pm, except to the extent that an Employee advises that they can be called outside of those times or where exceptional business reasons apply;

The Employee with the required classification and the lowest accrued overtime hours will be called first followed by others in order of accrued overtime hours;

For additional staffing requirements e.g. outage work, Employees with the necessary required skills will be called in on the basis of lowest accrued overtime hours.

### **33.9 NOTIFICATION OF ABSENCE AND RESPONSE**

Where practicable the Operations Team Leader (OTL) shall be the point of contact. Reasonable effort should be made to notify the OTL. This will allow the OTL to understand the nature of the absence and to consider any staffing implications for the present and potentially future shifts.

### **33.10 NOTIFICATION WHEN ON SITE FOR OVERTIME AND RDS**

When operators are on site for approved overtime e.g. training, project work etc, they must notify the on duty Operations Team Leader when they commence and finish on site.

When operators are required to attend on a RD and are not rostered to a shift position on the roster they must contact the on duty OTL when they commence and finish on site.

### **33.11 COVERING OTL ABSENCES**

Coverage of the OTL position may be done from within the teams (for OTL leave of 2 rounds or less, other than as set out below). It is the OTL or Operations Leader's responsibility to coordinate a replacement to cover OTL absences.

Where the coverage is provided by a "grandfathered PC3":

- For coverage of less than 2 consecutive rounds of shifts the PC3 will not attract Higher Duties Payment.
- For coverage of greater than 2 consecutive rounds of shifts the PC3 will be paid the Higher Duties payment applicable for the OTL role for any subsequent shifts.

Where the fill in is from within the teams, other than a "grandfathered PC3" being utilised, the person shall receive the Higher Duties payment applicable for the OTL role for all shifts.

### **33.12 LEAVE APPROVAL**

All leave applications are to be submitted to the OTL for approval.

If the operator gives less than 14 days' notice:

- Leave will be granted subject to staffing needs and business requirements with approval given where possible. Outages will be considered.

Where 14 days' notice or more is given, applications for leave, other than LSL, shall be processed in order of submission date and will be approved or rejected within 14 days of submission, unless otherwise agreed. LSL applications will be processed in accordance with sub clause 21.3.

- (a) At any one time 2 people from the UC, AUC and UA area (1 per stage or the skill mix covers 2 from 1 stage) will be granted leave if they apply. If there is no cover required for other business activities e.g., Outage Co-Ordination, Training, Secondment, then a 3<sup>rd</sup> person may be granted leave. Replacement for any team member taking an extended period of parental leave shall not be included in this number.
- (b) PW leave will be covered from a relief group of Power Workers and supplemented by bump-down as per sub-clause 33.14.
- (c) Once the new roster starts where the PW's become part of the team and staffing transitions to clause 33.1 GROUP MEMBERS, then paragraphs (a) and (b) above will have no effect and will be superseded by the following terms:



- At any one time 3 people from the UC, AUC, UA and PW area (subject to team skill mix) will be granted leave if they apply.
  - If there is no cover required for OTL leave of 2 rounds or less, then a 4<sup>th</sup> person will be granted leave (if they apply) and subject to the availability of the 4<sup>th</sup> relief. The 4<sup>th</sup> relief will be 'available' if they are not already covering leave or other duties.
- (d) In implementing the new leave approval process once the new roster commences (as referred to in (c) above):
- The leave taking ability of Power Workers will not be disadvantaged due to the new structure; and
  - OTL cover by the 4<sup>th</sup> relief will not disadvantage the leave taking ability of other Operations classifications.

Alternatively, RD's from other teams can be used to supplement the leave taking ability of a team.

### **33.13 LEAVE PREFERENCE**

Leave preference rosters to apply for a 12 month period, from the 1<sup>st</sup> December through to the 30<sup>th</sup> November of the following year for all operators.

Team leave preference cut off times are as follows: - 1st round of preferences - 31<sup>st</sup> July; 2nd round of preferences - 31<sup>st</sup> August; 3rd round of preferences - 30<sup>th</sup> September.

Outside of these periods, leave will be granted as per normal leave approval process.

During school holiday periods a maximum of two rounds of shifts may be taken. Where an individual changes team and leave has been approved on the original shift, the leave shall be honoured, without disadvantaging any individual.

### **33.14 BUMP DOWN**

The UC will bump down as necessary to the level of the UA.

The AUC will bump down as necessary to the level of CCA.

The UA2 will bump down as necessary to the level of CCA.

### **33.15 ROLES AND RESPONSIBILITIES**

Where a shift work Employee temporarily works other than shift work the Employee shall continue to be treated as a shift work Employee as far as their pay and entitlements are concerned. Work pattern will be determined to suit the role.

The qualifications, skills and responsibilities for each of the Operations Group classifications shall be in accordance with the role descriptors referred to in sub-clause 32.19.

### **33.16 TRANSITIONAL CROSS-STAGE TRAINING ARRANGEMENTS**

This clause does not apply to Employees who;

- a) have completed the structured cross stage training course;
- b) have completed an agreed mutually acceptable arrangement as detailed in sub clause (a) below;
- c) are deemed competent to operate on both stages, or
- d) have completed a traineeship or other appropriate training.

To avoid doubt this clause only applies to Employees who have been fully trained and deemed competent to operate in one stage only.

Employees will be provided the opportunity to declare their intent to complete cross-stage training, for example, during the PDP process. Those Employees who choose not to declare a commitment to cross-stage training will be immediately classified into the pay classification commensurate with the skills currently possessed. Employees who have declared their intent not to complete cross-stage training will only be offered that opportunity in the future where there is a business need. All others will maintain at their current pay rate and have their cross-stage training commitments recorded in their PDP.

The Company will provide Employees notice of when the training will be provided. Cross-stage training will be conducted as follows:

- a) The structured training course will be run as minimum two-week course consisting of 4 x 9 hour days per week on day work unless a mutually acceptable arrangement is agreed between the Company and the Employee; such arrangement must be equal to or in excess of the structured training course.
- b) On completion of the training course (or any agreed alternative arrangement), Employees will be required to consolidate the training. Each Employee will be rostered for 2 shift rounds on the new stage for this consolidation additional to normal staffing.
- c) Those at AUC level will be rostered for an additional 2 rounds in an AUC role by which time they will be expected to be deemed competent and have successfully completed the training, resulting in reclassification.
- d) Those at UC level will be rostered for an additional 3 months in a UC role by which time they will be expected to be deemed competent and have successfully completed the training, resulting in reclassification.

It is expected Employees will utilise opportunities to consolidate their newly acquired skills where appropriate.

Where an Employee has failed to complete the cross-stage training, in the process described above, they will be reclassified immediately into the pay classification commensurate with the skills possessed and they will be rostered for 3 shift rounds in the alternate stage to retrofit the skills required in their new pay classification after which they will be deemed competent.

### **33.17 GRANDFATHERED PC3 EMPLOYEES**

As part of the transitional arrangements relating to the new Shift Operations Group classification structure, Employees who were previously classified as PC3 will retain their existing pay relativity as long as they remain employed with EnergyAustralia Yallourn Power Station in the Operations Group. This grandfathering arrangement will be reflected in letters provided to each affected Employee.

To be eligible an existing PC3 must:

- (a) be fully cross-staged trained to UC3 level as detailed in the "Transitional Cross-Stage Training Arrangements" above.
- (b) Must perform the duties of the PC3 role, as per past practice, when requested.

### **33.18 CAREER PATH**

Progression will be based on business needs, individual aspirations, competencies and abilities. Employees in the Operations Group shall be provided opportunity and training to progress through a career path with commensurate classification and salary increases.

A peer review shall be carried out as part of the competency review.

Operations Employees will fully utilise their recognised skills in accordance with their classification and the bump down clause in this Agreement provided the Employee is deemed competent in the skill and it is considered both safe and legal.

<b>CAREER STEP</b>	<b>REQUIREMENT</b>
PW to UA1	Having successfully completed UA specific aptitude test, interview and UA training course. Competency reviewed by Team Leader and signed off by Operations Leader.
UA1 to UA2	Competency reviewed by Team Leader and signed-off by Operations Leader.
UA2 to AUC1	Having successfully completed AUC specific aptitude test, interview and AUC training course. Competency reviewed by at least two senior UCs, recommendation from Team Leader signed off by Operations Leader.
AUC1 to AUC2	Competency reviewed by Team Leader and signed off by Operations Leader.
AUC2 to UC1	Having successfully completed AUO process and competency assessment by at least two current senior UCs. Recommendation from Team Leader and signed off by Operations Leader.
UC1 to UC2	Competency reviewed by Team Leader and signed off by Operations Leader.
UC2 to UC3	Competency reviewed by Team Leader and signed off by Operations Leader.

The Company will normally appoint operators via the Operations career structure shown above, (i.e. appointed at the lower levels and working through the structure). However the Parties recognise there could be unusual circumstances where an immediate appointment, for the maintenance of team skill mix is necessary. If an applicant is found to have the requisite skills, and/or qualifications, recognition of prior skills and learning will apply to the extent that the successful applicant may be appointed at any level within this structure.

### **33.19 OPERATIONS ROLE DESCRIPTORS**

External to this Agreement is a document entitled “Operations Role Descriptors” which defines the role and duties of classifications within the Shift Operations Group. The Operations Role Descriptors document cannot be varied during the term of the Agreement except by mutual agreement of the operator’s representatives and the Company. The Operations Role Descriptors document forms part of this Agreement for the purposes of the Dispute Resolution clause.

## **34 MAINTENANCE GROUP**

It is important that arrangements for the maintenance teams are based on principles which are clear and applied consistently across all maintenance teams.

'Maintenance Guidelines and Principles' dated August 2013 includes Transitional arrangements following lodgement of the previous Agreement and Guidelines on how Employees would progress, on an ongoing basis, through the new career classification structure.

The current Career Path and Competency Matrices for the career classifications are confirmed for the purposes of the application of this Agreement.

The 'Maintenance Guidelines and Principles' document and the matrices will be maintained by the Yallourn-based People & Culture Group, with a copy placed on the Company's intranet site at FINGERTTIPS → People& Culture → Agreements

This document will not be displaced unilaterally but may need to be reviewed over the term of this Agreement and therefore is not incorporated as a term of this Agreement. However, the method of conducting any such review is regulated by this Agreement. It will be conducted in a consultative manner and any amendments to the 'Maintenance Guidelines and Principles' dated August 2013 will come into effect only by agreement between Management and affected Employees and their union/s and/or nominated representatives.

Despite the 'Maintenance Guidelines and Principles' dated August 2013 not being incorporated as a term of this Agreement, any dispute over its interpretation or application will be dealt with under the DRP of this Agreement and resolved, if necessary by consent arbitration.

## APPENDIX 1 – SALARY STRUCTURE, RATES AND ALLOWANCES: MAINTENANCE & SHIFT ELECTRICIANS

### Maintenance Salary Structure (Base Rate of Pay \$ per week)

Classification	% of AM2 rate	Indicative Function	Current	29 November 2019	1 April 2020	1 February 2021	1 February 2022
AM5	144	Degree or graduate diploma. Highly developed skill in technical or specialist in a technical field	2722.17	2790.22	2859.98	2931.48	3004.77
AM4.5	137	Associate Diploma Technical. Advanced Planner Supervisor including additional qualifications on project management	2600.30	2665.31	2731.94	2800.24	2870.24
AM4	131	Team Planner, Team Supervisor, Technical Officer	2477.37	2539.30	2602.79	2667.86	2734.55
AM3.5	123	Experienced Advanced Tradesperson	2322.93	2381.00	2440.53	2501.54	2564.08
PM3.4	117.5	Shift electrician (Dual Trade)	2218.92	2274.39	2331.25	2389.53	2449.27
AM3.3	115	Dual/Advanced Tradesperson: Dual trade Elec/Inst.	2168.49	2222.70	2278.27	2335.23	2393.61
PM3.2	112.5	Shift electrician	2126.47	2179.63	2234.12	2289.98	2347.22
AM3.1	110	Experienced Multi-task Tradesperson: Pressure Welder (CMV/Flux core wire)	2078.14	2130.09	2183.35	2237.93	2293.88
AM3	105	Multi-task Tradesperson: Electrician, Pressure Welder (Tubes), Instrument Trade	1984.63	2034.25	2085.10	2137.23	2190.66
AM2	100	Base Tradesperson: Boilermaker, Fitter	1889.02	1936.25	1984.65	2034.27	2085.12
AM1.5	98	Advanced and Intermediate rigger/scaffolder, Crane Driver, Qualified NDT Inspector	1851.20	1897.48	1944.92	1993.54	2043.38
AM1	95	Utility, Peggie, Basic Rigger/scaffolder	1794.47	1839.33	1885.32	1932.45	1980.76

**APPENDIX 1 – SALARY STRUCTURE, RATES AND ALLOWANCES: OPERATIONS (\$ PER HOUR)**

Classification	Current		29 November 2019		1 April 2020		1 February 2021		1 February 2022	
	Base Rate of Pay	Normal Rate of Pay*	Base Rate of Pay	Normal Rate of Pay*	Base Rate of Pay	Normal Rate of Pay*	Base Rate of Pay	Normal Rate of Pay*	Base Rate of Pay	Normal Rate of Pay*
OTL HDA	93.80	121.96	99.05	128.53	101.53	131.74	104.06	135.03	106.67	138.41
Unit Controller 3	82.85	108.72	87.54	114.61	89.73	117.47	91.98	120.40	94.27	123.42
Unit Controller 2	80.29	105.61	84.84	111.34	86.97	114.12	89.14	116.97	91.37	119.90
Unit Controller 1	78.83	103.84	83.31	109.49	85.39	112.22	87.53	115.02	89.72	117.91
Assistant Unit Controller 2	75.62	99.96	79.94	105.40	81.93	108.03	83.98	110.73	86.08	113.51
Assistant Unit Controller 1	72.14	95.76	76.28	100.98	78.19	103.50	80.15	106.09	82.15	108.75
Unit Attendant 2	65.64	87.88	69.44	92.71	71.18	95.02	72.96	97.39	74.78	99.84
Unit Attendant 1	62.86	84.53	66.53	89.18	68.19	91.40	69.90	93.68	71.64	96.04
Power Worker	51.51	70.79	54.59	74.74	55.96	76.60	57.36	78.51	58.79	80.49
Technical Officer (Scientific)	N/A**	N/A**	70.76	83.61	72.52	85.70	74.34	87.84	76.20	90.04
Technical Services Officer (Chemical Team)	N/A**	N/A**	59.39	70.83	60.88	72.60	62.40	74.41	63.96	76.27
Chemical Team Non-Technical Assistant	N/A**	N/A**	54.00	64.76	55.35	66.38	56.73	68.04	58.15	69.74

\*Normal Rate of Pay above does not include Availability Allowance which may be payable in addition in accordance with clause 8.12

\*\* New Operations classifications – Normal Rate of Pay above for these roles includes Base Rate of Pay (including built in Outage Allowance), Yallourn Allowance and 12.5% weekend penalty

**APPENDIX 1 – SALARY STRUCTURE, RATES AND ALLOWANCES: ALLOWANCES**

Allowance	EBA clause	When payable	Current (\$)	29 November 2019 (\$)	1 April 2020 (\$)	1 February 2021 (\$)	1 February 2022 (\$)
Yallourn allowance	8.13	Per week	140.78	144.30	147.91	151.60	155.39
Availability allowance (1 in 5)	8.12	Per week	808.98	829.20	849.93	871.18	892.96
Availability allowance (1 in 4)	8.12	Per week	922.45	945.51	969.15	993.38	1018.21
Shift allowance	10.3.4	Per week	163.90	168.00	172.20	176.50	180.91
Meal allowance	8.1	Per occasion	19.96	20.46	20.97	21.49	22.03
Travel allowance	12.11	Per occasion	35.88	36.78	37.70	38.64	39.60
Outage allowance (Power Station + Mine)	8.14	Per hour	2.56	2.62	2.69	2.76	2.83

## APPENDIX 2 – SEVERANCE PAYMENT

For the purposes of calculating severance, the Normal Rate of Pay definition in clause 8.12 shall apply.

<b>YEARS OF SERVICE</b>	<b>REDUNDANCY PAY (IN WEEKS) INCLUDING ADDITIONAL WEEKS' PAY IN LIEU OF NOTICE</b>
Less than 3 years	12
3	30
4	34
5	38
6	42
7	46
8	50
9	54
10	58
11	64
12	70
13	76
14	82
15	83
16	84
17	85
18	86
19	88
20	90
21	92
22	94
23	96
24	98
25	100
26	102
27	104
28	106
29	108
30	110
31	112
32	114
33	116
34	118
35	120
36	122
37	124
38	126
39	128
40	130



**SIGNATORIES**

For and on behalf of EnergyAustralia Yallourn Pty Ltd (the Company)

Name ELIZABETH WESTCOTT Witnessed by ROSS EDWARDS  
Position EXECUTIVE ENERGY Witness signature [Signature]  
Address 385 Bowke St, Melbourne Witness address 385 Bowke St, Melbourne  
3000 3000  
Signature Elizabeth Westcott Date Monday 19, 2020

For and on behalf of the Construction, Forestry, Maritime, Mining and Energy Union, (the CFMMEU) Mining & Energy Division

Name ..... Witnessed by .....  
Position ..... Witness signature .....  
Address ..... Witness address .....  
Signature ..... Date .....

For and on behalf of the Construction, Forestry, Mining and Energy Union, (the CFMMEU) C&G Division

Name ..... Witnessed by .....  
Position ..... Witness signature .....  
Address ..... Witness address .....  
Signature ..... Date .....

**ENERGYAUSTRALIA YALLOURN ENTERPRISE AGREEMENT 2020**

**For and on behalf of Australian Manufacturing Workers Union (AMWU)**

Name LOU MALGON

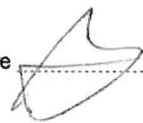
Witnessed by S. J Sullivan

Position ASSISTANT STATE SECRETARY

Witness signature 

Address 251 QUEENSBERRY STREET  
CARLTON SOUTH

Witness address 251 Queensberry St

Signature 

Carlton South, 3053.

Date MARCH 24, 2020

**For and on behalf of Australian Workers Union (AWU)**

Name .....

Witnessed by .....

Position .....

Witness signature .....

Address .....

Witness address .....

Signature .....

Date .....

**ENERGYAUSTRALIA YALLOURN ENTERPRISE AGREEMENT 2020**

**For and on behalf of Australian Manufacturing Workers Union (AMWU)**

Name ..... Witnessed by .....

Position ..... Witness signature .....

Address ..... Witness address .....

Signature .....

Date .....

---

**For and on behalf of Australian Workers Union (AWU)**

Name ..... Witnessed by MEI LIN .....

**BEN DAVIS**  
Victorian Branch Secretary  
The Australian Workers' Union  
685 Spencer St. West Melbourne VIC 3003  
Position ..... Witness signature [Signature] .....

Address ..... Witness address .....

Signature Ben Davis .....  
Date 24/3/20 .....  
Mei Lin  
CPA 9551103  
685 Spencer Street  
Melbourne Victoria 3003

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**SIGNATORIES**

For and on behalf of EnergyAustralia Yallourn Pty Ltd (the Company)

Name ..... Witnessed by .....

Position ..... Witness signature .....

Address ..... Witness address .....

Signature ..... Date .....

For and on behalf of the Construction, Forestry, Maritime, Mining and Energy Union, (the CFMMEU) Mining & Energy Division

Name GEOFF DYKE ..... Witnessed by KATHY BEESLEY .....

Position SECRETARY ..... Witness signature [Signature] .....

Address 5 LIGNITE CRT MORWELL ..... Witness address 5 LIGNITE CRT MORWELL .....

Signature [Signature] ..... Date 17/3/20 .....



For and on behalf of the Construction, Forestry, Mining and Energy Union, (the CFMMEU) C&G Division

Name RALPH EDWARDS ..... Witnessed by MOLLY LEDDIN .....

Position PRESIDENT ..... Witness signature [Signature] .....

Address 540 ELIZABETH ST. MELB ..... Witness address 540 ELIZABETH ST, MELBOURNE .....

Signature [Signature] ..... Date 24.03.20 .....

**ENERGYAUSTRALIA YALLOURN ENTERPRISE AGREEMENT 2020**

For and on behalf of Australian Municipal, Administrative, Clerical and Services Union (the ASU)

Name ..... Witnessed by .....

Position ..... Witness signature .....

Address ..... Witness address .....

Signature .....

Date .....

For and on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Services Union of Australia (the CEPU)

Name TROY GRAY ..... Witnessed by ZOE EVERS .....

Position STATE SECRETARY ..... Witness signature *Zoe Evers* .....

Address L1,200 ARDEN ST. NTH MELB VIC 3051 ..... Witness address L1,200 ARDEN ST. NTH MELB VIC 3051 .....

Signature *Troy Gray* .....

Date 18/3/2020 .....

**ENERGYAUSTRALIA YALLOURN ENTERPRISE AGREEMENT 2020**

**For and on behalf of Australian Municipal, Administrative, Clerical and Services Union (the ASU)**

Name Billy King ..... Witnessed by .....

Position Branch Executive President ..... Witness signature .....

Address 116 Queensberry St, Carlton Sth ..... Witness address .....

Signature  .....  
.....

Date 2 April 2020 .....

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**For and on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Services Union of Australia (the CEPU)**

Name ..... Witnessed by .....

Position ..... Witness signature .....

Address ..... Witness address .....

Signature .....  
.....

Date .....

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