[2024] FWCFB 235

The attached document replaces the document previously issued with the above code on 26 April 2024.

Headnote has been updated.

Associate to Vice President Asbury

Dated 6 June 2024

# DECISION

*Fair Work Act 2009*
s.604—Appeal of decision

**Health Services Union**

**v**

**Mercy Hospitals Victoria Ltd T/A Werribee Mercy Health**
(C2023/7275)

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MILLHOUSE

BRISBANE, 26 APRIL 2024

*Appeal against decision [2023] FWC 683 of Commissioner Mirabella at Melbourne on 3 November 2023 in matter number C2022/6450*

## Introduction and background

**[1]** The Health Services Union Victoria (HSU/Appellant) has appealed a Decision[1] of Commissioner Mirabella issued on 3 November 2023 (Decision), in resolution of a dispute arising under the *Health and Allied Services, Managers and Administrative Workers (Victorian Public Sector) (Single Interest Employers) Enterprise Agreement 2021-2025* (Agreement).

**[2]** The Decision concerned an application by the HSU for the Fair Work Commission (Commission) to deal with a dispute of a collective nature involving Mercy Hospitals Victoria Ltd (Mercy/Respondent) pursuant to clause 17 of the Agreement. The dispute concerned the proper construction of clause 29.3 of the Agreement which deals with "*Underpayment*" and whether certain employees were entitled to a penalty payment provided for in that clause, because Mercy delayed in paying Nauseous Work Allowance (NWA) and Educational Incentive Allowance (EIA) under the Agreement. The circumstances in which the dispute arose, as set out in the submissions of the parties in the hearing before the Commissioner, can be summarised as follows.

**[3]** The Agreement commenced operation on 20 April 2022, after its approval by the Commission on 13 April 2022. The NWA and the EIA are found in Section 2 of the Agreement which contains provisions for Health & Allied Services Employees and Dental Assistants. The NWA and EIA are expressed as flat amounts paid annually from the first full pay period on or after (FFPPOA) dates specified in tables set out in the Agreement with some payments expressed in the tables to be operative dates prior to 20 April 2022 when the Agreement commenced operation. The NWA and EIA are not cumulative from year to year and each payment simply replaces an earlier one.

**[4]** When the Agreement commenced operation on 20 April 2022, the following allowances were payable to eligible employees from dates preceding the operative date of the Agreement:

- first $350 NWA in clause 11.2 (1 December 2021);
- first additional $350 NWA for Theatre Technicians in clause 11.3 (1 July 2021);
- first $500 EIA in clause 16.1 (20 April 2022); and
- second $250 EIA (31 March 2022).

**[5]** It is common ground that Mercy did not pay the NWA or EIA until the period between 24 and 31 August 2022. At that point the second $350 NWA had become payable from FFPOA 1 July 2022. The HSU contended at first instance and in the appeal, that the late payment of the allowances is an underpayment for the purposes of clause 29.3 of the Agreement. In summary, that clause provides for a penalty payment of 20% of the value of an underpayment, calculated daily, to be made to employees who are underpaid, in circumstances where action set out in the clause has not been taken, for the period the relevant entitlement arose, and remains unpaid. The HSU also contended that the penalty for late payment of the NWA and EIA is calculated by taking 20% of each allowance and multiplying that by each day in the period from when the entitlement arose to when the payment was made. Mercy disputes that clause 29.3 was engaged or that a penalty is payable, and contends in the alternative, that the method of calculation requires that the 20% amount is divided by 365 and paid for each day that the payment is delayed.

## The dispute

**[6]** The HSU notified a dispute on 21 September 2022. The Form F10 filed by the HSU states that the Union seeks that Mercy comply with the 20% penalty under subclause 29.3(d) of the Agreement for late payment of the NWA and EIA. Initially the HSU claimed that allowances which were payable prior to the operative date of the Agreement, became due on 20 April 2022 when the Agreement commenced operation.[2] Later, the HSU adopted the formula advanced by Mercy and accepted that the date these allowances became payable was from FFPPOA 20 April 2022. In relation to the NWA that became payable from FFPPOA 1 July 2022, the HSU considered that the payment was due on 20 July 2022 because the first full pay period after 1 July 2022 for the Theatre Technicians entitled to the payment, was 4 – 17 July with payments being made for this pay period on 20 July 2022.[3]

**[7]** The HSU contended in the Form F10 that Mercy had considerable notice of the requirement to make the payments and there was considerable follow-up from the HSU from May 2022, to remind Mercy of its obligations. The HSU also referred to an earlier dispute that it lodged in June 2022 resulting in Mercy paying other amounts due under the Agreement, including for backpay, and contended that while these underpayments were rectified, the allowances subject of this dispute were not.[4] The HSU claimed a daily penalty amount of $70 for the NWA, $100 for the first EIA allowance and $50 for the second EIA, from the date of the entitlement arising until the allowances were paid, involving periods ranging from 126 to 133 days for the first and second NWA and 42 days for the third NWA and 126 – 133 days for the first and second EIA.[5] The HSU also sought that if conciliation was unable to resolve the dispute, the Commission assist in making determinations as to the number of days the underpayment penalty in subclause 29.3(d) of the Agreement applies to, with respect to each of the allowances.[6]

**[8]** At paragraph [3] of the Decision, the Commissioner described the dispute as relating to the proper interpretation of clause 29.3 of the Agreement, and the ultimate conclusion as to

whether Mercy is required to make a penalty payment to certain employees because Mercy delayed in paying their NWA and EIA under the Agreement. At paragraph [5] of the Decision, the Commissioner stated that the parties agreed on the following questions for determination:

> *Question 1*: Are each of the delayed payments by Mercy to eligible employees of:
>
> a. The nauseous work allowance under clause 11 (Section 2)
>
> b. The educational incentive allowance under clause 16 (Section 2)
>
> an 'underpayment' under clause 29.3 (Section 1) of the Agreement?
>
> *Question 2*: If the answer to Question 1 is yes, is Mercy required to make a penalty payment and if so, how is the penalty payment calculated?

**[9]** The Commissioner answered Question 1 in the affirmative and question 2 in the negative.

## Relevant provisions of the Agreement

**[10]** As its title indicates, the Agreement is a single-enterprise agreement made pursuant to a single interest employer authorisation. The single interest authorisation was granted by Deputy President Masson on 21 October 2021.[7] The Authorisation states that the Victorian Hospitals' Industrial Association (VHIA) is nominated by the employers to make the application on their behalf. The list of employers at Annexure A of the authorisation includes Mercy Hospitals Victoria Limited. The Employer declaration filed with the Agreement states that it was negotiated on behalf of Mercy and other employers, by the VHIA.

**[11]** By virtue of clause 5, the Agreement covers the Employers, all Employees and the HSU "*if it is named by the Commission as a party covered by the Agreement*"[8]. The employees covered are a wide class[9] and there are 87 employers in the Victorian public health system, including Mercy[10] covered by the Agreement. The Agreement is comprised of three Sections. Section 1 deals with common terms that apply to all employees in classifications set out in the Agreement employed by one of the 87 listed employers, except where expressly excluded. Section 2 provides for additional terms that apply specifically to Health and Allied Services Employees and Dental Assistants. Section 3 provides for terms specific to Managers and Administrative Workers and, for present purposes, is not material.

**[12]** Clause 17 of Part 1 of the Agreement sets out the Dispute Resolution Procedure in the following terms:

> "**17. Dispute Resolution Procedure**
>
> **17.1 Resolution of disputes and grievances**
>
> (a) For the purpose of this clause 17, a dispute includes a grievance.
>
> (b) This dispute resolution procedure will apply to any dispute arising in relation to:
>
> (i) this Agreement;

(ii) the NES;

(iii) a request for an additional 12 months parental leave; or

(iv) a request for flexible working arrangements.

(c) A party to the dispute may choose to be represented at any stage by a representative including the HWU or employer organisation. A representative, including the HWU or employer organisation on behalf of an Employer, may initiate a dispute.

**17.2 Obligations**

(a) The parties to the dispute and their representatives must genuinely attempt to resolve the dispute through the processes set out in this clause and must cooperate to ensure that these processes are carried out expeditiously.

(b) While the dispute resolution procedure is being conducted work will continue normally according to the usual practice that existed before the dispute, until the dispute is resolved.

(c) This requirement does not apply where an Employee:

(i) has a reasonable concern about an imminent risk to his or her health or safety;

(ii) has advised the Employer of the concern; and

(iii) has not unreasonably failed to comply with a direction by the Employer to perform other available work that is safe and appropriate for the Employee to perform.

(d) No party to a dispute or person covered by the Agreement will be prejudiced with respect to the resolution of the dispute by continuing work under this clause.

**17.3 Dispute settlement facilitation**

(a) Where the chosen representative is another Employee of the Employer, that Employee will be released by the Employer from normal duties as is reasonably necessary to enable them to represent the Employee/s including:

(i) investigating the circumstances of the dispute; and

(ii) participating in the processes to resolve the dispute, including conciliation and arbitration.

(b) An Employee who is part of the dispute will be released by the Employer from normal duties as is reasonably necessary to enable them to participate in this dispute settling procedure so long as it does not unduly affect the operations of the Employer.

**17.4 Discussion of dispute at workplace**

(a) The parties will attempt to resolve the dispute at the workplace as follows:

(i) in the first instance by discussions between the Employee/s and the relevant supervisor; and

(ii) if the dispute is still unresolved, by discussions between the Employee/s and more senior levels of local management.

(b) The discussions at subclause 17.4(a) will take place within fourteen days or such longer period as mutually agreed save that agreement will not be unreasonably withheld.

(c) If a dispute cannot be resolved at the workplace it may be referred by a party to the dispute or representative to the Commission for conciliation and, if the matter in dispute remains unresolved, arbitration.

**17.5 Disputes of a collective character**

Disputes of a collective character may be dealt with more expeditiously by an early reference to the Commission. However, no dispute of a collective character may be referred to the Commission directly without a genuine attempt to resolve the dispute at the workplace level.

**17.6 Conciliation**

(a) Where a dispute is referred for conciliation, the Commission member will do everything the member deems right and proper to assist the parties to settle the dispute.

(b) Conciliation before the Commission is complete when:

(i) the parties to the dispute agree that it is settled; or

(ii) the Commission member conducting the conciliation, either on their own motion or after an application by a party, is satisfied there is no likelihood that further conciliation will result in settlement within a reasonable period; or

(iii) the parties to the dispute inform the Commission member there is no likelihood the dispute will be settled and the member does not have substantial reason to refuse to regard conciliation as complete.

**17.7 Arbitration**

(a) If, when conciliation is complete, the dispute is not settled, either party may request the Commission proceed to determine the dispute by arbitration.

(b) The Commission member that conciliated the dispute will not arbitrate the dispute if a party objects to the member doing so.

(c) Subject to subclause 17.7(d) below, a decision of the Commission is binding upon the persons covered by this Agreement.

(d) An appeal lies to a Full Bench of the Commission, with the leave of the Full Bench, against a determination of a single member of the Commission made pursuant to this clause.

**17.8 Conduct of matters before the Commission**

Subject to any agreement between the parties to the dispute in relation to a particular dispute or grievance and the provisions of this clause, in dealing with a dispute or grievance through conciliation or arbitration, the Commission will conduct the matter in accordance with sections 577, 578 and Subdivision B of Division 3 of Part 5-1 of the Act.'

**[13]** Under clause 11 of Section 2 of the Agreement, eligible employees employed in classifications listed in clause 11.1 who are not casual employees, receive a NWA of $350. The NWA is required under clause 11.2 to be paid annually as follows:

| Amount | Date |
|---|---|
| $350 | FFPPOA 1 December 2021 |
| $350 | FFPPOA 1 December 2022 |
| $350 | FFPPOA 1 December 2023 |
| $350 | FFPPOA 1 December 2024 |

**[14]** The acronym, "*ffppoa*", is defined in clause 6 in Section 1 to mean the "*first full pay period on or after*". Employees classified as Theatre Technician (including Liver Transplant Technologies and Dual Qualified Technicians) under Schedule 2D of the Agreement, are entitled to receive the NWA allowance of $350 in addition to the entitlement prescribed in clause 11.2. The additional NWA payment is required by clause 11.3 to be made annually to Theatre Technicians employees on the following dates:

| Amount | Date |
|---|---|
| $350 | FFPPOA 1 July 2021 |
| $350 | FFPPOA 1 July 2022 |
| $350 | FFPPOA 1 July 2023 |
| $350 | FFPPOA 1 July 2024 |

**[15]** Further, under clause 16.1 of Section 2 of the Agreement, full-time eligible employees employed as at 13 May 2021, in classifications listed in clause 16.7, receive an EIA of $500, payable in a single amount from the FFPPOA the operative date of the Agreement. From dates in 2022 and each year thereafter, all full-time eligible employees are entitled under clause 16.2 to be paid an annual EIA of $500, payable in two instalments of $250 as follows:

| Amount | Date |
|---|---|
| $250 | FFPPOA 1 March 2022 |
| $250 | FFPPOA 1 September 2022 |
| $250 | FFPPOA 1 March 2023 |
| $250 | FFPPOA 1 September 2023 |
| $250 | FFPPOA 1 March 2024 |
| $250 | FFPPOA 1 September 2024 |

**[16]** Because the allowances are expressed as flat annual amounts there was no requirement for Mercy to calculate backpay in the same way as if the allowances were paid for all purposes of the Agreement. The effect of an operative date prior to 20 April 2022 is that the second and subsequent instalments of the allowances are payable in 12-month intervals from the first payment, rather than from the commencement of the Agreement, with the result that payments are compressed into a shorter time frame, providing a benefit to employees.

**[17]** Central to the dispute is clause 29.3 dealing with "*Underpayment*". Clause 29.3 is contained within Part D of Section 1, headed "*Wages*", and provides:

> "**29.3 Underpayment**

(a) Where an Employee considers that they have been underpaid as a result of error on the part of the Employer, the Employee may request that the Employer rectify the error or validate the payment.

(b) Where an Employee is underpaid by reason of Employer error and the amount of such underpayment is less than 5% of the Employee's fortnightly wage, the underpayment will be corrected in the next pay period.

(c) Where the underpayment exceeds 5% of the Employee's fortnightly wage, the Employer must take steps to correct the underpayment within 24 hours and to provide confirmation to the Employee of the correction.

(d) If the Employer does not take the action required under subclause 29.3(b) and subclause 29.3(c) above, the Employee will be paid a penalty payment of 20% of the underpayment, calculated on a daily basis from the date of the entitlement arising until all such moneys are paid. In addition, the Employer will meet any associated banking or other fees/penalties incurred by the Employee as a consequence of the error where those fees exceed the 20% penalty payment.

(e) Subclause 29.3(d) will not come into effect:

(i) if the payment of wages or other monies owed falls on a public holiday, until the expiration of such public holiday; or

(ii) where the Employee or Employer disputes whether the monies are owed to the Employee; or

(iii) where the underpayment is the result of Employee error, which includes, but isn't limited to circumstances where the Employee hasn't complied with the Employer's policies dealing with the completion or approving of timesheets; or

(iv) where the Employee agrees to defer the correction of the underpayment until the next pay period; or

(v) if any unforeseen event outside the control of the Employer frustrates their ability to meet the requirements of this clause."

**[18]** The parties agree that subclause 29.3(c) is relevant to the current dispute, on the basis that the unpaid allowances exceed 5% of the Employee's fortnightly wage.

## The Decision

**[19]** The Commissioner commenced by observing that the Dispute Resolution Procedure in clause 17 of the Agreement is broadly expressed, empowering the Commission to deal with disputes between parties in relation to matters arising under the Agreement, the National Employment Standards and other subjects, and noted that clause 17.5 specifically provides for a dispute of a collective character to be referred to the Commission.

**[20]** The Commissioner then set out background information from the Form F10 filed by the HSU, which was not disputed. The Commissioner noted that the HSU via Mr Danny Harika, an Organiser, had emailed Mercy on 5 May 2022, requesting clarification about when the back pay would take effect and had been informed by Ms Margaret Barrett, HR Business Partner for Mercy, that she would need to check an "*estimated date regarding the backpays.*" There was evidence about the correspondence between the HSU and Mercy in relation to this matter, and

internal correspondence between various managers of Mercy in relation to the requirement to pay the allowances in question. The Commissioner summarised the parties' positions as follows:

> "[8] The HWU argues that Mercy failed to pay the allowances to employees on the days these entitlements fell due, that this constitutes an 'underpayment', that Mercy did not comply with the Agreement to correct the underpayment within the requisite time period, and that for each day the allowances went unpaid, a penalty of 20% of the underpayment should be incurred by Mercy and paid to the employee who had been underpaid.
>
> [9] Mercy raises jurisdictional objections and argues that the HWU is not a proper party to the dispute. It also argues, amongst other things, that clause 29.3(a) provides preconditional steps for determining whether Mercy is obliged to pay a penalty to employees for underpayment of the allowances. It submits that in the alternative, the conditions in clause 29.3(c) are met so that there is no failure to act that would trigger a penalty payment on any underpayments. Mercy further contends that if I find it is required to pay a penalty, the penalty under clause 29.3 is calculated per annum."

**[21]** After setting out the context and the relevant provisions of the Agreement, the Commissioner recorded the following facts agreed by the parties:

> "Under the Agreement, the following allowances were payable by Mercy to eligible employees employed by Mercy and covered by the Agreement:
>
> - A nauseous work allowance in the amount of $350, payable on the first full pay period on or after (FFPPOA) 1 December 2021;
> - A second nauseous work allowance in the amount of $350, payable on FFPPOA 1 July 2021;
> - A third nauseous work allowance in the amount of $350, payable on FFPPOA 1 July 2022;
> - An educational incentive allowance in the amount of $500, payable from FFPPOA the operative date of the Agreement; and
> - A second educational incentive allowance in the amount of $250, payable on FFPPOA 31 March 2022.
>
> (together the allowances).
>
> Mercy paid the allowances to eligible employees in the period of 24 August 2022 to 31 August 2022."

**[22]** The Commissioner next summarised the parties' submissions - those of the HSU are dealt with in paragraphs [17] to [31] while a summary of Mercy's submissions is found at paragraphs [32]-[42]. The Commissioner also determined the jurisdictional objection[11] and an issue about the proper parties to the dispute finding, contrary to the submissions of Mercy, that the HSU, as a party to the Agreement, could bring the dispute. As to the construction of clause 29.3, the Commissioner did not accept that before any consideration of subclause 29.3(c), subclause 29.3(a) establishes threshold matters or preconditions. In this regard, the Commissioner said:

> "[98] …clause 29.3(a) uses the word 'may'. That is, where an employee considers that they have been underpaid as a result of an error, they may request the employer rectify the error or validate the payment. The word 'may' in this instance allows something to occur, but it does not mandate it. Otherwise, the drafters could have used, as they have in clause 29.3(c), a word like 'must' to mandate certain actions.
>
> [99] Clause 29.3(a) merely states an obvious workplace right. That is, if a worker thinks they have not been paid correctly, they can ask for, what is in their view, the correct payment. The existence of an underpayment is one of fact. It does not rely on an employee raising it as an underpayment to make it so.

> [100] Finding that clause 29.3(a) does not establish any preconditions for the consideration of clause 29.3(c) means that I do not need to make findings regarding the preconditions that Mercy says need to be satisfied."

**[23]** The Commissioner noted that there was no dispute that the underpayment exceeded 5% of employees' fortnightly wage and that subclause 29.3(c), rather than subclause 29.3(b), is relevant to the dispute. The Commissioner considered that the submissions of the HSU in relation to subclause 29.3(c) were broadly that Mercy had not taken the steps contemplated in subclause 29.3(c) as "*the only action taken by Mercy within the relevant 24 hours to correct the underpayment was to send an email replying to the* [*HWU*]"[12]. After setting out the text of the 5 May 2022 email exchanges between Mr Harika and Ms Barrett, the Commissioner made the following observations:

> "[106] There is a series of communication between the [HSU] and Mercy over the months following the HSU's 5 May 2022 email and the 5 May 2022 reply email from Mercy.
>
> [107] The wording of clause 29.3(c) says that steps must be taken to correct the underpayment within 24 hours. The [HSU] relies on the 5 May 2022 reply email to submit that this was the only action taken by Mercy and that the reference to steps taken implies more than one step is required. The email produced above is part of the communication between the [HSU] and Mercy. It refers to the author's 'understanding' of when the wage increase will take effect and that the author will need to check 'an estimated date regarding the backpays'. The communication discusses part of the process to rectify the underpayment. This is doing something with a view of rectifying the underpayment, that being the ultimate objective of the communication. Mercy submits that all that is required is to 'set the process in train that will ultimately rectify the error'".

**[24]** The Commissioner then set out the dictionary meaning of the phrase – "*take steps*" – as follows: "*Begin a course of action, as in* [t]*he town is taking steps to provide better street lights*…" or "*To undertake measures (to do something) with a view to the attainment of some end*"[13]. The Commissioner indicated that on balance she was persuaded by Mercy's submission that subclause 29.3(c):

> "…cannot mean that all steps that need to be taken to correct the underpayment must be taken within 24 hours" and "if the intention was that complete rectification of the underpayment is required, the wording of the clause would so specify".[14]

**[25]** The Commissioner contrasted the language used in subclause 29.3(b) which deals with underpayments that are less than 5% of the employee's fortnightly wage, with the language of subclause 29.3(c). In this regard, the Commissioner observed that the language "*the underpayment* ***will be*** *corrected in the next pay period*" (emphasis in Decision) in subclause 29.3(b) was not used in subclause 29.3(c) when subclause 29.3(c) could have easily followed the same wording in the preceding clause. The Commissioner concluded the plain meaning of subclause 29.3(c) is that "*rectification of the underpayment needed to begin within the 24-hour period of the payment being due*"[15] and went on to observe that if the intention of the clause was to ensure correction of the underpayment within 24 hours, the clause could have stated that the underpayment must be corrected in this timeframe.[16]

**[26]** In relation to the HSU submission that logic dictates a more onerous obligation to deal with larger underpayments in subclause 29.3(c) faster, the Commissioner observed that subclause 29.3(b) dealing with smaller underpayments requires that they be corrected in the next pay period, while subclause 29.3(c) states that the employer must take steps to correct the

underpayment, and that the urgency was to impose an obligation on the employer to act within 24 hours to begin the process of rectification.[17] The Commissioner also observed that to give the words "*take steps*" the meaning asserted by the HSU would be an impractical and narrow interpretation.[18] In relation to an alternative submission that the clause requires the employer authorise the payment within 24 hours and allows for delays in processing such payments, the Commissioner found that this interpretation was not supported by the plain meaning of the words in subclause 29.3(c) and surrounding clauses and is impractical in its narrow interpretation of factors that could go to correcting the underpayment within 24 hours.[19]

**[27]** The Commissioner went on to make the following findings:

> "[117] I find that the 5 May 2022 reply email is the start of a course of action that is steps taken to rectify the underpayment. As is evidenced by the correspondence between the parties, Mercy continued to take steps to rectify the underpayments of the allowances. There would also appear to be some recognition from the [HSU] that a course of action is required to correct the underpayment. In his email to Mercy on 31 May 2022, Mr Steven Reilly, Industrial Organiser for the [HSU], asks, 'What stage is Mercy Health currently at right now? This way we can relay it back to our members.'
>
> [118] That it took four months for the rectification to be completed does not reflect well on Mercy's internal processes, particularly that of its human resources team."

**[28]** As Mercy was found to have taken steps within the meaning of subclause 29.3(c), the Commissioner concluded that subclause 29.3(d) could not apply to impose a penalty payment and the issues relating to the calculation of the penalty payment did not arise for consideration. Accordingly, the Commissioner determined that the answers for Questions 1 and 2 are respectively "*Yes*" and "*No, Mercy is not required to make a penalty payment. Accordingly, no penalty payment needs to be calculated*".

## Correspondence between Mercy and the HSU

**[29]** The material before the Commissioner included correspondence between Mercy and the HSU and internal correspondence between various Managers. Given the argument advanced by the HSU on appeal, it is necessary to consider that correspondence. The correspondence from the HSU said to be requests for the purposes of subclause 29.3(a) was appended to the submissions of Mercy in the appeal. On 5 May 2022, Mr Harika corresponded with Ms Barrett by email enquiring as follows: "*Can you please give me some detail as to when the wage increases, and back pay will take affect for the 2021-2025 EBA?*" On the same day, Ms Barrett replied by email stating: "*My understanding is the wage increase will take effect from the next pay period. I will need to check an estimated date regarding the backpays.*"[20]

**[30]** On 10 May 2022, an internal Memorandum dated 6 May 2022[21] was issued to Mr Michael Cotela, Group Manager Remuneration Services for Mercy, by the Executive Director of People, Learning and Culture, authorising the implementation of the terms and conditions under the Agreement, including the wage and allowance increases, in accordance with a Bulletin[22] and Salary Circular 801[23] prepared by the VHIA. The Bulletin, issued on 13 April 2022, notified VHIA members that the Agreement was to come into effect on 20 April 2022 and enclosed an Implementation Guide highlighting the obligations under each clause in the Agreement, including the relevant pay periods for the NWA and EIA[24]. With respect to "*back pay*", the Memorandum recorded that the new rates applied from 1 July 2021 and there would

be a back pay component that Mr Cotela should proceed to calculate and process as soon as possible.

**[31]** On 10 May 2022, Ms Lauren Thomas (Employer Relations Advisor for Mercy) sent an internal email[25] to the Employee Relations Team confirming that an internal implementation meeting for the Agreement was scheduled for 13 May 2022. Ms Thomas further stated that "*given there are a number of Agreements we will shortly have to implement… we therefore kindly request that everyone complete their action items within 8 weeks of the first implementation meeting*." Ms Thomas also directed specific instructions and questions to Mr Cotela as follows:

> "Please do not wait until the first implementation meeting to review the material and process the wage and allowance increases, these should be done as soon as possible.
>
> Could you please advise the anticipated timing of the payments so that Margaret may communicate this to the HWU? For context the HWU have already asked for the timeframe and VHIA have advised health services to communicate this with the union as soon as practicable. So:
>
> - From when will the new rates take effect? (i.e. which pay period/pay run – and is this an estimated or confirmed date?
> - When will the back pay be processed? (i.e. which pay period/pay run – and is this an estimated or confirmed date)"

**[32]** Mr Cotela replied to Ms Thomas on 12 May 2022 confirming that he had reviewed and left comments in the Implementation Guide for the Agreement. One comment – "*RO Config*"[26], an abbreviation for RosterOn which is a rostering software used by Mercy[27] – was left in the "*status*" column concerning the implementation of the NWA and EIA. There was evidence before the Commissioner that RosterOn was not equipped to handle one-off payments, such as the NWA and the EIA, and Mercy had to set up the payments in its payroll system and perform system configurations and testing before making the payments.[28]

**[33]** On 12 May 2022, Mr Harika emailed Ms Barrett[29] enquiring as to whether she had "[found] *out as of when the back pay will go through?*". There appears to be no evidence of any discussions about the steps to be taken by Mercy in relation to the payments of the allowances at the first internal implementation meeting on 13 May 2022. Between 20 and 27 May 2022, Ms Thomas engaged in a series of email correspondence[30] with the VHIA seeking clarification about the eligibility of employees to receive the NWA and EIA under the Agreement.

**[34]** Having received no response from Mercy, Mr Harika sent an email[31] to Ms Natasha Walker, HR Business Partner for Mercy, on 26 May 2022 seeking an update on when all staff will be receiving their "*back payments*". On 30 May 2022, Ms Walker replied to Mr Harika and Mr Steven Reilly, HSU Industrial Organiser, advising that Mercy was "*approaching this by (sic) in the following phases: 1. Complete translations – currently working through this; 2. Apply increase; 3. Process back-pay*". Ms Walker stated that when Mercy had "*more information and dates*", it would provide these details to the HSU[32]. On 31 May 2022, Mr Reilly responded to Ms Walker, copying Mr Harika to the email, asking: "*What stage is Mercy Health currently at right now? This way we can relay it back to our members. Has Mercy Health communicated to staff what stage you are up to?*"[33] No response was provided by Mercy to Mr Reilly's email.

**[35]** On 3 June 2022, Ms Thomas sent an internal email to various Mercy personnel, including Mr Cotela, Ms Barrett, Ms Walker, Ms Catherine Keddad (Group Employee Relations Manager) and Mr James Wang (Payroll Manager). That email sought information on the entitlement of former employees to the backdated allowances. In conclusion the email stated that a response in relation to this matter had been received and that appropriate backpay reports could now be prepared which should be shared with ER so that a memo authorising the payment could be prepared.[34]

**[36]** Witnesses for Mercy gave evidence that between June and July 2022, Mercy experienced significant difficulties in processing the backpay for the allowances. Those difficulties included having to perform similar exercises in respect of other entitlements and allowances under the terms of the recently commenced Agreement, operating under reduced staffing capacity due to resignations, and having to maintain payroll responsibilities with respect to approximately 6,000 employees in addition to processing the allowance payments.[35]

**[37]** On 11 July 2022, Mr Harika attended an Agreement Implementation Committee (AIC) meeting with Mercy. The minutes of the meeting record that one of the items discussed was that employees had not received the payments for the NWA and EIA[36]. The action to be taken by Mercy, as recorded in the minutes, was for "*HR to follow up*" with a notation that "*Payroll have compiled the list of employees of Nauseous Work Allowance and Education Incentive Allowances for review*".[37]

**[38]** On 12 July 2022, Ms Walker made an enquiry by email to Ms Keddad because it was raised at the AIC meeting that "*no nauseous payments had been received*".[38] Ms Walker queried whether Mr Cotela had provided an update regarding Ms Thomas's email of 3 June 2022 (as set out above) and stated that Ms Walker would need to provide an update on this matter in the next AIC meeting in 3 weeks.[39] On 21 July 2022, Mr Harika wrote to Ms Barrett and Ms Walker requesting the minutes of the AIC meeting on 11 July 2022 and an update on "*what was raised in the agenda*". On 25 July 2022, Mr Harika sent a further email stating, relevantly, as follows:

> "A lot of the responses to the items that we discussed in the meeting were responded by, 'We will need to get back to you.' For example, when will the nauseous and educational incentive allowance be made?
>
> Since we agreed to meet in 3 weeks time, and you have scheduled us in for 4 weeks time. I believe, it now would be reasonable to request a follow up of what's transpired so far in the agenda items discussed at the time of our meeting.
>
> - Nauseous Allowance?
> - Educational Incentive Allowance?
> - Instrument Tech & Theatre Tech Reviews?
> - Annual Leave Accrual?
> - Weekend On-Call Rates for Theatre Techs?
>
> All I am requesting is an update to these points above."

**[39]** Ms Walker's email enquiry of 12 July 2022 was not responded to until 25 July 2022 when an inquiry was made to Ms Walker as to whether she had received an update from Employee Relations or Payroll about the allowance payments.[40] On 26 July 2022, Ms Walker confirmed that she had received no update and asked Ms Keddad whether an email should be

sent to Mr Cotela to follow up. Ms Walker also stated that the next AIC meeting was scheduled for 8 August 2022 and "*it would be ideal to have these payments made by then or at the very least provide an update as to when the payments will be made*."[41] Following this email, Ms Keddad emailed Mr Cotela and Mr Wang, who was the Payroll Manager, on 26 July 2022 asking whether they were able to advise when the allowance would be paid. Ms Keddad also confirmed that Mercy "[did] *not need to see the back pay sum in order to approve it as it is part of the Agreement*". [42]

**[40]** A second AIC meeting was scheduled for 8 August 2022. On 1 August 2022, Mr Harika wrote to Ms Barrett and Ms Walker stating that he was "*still waiting on a short brief as to where* [those] *points are at before our meeting for next week*." In relation to the item "*Nauseous Allowance*" discussed at the second AIC meeting, the minutes recorded that the actions to be taken by Mercy were "*to be followed up with payroll*".[43] After the second AIC meeting on 8 August 2022, Ms Barrett emailed Mr Cotela and Mr Wang to follow up on Ms Keddad's email of 26 July 2022 regarding the payments of the NWA and EIA and when those payments would be made.[44] On 9 August 2022, Mr Harika sent the following email to Ms Barrett and Ms Walker (salutations omitted):

> "I wish to reiterate our discussion in the Agreement Implementation Committee yesterday the 8th of [August] regarding the Educational Incentive and Nauseous Allowances. I have requested that I receive a response this week as to when the allowances will be paid.
>
> As per the agreement, all staff that are eligible to receive the Educational Incentive Allowance must be paid $750.
>
> All staff (except Theatre Technicians) that are eligible to receive the Nauseous Allowance must be paid $350.
>
> All Theatre Technicians are eligible to receive the Nauseous Allowance must be paid $1050.
>
> I again requesting (sic) that Mercy Health advises me of when this payment will be made by close of business Friday the 12th of August 2022.
>
> If I do not receive a reasonable response by COB Friday, the HWU will enforce clause 29.3(d) and lodge the case through to the commission."

**[41]** On 12 August 2022, Mr Wang produced a summary of the estimates of the total amounts payable for each of the five payments in relation to the NWA and EIA relevant to the dispute,[45] and the allowances were paid to eligible employees on 24 and 31 August 2022.

**[42]** Evidence was also given by Mr Cameron Granger, an Industrial Officer with the HSU, about communication between the VHIA and members in relation to backpay. In summary, that evidence was that on 13 April the VHIA informed members that the Association had secured flexibility for its members in the timing of payment of wages and allowances that arose prior to the Agreement coming into effect and that members were encouraged to consider delaying the payment of backpay until the pay period after Anzac Day and to communicate the timing of payments to employees and the HSU as soon as possible. On 7 June 2022, the VHIA sent correspondence to its members advising that the HSU were lodging disputes in the Commission regarding delays in processing of backpay and while it had not sought to enliven the underpayment of wages penalty in the Agreement, the Association understood that the HSU would do this shortly. The VHIA also informed its members that they should consult the HSU

on the timing of backpay, noting the Union was seeking that this payment occur prior to 30 June 2023.

## Other relevant evidence and submissions at first instance

**[43]** In the proceedings at first instance, evidence was given for the HSU by three employees named in the Form F10 filed by the Union – Mr Andrew Hargreaves (Grade 4 Theatre Technician), Mr Nicholas Barbante (Grade 5 Theatre Technician), and Mr Timothy Hodges (Grade 2 Patient Service Assistant). Although the three employees were eligible to receive the NWA and two of them were entitled to the additional NWA as Theatre Technicians, they do not meet the eligibility criteria for receiving the EIA under clause 16 in Section 2 of the Agreement. In summary, the evidence was that all were entitled to be paid the NWA and received the payments at the times set out above after making inquiries to the HSU. The employees also gave evidence of the officials of the HSU querying when the allowances would be paid, at AIC meetings in July and August 2022.

**[44]** Mr Granger also gave evidence of the negotiations for the Agreement including claims from the VHIA on behalf of employers, seeking to include exemptions to the underpayment clauses in the previous 2016 – 2020 Agreement. Mr Granger appended a copy of the previous agreement to his witness statement.[46] The previous agreement had provisions dealing with underpayment in Section 2 (Health and Allied Services Employees and Dental Assistants) and Section 3 (Managers and Administrative Workers). The provisions in Section 2 of the previous agreement were found in clause 25 Payment of Wages, and subclauses 25.3 to 25.6 are essentially in the same terms as subclauses (a) – (d) of clause 29.3 of the current Agreement. Clause 25.7 of the previous agreement provided that the 20% penalty payment then in clause 25.6, would not come into effect if the payment of wages or monies owed fell on a public holiday, until the expiration of the holiday, or if any unforeseen event outside the control of the employer frustrated their ability to meet the requirements of this clause.[47] Section 3 of the previous agreement had equivalent provisions to those in subclause (a) – (c) of the Agreement but did not include a penalty for late payment or any exemptions.[48]

**[45]** The provisions in Sections 2 and 3 of the previous Agreement were consolidated and included in Section 1 of the Agreement as common provision applicable to employees under all Sections of the Agreement. Additional exemptions were added to the new subclause 29.3(d) where the employer disputes whether monies are owed to the employee, where the underpayment was due to employee error, or where the employee agreed to defer the correction of the underpayment to the next pay period. The effect was to increase the range of exemptions from the penalty now in subclause 29.3(d) and to extend the penalty and the exemptions in subclause (e) to Managers and Administrative Workers. Mr Granger's statement confirms that the VHIA on behalf of employers sought amendments to the requirements in what became subclause 29.3(c) to the effect that the 24-hour period for steps to be taken to correct an underpayment exceeding 5% of an employee's fortnightly wage, would not include weekends or public holidays. Mr Granger's statement confirms that this amendment was not agreed by the HSU.[49]

**[46]** Mr Granger also gave evidence about the finalisation of the negotiations for the Agreement indicating that a "*heads of agreement*" document was signed by the negotiating parties in May 2021, with agreement being reached by exchange of letters on 21 August 2021.

A final draft of the heads of agreement document was tendered by Mr Granger[50] and it was accepted by Mr Pullin in cross-examination that this draft did not change before the final version of the exchange was signed.[51] The heads of agreement states in relation to the objective of "*Trustworthy and committed*" that they agreed the Agreement would provide for "*a detailed method by which alleged underpayments are examined and corrected in a timely manner*."[52] This objective was reflected in an Implementation document issued by the VHIA, also tendered through Mr Granger.[53] The exchange of letters, sent by VHIA to the State Secretary of the HSU Ms Diana Asmar, is dated 26 August 2021. It sets out best practice employment commitments, to operationalise elements of the Victorian Government's Public Sector Priorities and included: "*Examining and addressing underpayments of wages*."[54] These documents were used by the negotiating parties to establish consistency with the Victorian Government's wages policy and enterprise bargaining framework.[55]

**[47]** Mr Gavin Sharpe, an Organiser with the HSU, gave evidence that two employees of another employer covered by the Agreement, who did not receive payment of the NWA by the first full pay period on or after 1 December 2022, had been paid the penalty in subclause 29.3(d) calculated in the manner contended for by the HSU in these proceedings. The evidence is of little assistance in resolving the issues in the present dispute.

**[48]** Evidence for Mercy was given by Mr Daniel Pullin, Senior Workplace Relations Consultant for the VHIA. Mr Pullin's evidence was that the HSU sought in negotiations for the Agreement, to align underpayment terms that existed for employees covered by Section 2 of the Agreement across to Section 3. VHIA also sought amendments to the underpayment clause to improve readability and to clarify circumstances where the clause could not be invoked by employees. Mr Pullin said that at no stage did any HSU representative raise any circumstance where the underpayment clause was applicable to a circumstance where a health service was delayed in implementing the payment of an allowance or that the clause applied in the compounding manner contended for by the HSU in the present case.

**[49]** Mr Pullin also said that during discussions in April and May 2022, the HSU did not state a date where it expected all applicable backpay to be paid to employees and his impression was that the Union was prepared to be flexible and was cognisant that it would take health services time to make back payments as was historically commonplace in the industry. The VHIA encouraged health services to engage with the Union to avoid disputes about when back payments would be made to employees. Mr Pullin expressed the view that a variation made to the Agreement in early May 2022, to remove ambiguity and uncertainty in relation to several provisions, may have contributed to uncertainty by different health services in relation to the implementation of the Agreement. There was also uncertainty among some health services about whether allowances were required to be paid to former employees. This took some time to clarify.

**[50]** Mr Pullin understood that the latest the HSU would accept back payments being made was 30 June 2022. Mr Pullin said that to the best of his knowledge, no health service implemented the Agreement immediately upon its commencement on 20 April 2022, and he is not aware of any circumstance where a penalty was paid to employees because allowances were not back paid immediately upon commencement of the Agreement. Mr Pullin did not consider a health service not providing backpay or allowances immediately upon the commencement of the Agreement to be the type of error contemplated by the underpayment clause, that would

necessitate a penalty being payable in accordance with that clause. Mr Pullin tendered a record of bargaining discussions related to the underpayment of wages clause[56]. The Summary indicates that in addition to the exemptions to the penalty for late payment that were agreed to by the HSU: "*Employers seek to insert exemptions at subclause 25.6 of Section 2 to include exemptions where …the 24 – hour period excludes non-business days*".[57]

**[51]** Subclause 25.6 of the previous agreement became subclause 29.3(d) of the Agreement, and the reference to the 24-hour period in which an employer is required to take steps to correct an underpayment exceeding 5% of the employee's fortnightly wage, contained in subclause 25.5 of the previous agreement became subclause 29.3(c) of the Agreement. In a column headed "*Intent of Claim/Underlying Issue (Employer)*" the Summary states that the clause as currently drafted does not contemplate a scenario where the employee notifies the employer immediately prior to or on a weekend/public holiday. This reference indicates that the VHIA sought to extend the 24-hour period then referred to in subclause 25.6 of the previous agreement, in circumstances where the employee request for an underpayment to be corrected, was made immediately prior to a weekend or public holiday. While the Summary indicates that the HSU indicated on a preliminary basis that this and other exemption proposals which did find their way into the Agreement were "*agreeable*" the VHIA's claim in relation to the 24-hour period was not included in the current Agreement.

Under cross-examination at the first instance hearing, it was put to Mr Pullin that this aspect of the Summary document indicated that clause 25.5 of the previous agreement required underpayments to be corrected within 24 hours. Mr Pullin said that the previous agreement dealt with steps being taken to correct the underpayment within 24 hours and to provide confirmation to the employee of the correction, and disagreed with the proposition that the underpayment was required to be corrected within 24 hours.[58]

**[52]** Ms Kingsley did not commence employment with Mercy until January 2023, but said that her examination of business records indicated that during May 2022, Mercy received memoranda from VHIA explaining the Agreement and that implementation meetings were held between relevant managers of Mercy where it was agreed that action items would be implemented to facilitate back payments being made to employees. Ms Kingsley also outlined an amendment to the Agreement on 27 May 2022 to remove ambiguity or uncertainty with respect to several provisions including back payments to terminated employees. Ms Kingsley stated that the variation included changes to the EIA and the NWA. Mercy's Senior Employee Relations Advisor, Ms Lauren Thomas, sent an email to relevant payroll and human resources persons on 3 June 2022, confirming her understanding that this would allow the payroll team to prepare backpay reports in respect of these allowances and requesting this information be shared with Mercy's employee relations team so that the payments could be authorised.

**[53]** Ms Kingsley also said that Mercy's employee roster system is not equipped to handle one off payments like the NWA and EIA which meant that payment of these allowances had to be set up in the payroll system and that system configuration and testing had to be undertaken prior to making the payments. Further, Ms Kingsley gave evidence of difficulties with Mercy's payroll system throughout June and July 2022, including staff absences where duties usually performed by four staff members were required to be performed by two staff members. Correspondence from Mercy's human resources team to its payroll team was also tendered by Ms Kingsley in which the timing of the backpay of the NWA and EIA was queried.

**[54]** In relation to Ms Kingsley's evidence the HSU submitted in the proceedings at first instance, that the proposition of the underpayment being deliberate, was not borne out by the evidence in relation to understaffing and that this is inadvertence, which would bring the underpayment within the definition of "*error*" advanced by Mercy.

## The Appeal

**[55]** By its Notice of Appeal, the HSU advanced the following appeal grounds:

> "1. The Commission erred by construing the phrase "take steps to correct the underpayment within 24 hours" in clause 29.3(c) *Health and Allied Services, Managers and Administrative Workers (Victorian Public Sector) (Single Interest Employers) Enterprise Agreement 2021-2025* (Agreement) as meaning no more than 'to do something' or 'begin a course of action' with a view to rectifying the underpayment.
>
> 2. Alternatively, having construed the phrase "take steps to correct the underpayment within 24 hours" in cl 29.3(c) of the Agreement, the Commission erred by concluding that the email from Ms Barrett to Mr Harika on 5 May 2022 (5 May reply) was "[taking] steps to correct the underpayment within 24 hours", because, as a matter of characterisation, the 5 May reply was not doing something or beginning a course of action with a view to rectifying the underpayment.
>
> **Particulars**
>
> A. On 5 May 2022 at 11:16am, Danny Harika of the Appellant sent an email to Margaret Barrett of the Respondent (5 May Harika email) stating relevantly:
>
> *Can you please give me some detail as to when the wage increases, and back pay will take affect for the 2021-2025 EBA?*
>
> B. On 5 May 2022 at 4.26pm, Ms Barrett replied to Mr Harika saying relevantly:
>
> *I will need to check an estimated date regarding the backpays*.
>
> C. There was no evidence that Ms Barrett checked "an estimated date regarding backpays", or any checking that led to any further action.
>
> D. The Commission found that the 5 May reply, of itself, "is doing something with a view to rectifying the underpayment, that being the ultimate objective of the communication": at [107].
>
> E. The Commission found that "the 5 May 2022 reply email is the start of a course of action that is steps taken to rectify the underpayment": At [117].
>
> F. The Commission's findings at [107] and [117] were not open as a matter of characterisation."

## Permission to appeal

**[56]** Section 604 of the *Fair Work Act 2009* (Cth) (FW Act) provides that a person aggrieved by a decision of the Commission may appeal the decision with the permission of the Commission. This provision operates subject to the terms of an instrument otherwise providing the basis for the Commission to determine a matter by arbitration under s.739 of the FW Act. As we have noted, subclause 17.7(d) provides that an appeal lies to a Full Bench of the

Commission from a decision of a single member, subject to leave being granted. It is not in dispute, and we accept, that "*leave*" in this context does not have a meaning different from "*permission*" as that term is used in s. 604[59] and the question of leave should be approached in the same manner as "*permission*" in s. 604. The Dispute Settlement Procedure in the Agreement does not establish an independent right of appeal and an appeal lies only with permission in accordance with s. 604(2).

**[57]** The Decision against which the appeals have been brought concerns the proper construction of the Agreement. The substantive part of the Decision did not involve the exercise of discretion. The answer given by the Member at first instance is either correct or incorrect and appeals concerning the proper construction of the Agreement are to be determined by the "*correctness standard*". As the High Court explained in *Minister for Immigration and Border Protection v SZVFW*[60], the legal criterion applied to reach the conclusion demand a unique outcome,[61] and there is only one right answer.[62]

**[58]** By virtue of s. 604(2), without limiting when permission to appeal may be granted, the Commission must grant permission if satisfied that it is in the public interest to do so. Permission to appeal may also be granted where there is an arguable case of appealable error, and the decision is attended with sufficient doubt to warrant its reconsideration.[63]

**[59]** We are satisfied that permission to appeal should be granted on the basis that the appeal raises issues of construction of an important Agreement applying to a sizeable workforce of approximately 41,000 workers and 87 different employers in the Victorian public health system. We also consider that the disputed provision in clause 29.3 raises novel questions around rights and obligations in relation to the payment of wages and potential liability arising from underpayments for all employers covered by the Agreement and that these matters are of significance so as to engage the public interest in the grant of permission to appeal.

## Submissions in the appeal

### *HSU*

**[60]** In oral submissions in the appeal, the HSU said that the debate is narrow and concerns the proper construction of clauses 29.3(c) and (d). In response to a question from the Full Bench, Senior Counsel for the HSU Mr Harding, said that the 24-hour period in subclause 29.3(c) runs from the point of the underpayment, being when the obligation to make a payment crystallises. Further it was submitted that the steps required to be taken must be such that the error is corrected within 24 hours. In response to the proposition that the employer may not be aware of the underpayment, Mr Harding said that there are a number of ways that an employer can become aware of an underpayment, including by being notified by an employee, or because, as in the present case, the terms of an enterprise agreement require that a certain amount be paid by a certain date. It was also submitted that if an employer is not aware of an underpayment, then subclause 29.3(e)(v) may apply, so that the penalty payment in (d) does not apply.

**[61]** It was also submitted that the provisions in subclause 29.3(a) are not a precondition, and while the employee raising it is a way that an employer may discover an underpayment, the obligation under the Agreement falls on the employer and employees are not tasked with enforcing the employer's obligations. Further, it was submitted that an error includes an

omission or failure to pay an amount at the time it became due and payable. In this regard, Mr Harding contended that it would be an extraordinary result if the employer, knowing full well that it was obligated to pay the allowances and does not, is excused, because an employee did not raise the underpayment. In any event, it was submitted that the email from the HSU dated 5 May 2022 stating that its members had not been paid NWA or EIA, was notice of the underpayment of those amounts if such was required by subclause 29.3(a).

**[62]** The HSU submits that from 5 May 2022 until the eventual payment of the allowances, its officials consistently made demands to Mercy for the payment of the allowances to eligible employees. The HSU points to evidence before the Commissioner establishing that on 5 May 2022, Mr Harika sent an email to Ms Barrett, relevantly asking:[64] "*Can you please give me some detail as to when the wage increases, and back pay will take affect for the 2021-2025 EBA?*" The HSU says that "*back pay*" in this context can be taken to include reference to the allowances. The same afternoon, on 5 May 2022, Ms Barrett responded by email (5 May reply)[65] stating: "*I will need to check an estimated date regarding the backpays*." The HSU then made additional requests for rectification of the underpayment of the allowances on 12 May 2022,[66] 26 May 2022,[67] 31 May 2022,[68] 11 July 2022,[69] 25 July 2022,[70] 1 August 2022,[71] 8 August 2022,[72] and 9 August 2022.[73]

**[63]** In relation to Ground 1, the HSU contends that the Commission at first instance erred by construing "*take steps to correct the underpayment within 24 hours*" in subclause 29.3(c) as meaning no more than to "*do something*"[74] or "*begin a course of action*"[75] or "*set the process in train*"[76] with a view to rectifying the error. Read in context, subclause 29.3(c) imposes an obligation on an employer to do that within its power that could plausibly correct the underpayment within 24 hours. The HSU submits that put another way, subclause 29.3(c) requires the employer to complete the rectification of the underpayment *from its end* within 24 hours, save that the employer would not be in breach if actual repayment was delayed by external matters outside of the employer's control. For the avoidance of doubt, the HSU states that it does not submit that the provision requires money to be in workers' bank accounts within 24 hours[77].

**[64]** At the hearing of the appeal, the HSU submitted that the proposition that subclause 29.3(c) does not require the money to be in the employee's bank account within 24 hours is not inconsistent with its contended construction of the clause. In this regard, the HSU said that the underpayment is corrected when it no longer exists and inherent in that idea is that ultimately, the employee will have the money in their hands. As the language of clause 29.3 requires the employer to "*take steps to correct within 24 hours*", the employer is under an obligation to take a series of steps, or to set an outcome in train, and it is required to do everything it can to correct the underpayment by making sure that the money is going to be put into the hands of the employee.[78] In the HSU's view, the money in the employees' bank account is the ultimate effect and not a failure to take action of the kind referred to in subclause 29.3(d).[79]

**[65]** In circumstances where the payment is delayed by a third party, such as a bank, the HSU is of the view that subclause 29.3(e)(v) provides for "*unforeseen event outside the control of the employer*" and subclause 29.3(d) would not come into effect if subclause 29.3(e)(v) is engaged.[80] In order for the employer to comply, the HSU said that subclause 29.3(c) would require the employer to do what it needs to do at its end, within 24 hours, including to effect the electronic transfer of the funds.[81]

**[66]** Applying the well-known and uncontroversial principles relevant to the interpretation of enterprise agreements as summarised by the Full Court of the Federal Court in *WorkPac Pty Ltd v Skene*[82], the HSU submits that its proposed construction does not involve the reading in of any additional words to the provision and the difference in approach between the Commissioner and the HSU lies in the choice of phrasing to construe.

**[67]** In the Decision, the Commissioner was concerned to interpret the phrase "*take steps to correct the underpayment*" and plainly regarded the words "*within 24 hours*" as providing a time limit within which the relevant "*steps to correct the underpayment*" must be taken. The HSU's proposed construction instead regards the whole of the phrase "*correct the underpayment within 24 hours*" as being descriptive of the steps to be taken. The temporal aspect of the phrase does not fix the time within which steps must be taken; it is descriptive of the steps themselves. Understood in this way, the HSU submits that the "*steps*" are things that could have the effect of correcting the underpayment within 24 hours. On the HSU's proposed construction, there is therefore no direct temporal limit on when the steps must be taken. However, in practice, for a step to be capable of being described as "*to correct the underpayment within 24 hours*", it must also be taken by the employer within 24 hours, if not before.

**[68]** The HSU submits that its construction sits most conformably with clause 29.3, read in context and with its evident purpose in mind. That purpose is self-evidently to require the prompt rectification of underpayments and to provide an economic incentive for the employer to act with due haste to rectify the underpayment. The HSU relies on two contextual indicators to support its construction. *First*, is the bifurcation of the obligation to repay underpayments depending on the size of the underpayments in subclauses 29.3(b) and 29.3(c). *Second*, is the express exemption in subclause 29.3(e) where compliance with subclauses 29.3(b) or 29.3(c) cannot occur due to matters outside the employer's control.

**[69]** As to the *first*, under clause 29.3 the "*onerousness*" of the obligation on an employer to rectify an underpayment depends upon the size of the underpayment. A smaller underpayment, less than 5% of the employee's fortnightly wage, is subject to the obligation in subclause 29.3(b) and "*will be corrected in the next pay period*". Larger underpayments, more than 5% of the employee's fortnightly wage, attract the obligation in subclause 29.3(c) to "*take steps to correct the underpayment within 24 hours*". For reference, 5% of the fortnightly wage of a worker earning $80,000 would be about $150.

**[70]** The HSU says this is plainly a deliberate choice to split the obligation in this way as a larger underpayment is objectively a more serious matter – both in terms of the gravity of the employer's wrongdoing and consequences for the worker and a more serious breach should attract a more onerous responsive obligation. A construction of subclause 29.3(c) that would permit an employer to take any step, no matter how small, towards the eventual rectification of the underpayment is at odds with that purpose and would countenance the rectification of larger underpayments more slowly than the rectification of smaller underpayments (as happened in this case) and provide no urgency or incentive for prompt rectification.

**[71]** As to the *second* contextual indicator, subclause 29.3(e) provides exemptions from the requirement to pay a penalty under subclause 29.3(d), including if any unforeseen event outside

the control of the employer frustrates its ability to make repayment.[83] The exemption is consistent with the construction that the words "*take steps*" soften the obligation to make rectification only to the extent that matters outside of the control of the employer causing delay will not lead to breach.

**[72]** The HSU submits that the construction determined by the Commissioner can be tested by the absurdity of the results which it produces. That construction says nothing about when underpayment must be rectified and would permit long delays. The only urgency required would be to take some small step to commence a process, and then, as here, there could be delays of many months before the payment is finally rectified.

**[73]** In relation to Ground 2, the HSU submits that even if the Commission at first instance was correct in the construction of subclause 29.3(c) as requiring no more than doing something to set a process in train to correct the underpayment, the Commissioner nevertheless erred by finding that the 5 May reply email met that condition.

**[74]** The 5 May reply email did no more than implicitly acknowledge that a request for rectification or information had been made by the HSU. It was directed externally (to the HSU) and not internally to any person or team that could do anything to progress Mercy's rectification of the underpayments. It did not describe any steps that *would* be taken, rather just that Ms Barrett *needed* to check an estimated date. It had no relationship at all, much less any causal relationship, to any other step taken by Mercy to eventually rectify the underpayments. The HSU says that there is no evidence that Ms Barrett *did* check an estimated date regarding the backpays, and that Mr Harika was forced to follow up on 12 May 2022 by email to which he received no response.[84] Thus, it cannot even be said that the email was related in some way to Ms Barrett doing some other thing to progress rectification. The 5 May reply email did not, directly or indirectly, move Mercy any closer to rectifying the underpayments. It was not open to the Commissioner at paragraphs [107] and [117] to characterise the 5 May reply email as "*doing something*" or "*the start of a course of action*" to correct the underpayment.

**[75]** If its proposed construction is accepted on appeal, the HSU submits that the Full Bench should find that Mercy did not take any step that could meet the description of "*to correct the underpayment within 24 hours*" until about 24 August 2022 in relation to the first group of eligible workers who were paid the allowances on that date, and 31 August 2022 in relation to the second group of eligible workers who were paid the allowances on that date. Aside from the receipt of payment into eligible workers' bank accounts, the HSU submits that there is no other evidence of Mercy doing anything before that moment that would meet the description of a step "*to correct the underpayment within 24 hours*" in accordance with the construction contended for above.[85] On this basis, the HSU submits that the Full Bench may comfortably find that Mercy did not take the action required under subclause 29.3(c) of the Agreement.

**[76]** However, if the HSU's proposed construction is not accepted, the HSU says the Full Bench may still find Mercy to have not taken the action required under subclause 29.3(c) as the 5 May reply email should not be regarded as any step taken to rectify the underpayments. On the evidence before the Commission, the first thing that Mercy did that could plausibly meet a description of being a step towards rectification of the underpayments was the sending of a memorandum from Ms Karen Horner, Executive Director People, Learning and Culture, to Mr Cotela on 10 May 2022 authorising Mr Cotela to implement the Agreement, and containing

short reference to the allowances.[86] Having not been done within 24 hours of Mr Harika's 5 May 2022 email to Ms Barrett, the HSU submitted that the step would not satisfy Mercy's obligation under subclause 29.3(c). Even on the construction determined by the Commissioner, the Full Bench should find that Mercy did not take the action required by subclause 29.3(c) of the Agreement.

**[77]** If Mercy is found not to have taken the action required under subclause 29.3(c), Mercy became liable to make a penalty payment in respect of each underpayment calculated in accordance with subclause 29.3(d). The method of calculation of the penalty was an issue before the Commissioner and an aspect of Question 2. The HSU contends that the plain words of the penalty provision require the payment of 20% of the value of the underpayment for each day that the underpayment goes unpaid. Only this construction could provide an appropriate deterrent effect and adequate incentive to employers to rectify underpayments in time spans measured in days rather than months.

**[78]** The HSU submits that Mercy's contention that subclause 29.3(d) provides for payment of penalty *interest*, such that the entitlement would be calculated as 20% of the underpayment *per annum*, prorated for the number of days the underpayment went unpaid, should be rejected. *Firstly*, the words of the Agreement contain no reference to "*interest*", or any penalty being calculated on a "*per annum*" basis. On the contrary, the only temporal reference in the provision is the word "*daily*" which strongly supports the construction proposed by the HSU. *Secondly*, a penalty of 20% per annum is at odds with the obligations in clauses 29.3(b) and 29.3(c) to rectify the underpayment within a matter of days (up to 14 days). The Agreement should not be understood to apply an annualised interest rate because it did not envisage rectification taking place over a period measured in years. Further, the calculation proposed by Mercy would result in a penalty payment of $0.19 cents for each day that the nauseous work allowance (for example) went unpaid. A result that would have no deterrent effect at all.

***Mercy***

**[79]** Mercy submits that in interpreting industrial instruments, the desirable construction is one that contributes to a sensible industrial outcome,[87] and gives effect to the instrument's evident purpose.[88] In Mercy's view, the HSU's approach would produce an enormous, potential liability that could not have been intended. On the HSU's construction, more than 220 employees are *each* owed amounts in the high thousands or low tens of thousands, for delays in paying allowances worth not more than $350. For Mercy alone,[89] the liability based on the HSU's construction, is estimated to be at least $3.46 million.[90]

**[80]** The effect is striking at both the global level, and in relation to each individual employee. One of the named employees, Mr Barbante, for instance, alleged that he is entitled to compensation of $21,490 for the delayed payment (of one to four months) of three allowances, together totalling around $1,000.[91] Mercy says it must be borne in mind that at the time when his witness statement was provided, the employee's weekly base pay appeared to be $1427.80.[92] The interpretation advanced by the HSU would produce a penalty 20 times greater than the allowance.

**[81]** Mercy submits that the actual purpose of subclause 29.3(d) is compensatory, and not deterrent as contended by the HSU. Each of the normal interpretive approaches,[93] namely:

analysis of the text; the context provided by the other terms of the instrument; the context provided by the form of the instrument; the beneficiaries thereof; the legislative, social and economic environment in which the Agreement was made, and the history of the clause in predecessor Agreements, lend themselves to that conclusion. According to Mercy, the history of the clause shows that the purpose of the clause was to compensate, and not to punish.

**[82]** Mercy submits if the Full Bench is satisfied that the Commissioner erred, then permission to appeal would normally be granted and the Full Bench would substitute its own decision for that of the Commissioner, after entering upon rehearing. Should error be found, Mercy does not oppose permission to appeal being granted. Upon rehearing, Mercy says the Full Bench must "*deal with*" the "*dispute*" by substituting its decision for the decision below on *all issues*. That is, the award binding the disputants (to use the orthodox arbitral phrase) must be correct. A consequence of this, Mercy says, is that the Full Bench must be satisfied the four issues presented for resolution before the Commissioner are determined correctly and the overall outcome is thus correct.[94] Those four issues are:

(1) Jurisdiction;

(2) Whether a valid request was required (and therefore made);

(3) Whether Mercy fulfilled its obligation to "*take steps*" (this being the Union's point on appeal); and

(4) The appropriate manner in which to calculate a penalty, if any.

**[83]** Mercy notes the Commissioner found against it on its jurisdictional objection and proceeded to determine the dispute. In this appeal, Mercy says that the contention is raised again as a matter of form, and that the Full Bench should proceed on the same basis. Mercy submitted that the case it advanced at first instance was, and remains on appeal, that the operation of subclauses 29.3(b) or 29.3(c) of the Agreement first required the conditions in subclause 29.3(a) to be satisfied. In essence, the HSU contended that liability arises automatically whereas Mercy said that there must be at least an error, and a valid request, before the obligation in subclause 29.3(c) and the remainder of subclause 29.3 could operate. In Mercy's view, the HSU's submissions on appeal[95] now appear to tacitly accept, at least, the requirement for a request.

**[84]** Mercy contends that subclause 29.3(d) operates sequentially as follows: the operation of subclause 29.3(d) is contingent upon the conditions in subclauses (b) or (c) being satisfied, those clauses are contingent upon the conditions in subclause 29.3(a). It is plain from the wording of subclause 29.3(a) that the employee must make a request to engage the regime in subclauses (b) and (c). Mercy submits that the Commissioner erred at paragraphs [97] – [99] in finding that subclause 29.3(a) does not establish threshold matters that must be satisfied, with the result that the Commissioner did not make any findings of fact on this point.

**[85]** Mercy provided a Schedule to its outline of submissions setting out the various actions characterised by the HSU as "*demands*". Mercy states that they may be so, but the relevant test is not whether the HSU made "*demands*", but whether any relevant "*request*" was made. Mercy says the relevant "*request*" (if made) could only have been made, in relation to some unspecified employees, on 9 August 2022.[96] Mercy says if it is correct on this construction point, and if the

HSU succeeds on its appeal, and because the Commissioner did not make findings of relevant facts, then five distinct problems arise. Those problems set out by Mercy in footnote 52 to its appeal submissions were:

> "…whether there was a requirement to make a request for each employee; a requirement… for that request to be made when an error was present; a question as to whether the union could make a request on behalf of non-members; doubt as to whether informal emails could constitute a relevant request; and evidentiary ambiguity as to which of those 220 employees were covered by the request."

**[86]** Mercy submits that the Commission will first have to determine which of the actions was appropriate form of request. *Secondly* (and again, only if the question of penalty becomes relevant) the Commission will have to consider the timing of any request and its consequences.

**[87]** At first instance, Mercy submitted that all that was required was that it set the process in train that will ultimately rectify the error, and later notify the employee that it had done so.[97] The Commissioner agreed with this submission. In this regard, Mercy says that the HSU has advanced at least five[98] different positions and contends that a further construction of subclause 29.3(c) has now been advanced by the HSU in its submissions on appeal.[99]

**[88]** Mercy submits that there are at least seven reasons why the HSU's construction should not be preferred:

- *First*, the HSU ignores the need to construe subclause 29.3(d) as an aide to construing subclause 29.3(c). The HSU refers to the context provided by all of subclause 29.3(e), not the context provided by subclause 29.3(d), despite its primacy.
- *Second*, the precise nature of the steps required by the HSU's construction is vague. For example, the HSU's construction now admits an exception[100] that the steps "*do not require money to be in workers' bank accounts within 24 hours.*"
- *Third*, likely conscious of the imprecision inherent in its construction, the HSU re-writes (in its words, "[p]ut another way") that "*s 29.3(3) (sic) requires the employer to complete the rectification of the underpayment from its end within 24 hours.*"
- *Fourth*, the proposed construction at paragraphs [26]-[28] of the HSU's submissions has the effect of removing or reading out the phrase "*take steps to*" by requiring that the underpayment is actually corrected.
- *Fifth*, the drafters of the Agreement made a constructional choice: there is no acknowledgement in the HSU's case that subclause 29.3(b) says "*the underpayment <u>will be corrected</u> in the next pay period*". This contrasts with subclause 29.3(c), which requires merely that the employer must "*take steps*". If the correction was required within 24 hours or any time period, that is the language the instrument would have used.
- *Sixth*, the HSU makes much of the difference between the obligations in subclause 29.3(b) and subclause 29.3(c).[101] Contrary to their submission, it is perfectly rational for the employer not to have to respond (or provide confirmation prior to rectification) in relation to a small underpayment, but to be mandated to recognise and respond to a larger one within 24 hours – and begin to "*take steps*" within that time period.
- *Seventh*, Mercy says it is very strange that the HSU refers to absurdity and questions, "*How can the absurdity they refer to come close to trumping the absurdity of the result on their construction?*"

**[89]** In relation to HSU's contention that a finding by the Commissioner as to the nature of one email did not constitute "*taking steps*", Mercy says there are two problems with this attack: *firstly*, it ignores other steps[102] that Mercy took to comply with the obligation; and *secondly*, the nature of the steps required to be taken must be assessed by reference to the nature of the request made. The criticism of the steps taken in response to the short email of Mr Harika on 5 May ignores the fact that the language of the HSU's request was informal, shorthand and staccato. The response was in the same terms.

**[90]** Mercy submits that it may be the case that the obligation to "*take steps*" does not place a particularly onerous obligation on Mercy to quickly rectify underpayments given that employees are already protected by a legislative regime that penalises the late payment of entitlements,[103] and provides for the payment of civil penalties[104] and interest.[105]

**[91]** In dealing with this appeal, Mercy says that the Full Bench must at least determine whether the Commissioner's construction of subclause 29.3(c) was correct and perhaps, also, whether the facts found by the Commissioner below satisfy that proper construction. In approaching this task, Mercy submits that the Commission must determine whether subclause 29.3(a) constitutes a precondition to enlivening the obligation under subclause 29.3(c). Depending on the findings of fact and the legal conclusions reached, the Full Bench will be required to determine whether an additional payment beyond the allowances which have all been paid, should be ordered and whether the purpose of the clause is to compensate or deter. Mercy argues that assessing whether any payments ought to be made involves a constructional choice as to the interpretation of subclause 29.3(d). For the following reasons, Mercy submits that its construction of subclause 29.3(d) should be preferred:

- *First*, it should be noted that the difference between Mercy and the HSU as to the outcome of the constructional choices is very large (in the example of Mr Barbente, the HSU says $21,490 whereas Mercy says $50.44). Mercy submits that the task is not to find which construction is perfect, but which is better.
- *Second*, the construction advanced by Mercy fully and fairly compensates the employees in terms of the actual loss suffered for the loss of the use of the money – for example, one employee was deprived of the use of an amount totalling around $1000, for periods of one and no greater than four months.
- *Third*, given the short periods involved – the criticism by the HSU about the daily rate is misplaced. Again, by way of an example, Mercy's construction, which would result in a penalty payment of $50.44, still produces an extraordinarily high, above-market interest rate that fully compensates the employee for the loss of the use of funds for a short period.
- *Fourth*, the HSU makes no reference to subclause 29.3(d) requiring the employer to "*meet any associated banking or other fees/penalties incurred by the Employee as a consequence of the error where those fees exceed the 20% penalty payment*".
- *Fifth*, and in correlation with the bank fee obligation, it would be unlikely that the Instrument would have needed to provide for compensation for any excess bank fees incurred if the HSU's construction were correct. A bank fee of the type above exceeding $21,490 is completely implausible. Only on Mercy's construction does the second obligation in subclause 29.3(c) have any work to do.

- *Sixth*, it is very common for an annual rate of interest to be calculated and expressed on a daily basis. The ordinary meaning of "*daily basis*", in this context, means that the annual interest is calculated daily.
- *Seventh*, although the Commission has said that the equitable doctrine of penalties[106] does not apply to industrial instruments[107] (and assuming that is the correct position), there must be a principle that an interpretation that is consistent with the equitable view of penalties would normally be preferred. That is to say, the aversion in equity to excessive or extravagant penalties must form some of the context to the interpretation.
- *Eighth*, even if contrary to the Mercy's submissions and the true purpose of the clause is deterrence, Mercy says the real question is how far does it need to go to give effect to that purpose?[108] If it is seriously contended that the HSU's construction was what is said to have been agreed by the parties, it is very unlikely that the makers of the Instrument would have gone in the pursuit of this object or purpose of deterrence that would produce an enormous potential liability for a public health service for delays of up to four months in making payments of a comparatively much lower amount.

***HSU submission in reply***

**[92]** The HSU does not accept a submission by Mercy that upon rehearing, the Full Bench must deal with the dispute by substituting its decision on *all issues*, including the issue of whether a valid request was required (and therefore made) and the contention that subclause 29.3(d) operates sequentially contingent upon the satisfaction of preconditions in subclauses (a) and (b) or (c). The HSU contends that that issue does not arise on this appeal. It did not form any part of the Commissioner's dispositive conclusions at paragraphs [120] to [121] for answering the second question posed for determination in the negative. Mercy has not appealed the Commissioner's determination by engaging subclause 17.7(d) of the Agreement.

**[93]** The HSU submits that the Full Bench's appellate authority derives from subclause 17.7(d) of the Agreement and s. 604 of the FW Act. As the majority said in *Coal and Allied Operations Pty Ltd v AIRC*[109]:

> "… statutory provisions conferring appellate powers, even in the case of an appeal by way of rehearing, are construed on the basis that, unless there is something to indicate otherwise, the power is to be exercised for the correction of error."

**[94]** The asserted error which has enlivened subclause 17.7(d) of the Agreement relates to the Commissioner's construction and resultant application of subclause 29.3(c) of the Agreement. It was this that resulted in the negative answer the Commissioner gave to the second arbitration question. On this issue, the Commissioner was either right or wrong. This appeal by way of re-hearing will either uphold the Commissioner's dispositive constructional conclusion or find error and, upon rehearing, substitute the negative answer the Commissioner gave to the second arbitration question for an affirmative answer. The correction of error requires no more than this. However, the HSU submits if the Full Bench allows Mercy to contend for the error referred to in its submissions[110], the HSU's position is that the Commissioner was correct to reject its argument.

**[95]** The HSU contends that Mercy's submission that subclauses 29.3(b) and 29.3(c) are conditional on the "*conditions in sub-cl 29.3(a)* [being] *satisfied*", should be rejected for two reasons. *First*, none of the preconditional language used throughout clause 29.3 suggests that

either the obligation of an employer to rectify underpayment under subclauses 29.3(b) and 29.3(c) or the obligation of an employer to pay a penalty under subclause 29.3(d) is conditional upon a request having been made in accordance with subclause 29.3(a). *Second*, the only express precondition on the requirement of an employer to take action under subclauses 29.3(b) or 29.3(c) is that there has been an underpayment. This is a factual question which if answered in the affirmative engages subclauses (b) or (c). The size of the underpayment will then determine the type of correctional step that must be taken under either subclauses (b) or (c). In any event, if a request is a precondition for engagement of subclauses 29.3(b) or 29.3(c), subclause 29.3(a) should not be interpreted restrictively or narrowly.[111] The HSU's requests put Mercy on notice of the existence of the underpayments and the need to rectify them.

**[96]** In relation to the jurisdictional objection raised by Mercy, the HSU says it appears that Mercy accepts, at least for the purposes of this appeal, that its jurisdictional objection cannot succeed for the reasons given by the Full Court in *One Tree Community Service Inc v United Workers Union*[112] (*One Tree*), a position with which the HSU agrees. In addition, the HSU says that Mercy, defined by the Agreement as a "*Party*", together with other employers, "*made*" the Agreement. The Agreement itself is signed "*for and on behalf of each of the employers referred to in schedule 1A*". Mercy is one of them. The VHIA bargained for those employers, signed the Agreement for them and applied to the Commission for its approval. Mercy necessarily bound itself to the outcome of the process that produced the Agreement. One of those outcomes is the term in subclause 17.1(b) of the Agreement. That term expressly applies the dispute resolution procedure in clause 17 to the kinds of disputes it mentions. The dispute the subject of this proceeding is one of those kinds of disputes. Another outcome was a term that binds all of those covered by the Agreement to the Commission's determination of a dispute in exercise of its authority under s. 595(1) of the FW Act.

**[97]** The HSU contends that Mercy's submission about the "*enormous potential liability*", is not a proper basis to construe subclause 29.3(c) in the manner contended for by Mercy. Any potential liability is avoided by compliance in the first instance and prompt rectification in the second. Any penalty is to be calculated "*on a daily basis*". Mercy delayed rectification of the underpayment of four of the five allowances by four months, or more than one hundred days. Repayment of the fifth allowance was delayed by more than a month. In this case, Mercy's liability is simply the consequence of its failure to comply in a timely way with the obligations it has, and has agreed to, under the Agreement.

**[98]** The HSU says that Mercy's submissions around "*bank fees*" places contextual significance on the inclusion in subclause 29.3(d) of the requirement that an employer pay bank fees where those fees exceed the penalty payment. The HSU says it should be recalled that the penalty provision applies to underpayments captured by subclauses 29.3(b) and 29.3(c). An underpayment that is less than 5% of a worker's fortnightly pay might be anywhere from $1 to $150. In such cases bank fees might plausibly exceed the penalty payment. This matter is of no constructional moment.

**[99]** The HSU regards Mercy's submission that the history or context of the Agreement indicates a compensatory rather than deterrent purpose of subclause 29.3(d), as baseless. The payment referred to in subclause 29.3(d) is described by the clause itself as a "*penalty payment*" and is fixed at 20% of the underpayment and there is no textual support for the compensatory purpose suggested by Mercy.

## Consideration

### *Issues for determination*

**[100]** Our task in the appeal is to determine whether the construction of the Agreement adopted by the Commissioner, and the answers to the questions posed for determination that follow from that construction, are correct. In undertaking this task, it is open to us to consider any relevant matter, including the arguments and evidence that was before the Commissioner, regardless of whether the Commissioner considered an argument or reached a conclusion in relation to it. We do not accept Mercy's submission that if we find error, we must substitute our decision for that of the Commissioner on all issues presented for resolution by the parties. Nor do we accept the HSU's submission that we are limited to matters that formed part of the Commissioner's dispositive conclusions.

**[101]** The Dispute Resolution Procedure at subclause 17.7(d) provides that an appeal from a determination of a single Member of the Commission lies to a Full Bench, with the leave of the Full Bench. The provision does not limit the powers of the Full Bench in the appeal which include the power to admit further evidence or take into account any other information or evidence, and the power to confirm, quash or vary the decision or make a further decision in relation to the matter.[113] If we find error in the Commissioner's conclusions which led to error in the ultimate conclusion, it is open to us to exercise any of the powers in s. 607 of the FW Act to correct such error.

### *The jurisdictional objection and the status of the HSU*

**[102]** Mercy's submission in the appeal that the Commissioner found against it at first instance in relation to its jurisdictional objection, is not correct. Mercy submitted at first instance that the Commissioner was entitled to proceed on the basis that Part 6–2 and s. 739 of the FW Act are validly enacted and that the Commission did not lack jurisdiction to arbitrate the dispute on this basis. Rather than finding against Mercy in relation to the objection, the Commissioner simply took the approach Mercy identified. Mercy raised the issue in the appeal as a matter of form, and we adopt the same approach as was adopted by the Commissioner and proceed on the basis that the statutory provisions applicable to the matters we are required to determine, are valid.

**[103]** In relation to Mercy's submission that the HSU is not a party to the dispute and that it is properly characterised as a dispute raised by three named employees rather than the HSU raising a dispute as a party principal on behalf of an unspecified cohort of employees, we make the following observations. Mercy voluntarily entered into a single enterprise agreement made pursuant to a single interest employer authorisation. The single interest authorisation was granted by Deputy President Masson on 21 October 2021.[114] Section 248 of the FW Act requires that an application for a single interest employer authorisation must specify *inter alia* the employers who will be covered by the agreement and the person (if any) nominated by the employers to make applications under the FW Act if the authorisation was granted. The authorisation issued by the Deputy President states that the VHIA is nominated by the employers to make application on their behalf. The list of employers at Annexure A of the

authorisation includes Mercy Hospitals Victoria Limited. The Agreement was negotiated on behalf of Mercy and other employers, by the VHIA.

**[104]** Clause 5 in Section 1 of the Agreement states that the Agreement covers the HSU if it is "*named by the Commission as a party covered by the Agreement*". Clause 6 defines the term "*party*" as the Employer, Employees and the HSU who are covered by the Agreement. Section 183 of the FW Act provides that after an enterprise agreement is made, an employee organisation that was a bargaining representative for the agreement may give notice to the Commission, and to each employer covered by the Agreement, stating that the organisation wants the agreement to cover it. Section 201(2) of the FW Act provides that if an employee organisation has given notice under s. 183(1) that it wants an enterprise agreement to cover it, the Commission must note in its decision to approve the agreement that the agreement covers the organisation. In a decision approving the Agreement, Deputy President Masson noted that the HSU, being a bargaining representative for the Agreement had given notice under s. 183 of the FW Act and that in accordance with s. 202(1) of the FW Act, the Agreement covered that organisation.[115]

**[105]** By virtue of subclause 17.1(b) the Dispute Resolution Procedure applies to disputes including grievances and disputes arising in relation to the Agreement. Subclause 17.1(c) provides that a party to a dispute may choose at any time to be represented by a representative including the HSU or an employer organisation, and that a representative, including the HSU may "*initiate a dispute*". Clause 17.5 provides for disputes of a collective character to be dealt with more expeditiously by early reference to the Commission. Clause 17.7 provides that "*either party*" may refer a dispute for arbitration and there is no reason why the HSU, as a party to the Agreement, with the right to initiate a dispute, cannot refer that dispute to the Commission.

**[106]** A similar argument in relation to consent to arbitration and the status of "*parties*" to an enterprise agreement was considered by the Full Court of the Federal Court in *One Tree*[116]. In *One Tree*, a majority of the Full Court of the Federal Court considered whether One Tree Community Services Inc. had agreed to arbitration as provided for in a dispute settlement procedure in an enterprise agreement, which applied to that Company by virtue of a transfer of business. The majority held that in circumstances where One Tree voluntarily acquired the business of another employer and chose to employ a transferring workforce, an objectively ascertainable conclusion could be sustained that One Tree made a voluntary election to accept the binding force of the enterprise agreement that applied to that workforce, including the dispute resolution procedure, which provided for arbitration of disputes without the need for both parties to agree. This conclusion was reached notwithstanding the fact that One Tree offered employment contracts to the transferring workforce which disavowed the application of a provision of the relevant enterprise agreement in relation to recognising the previous service of the transferring employees, and the dispute related to that issue.

**[107]** In the present case Mercy voluntarily elected to submit to the binding force of the Agreement by nominating the VHIA to make an application under the FW Act for a single interest employer declaration, in relation to a proposed enterprise agreement and by taking necessary steps to issue a notice of employee representational rights in concert with other employers to be bound by the proposed agreement, as indicated in the Form F17 Employer's declaration in support of approval of the Agreement made on behalf of the 87 employers named

in the single interest employer declaration, made by Mr Pullin of the VHIA. The HSU is covered by the Agreement and the HSU has a right to initiate a dispute under the Dispute Resolution Procedure in the Agreement. That procedure provides for arbitration in relation to disputes arising under the Agreement and it is common ground that the present matter concerns such a dispute.

**[108]** Further, as a Full Bench of the Commission said in *Australian Rail, Tram and Bus Industry Union v Asciano Services Pty Ltd T/A Pacific National*[117]:

> "[15] As to the second reason, in order for the Commission to have jurisdiction to deal with a dispute pursuant to s.739 of the FW Act, the dispute, properly characterised, must fall within the scope of disputes that the applicable enterprise agreement "requires or allows" the Commission to deal with and the parties must comply with any mandatory pre-filing steps set out in the enterprise agreement. However, there is no requirement in the FW Act for every s.739 application filed in the Commission to identify by name each employee who was a party to the dispute at the time the application was filed. In some circumstances the employee parties to the dispute may be identified with sufficient particularity by reference to a class of employees. Further, in the event that there is some uncertainty about who belongs to the class of employees or further information is required to enable the employer, as a matter of natural justice, to understand the case it has to meet in dealing with the dispute, including the names and circumstances of employee parties to the dispute, then directions can be sought from, and made by the member of the Commission dealing with the dispute. In the event that a party to a dispute is directed to provide such additional information and refuses to do so, it may provide a foundation for the Commission to exercise its discretion to dismiss the application, decline to grant any relief, or take some other course.
>
> [16] We consider that dealing with disputes in the manner set out in the previous paragraph is consistent with the duty imposed on the Commission to perform its functions and exercise its powers in a manner that is, amongst other things, "quick, informal and avoids unnecessary technicalities." In our view, it would be contrary to the obligations imposed on the Commission pursuant to s.577 of the FW Act for s.739 applications to be automatically dismissed on the basis that every employee party to the dispute was not identified by name in the application."

**[109]** The Resolution of Disputes term of the agreement considered by the Full Bench in *Asciano* provided for employees to be represented at any stage of the dispute resolution procedure, by a representative of their choosing, which may include a union. The term also provided for disputes to be lodged by employees and their representatives and in contrast with the Agreement in the present case, did not specifically provide that a union could initiate a dispute on its own behalf. Notwithstanding these provisions, the Full Bench found that there was no requirement at the time the dispute was lodged, for the relevant union to name each employee who was a party to the dispute.

**[110]** Consistent with those authorities and the clear terms of the Dispute Resolution Procedure in clause 17 of the Agreement, the HSU is entitled to notify a dispute on its own initiative including a dispute of a collective nature. Further, as a party to a single interest agreement covering 87 employers, the HSU has an interest in compliance with the Agreement that goes beyond any single employer or the employees of any single employer, and in ensuring that employees covered by the Agreement receive their entitlements under it, at the time those entitlements are payable. There is no requirement for the HSU to identify each individual employee subject of the application. Mercy can have been in no doubt as to the identity of the class of employees concerned nor their entitlement to be paid the relevant allowances from the dates claimed by the HSU.

**[111]** The Commissioner dealt correctly with these matters and we agree with her conclusion at paragraph [95] of the Decision.

***The approach to the construction of enterprise agreements***

**[112]** It is common ground that the resolution of the dispute requires the construction of subclauses 29.3(c) and (d) of the Agreement. The approach and the principles relevant to the task of construing the terms of an enterprise agreement were set out in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v Berri Pty Ltd* (*Berri*)[118]. The relevant passage setting out the principles is well known, and it is not necessary to repeat it. More recently, in *AMA (Victoria) Ltd and Australian Salaried Medical Officers Federation v The Royal Women's Hospital*[119], a Full Bench of the Commission distilled the following principles in relation to the approach to the construction of agreements from the Full Court of the Federal Court majority in *James Cook University v Ridd*[120] as follows:

> "The starting point is the ordinary meaning of the words, read as a whole and in context.
>
> A purposive approach is preferred to a narrow or pedantic approach – the framers of such documents were likely to be of a practical bent of mind. The interpretation turns upon the language of the particular agreement, understood in the light of its industrial context and purpose.
>
> Context is not confined to the words of the instrument surrounding the expression to be construed. It may extend to the entire document of which it is a part, or to other documents with which there is an association.
>
> Context may include ideas that gave rise to an expression in a document from which it has been taken.
>
> Recourse may be had to the history of a particular clause where the circumstances allow the court to conclude that a clause in an award is the product of a history, out of which it grew to be adopted in its present form.
>
> A generous construction is preferred over a strictly literal approach but agreements should make sense according to the basic conventions of the English language.
>
> Words are not to be interpreted in a vacuum divorced from industrial realities but in the light of the customs and working conditions of the particular industry."[121]

**[113]** The following observations of Madgwick J in *Kucks v CSR Ltd*[122] are also apposite in the present case:

> "It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand.

> But the task remains one of interpreting a document produced by another or others. A court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award. So, for example, ordinary or well-understood words are in general to be accorded their ordinary or usual meaning."[123]

**[114]** Also relevant is the general principle discussed by the Full Bench of the Commission in *Berri* to the effect that all words in an enterprise agreement must *prima facie* be given some work to do.[124]

***Construction of the disputed term***

**[115]** As we have noted, the starting point for the construction of an enterprise agreement commences with the text of the disputed term read as a whole, and in context. Subclause 29.3(c) of the Agreement, upon which the dispute centres, provides that "*Where the underpayment exceeds 5% of the employee's fortnightly wage, the employer must take steps to correct the underpayment within 24 hours and to provide confirmation to the employee of the correction.*" (our emphasis)

**[116]** It is common ground that the term "*Wages*" in the heading of clause 29.3 and elsewhere in the clause, encompasses allowances including the NWA and EIA. The parties also accept that to the extent that clause 29.3 is applicable in this case, subclause 29.3(c) applies, on the basis that the quantum of the underpayment exceeds 5% of the fortnightly wages of the relevant employees. In this regard the parties have accepted that the appropriate mechanism to determine whether subclause 29.3(b) or (c) applies is to compare the total amount of the lump sum payments at the point they were payable, with the employee's fortnightly wage in the relevant pay period. We accept that approach for the purposes of this appeal.

**[117]** For reasons we have set out above, the Dispute Resolution Term in the Agreement provides for the HSU to notify a dispute as a party to the Agreement and for disputes of a collective nature to be referred to the Commission at an early stage. We accept, as the Commissioner did, that an underpayment of employees in an identifiable group or class is capable of being the subject of the process established in clause 29.3 and that the HSU may initiate that process on behalf of an identifiable group or class of employees without identifying individual employees.

**[118]** Where we part ways with the Commissioner is on the interaction between subclauses 29.3(a) and (c). On this point we agree with the submission of Mercy that the making of a "*request*" as provided in subclause 29.3(a) that an underpayment be corrected or a payment validated, is a precondition for engaging subclauses (b) and (c) of clause 29.3 of the Agreement. The Commissioner's rejection of that submission was erroneous.

**[119]** The relationship between the various subclauses of clause 29.3 is evident from the text of the clause read as a whole. Subclause 29.3(a) refers to underpayment as a result of error on the part of the employer. Subclause 29.3(b) also refers to an employee underpaid because of employer error and clearly describes an error of the kind referred to in subclause (a). Subclause (b) applies to underpayments less than 5% of the relevant employee's fortnightly wage and subclause (c) to those that are more than 5% of that amount. Both subclauses (b) and (c) refer to "*the underpayment*". On the plain words of those subclauses, "*the underpayment*" is an

amount an employee has requested the employer rectify or validate, pursuant to subclause 29.3(a).

**[120]** If subclause (c) is construed as standing alone, there is no reference point from which the 24-hour period referred to in that subclause commences. Read in the context of clause 29.3, the only points in time referred to in other provisions of clause 29.3 are the making of the request in subclause (a) and "*the date of the entitlement arising*" in subclause (d). We do not accept the HSU submission that the 24-hour period referred to in subclause (c) runs from the date the entitlement to the amount underpaid, arose. If that was the intention of those who drafted the Agreement, subclause (c) would have included the same wording as was included in subclause (d).

**[121]** The use of the term "*may*" in subclause 29.3(a) does not mean that the request referred to is optional and that employees are entitled to simply invoke subclauses (b) or (c) without making a request to the employer to have the error rectified or the payment validated. The term *may*" indicates that employees may use means other than the process in clause 29.3, to recover underpayments – for example by commencing action in a court. We disagree with the Commissioner's conclusions on this point. Where an employee or the HSU on behalf of an employee or a group or class of employees, elects to invoke clause 29.3, there must be a request as provided in subclause 29.3(a) that makes this clear.

**[122]** This construction is based on the well-established principle that each provision of the Agreement is given some work to do. If a request was not required to be made to trigger the later provisions of clause 29.3, subclause (a) would have little if any work to do. In the context of clause 29.3 read as a whole, the purpose of the request is to inform the employer that employees consider that they have been underpaid and to give the employer an opportunity to confirm that there has been an underpayment or to validate the payment it has made. The term "*validate*" means to check or prove the accuracy of something. Accordingly, when the request is received, the employer is provided with an opportunity to check the accuracy of the request and decide to either dispute that the employee has been underpaid by validating the amount it has paid or confirm that there has been an underpayment. If there has been an underpayment, the request also ensures that the employer is on notice that it is required to correct the underpayment consistent with the time frames in subclauses (b) or (c), depending on the quantum, and that the employer is liable to the consequences in subclause (d) if it does not comply with those timeframes.

**[123]** As we have noted, we do not accept the HSU's submission that the 24-hour period in subclause 29.3(c) operates from the date the entitlement to payment arises. It is intuitively unsound to construe subclauses 29.3(b) and (c) so that the relevant time frames for an employer to take steps to correct an underpayment, operate from a point at which the employer may not know the relevant employee has been underpaid, or has not had an opportunity to determine whether there has been an underpayment, or prior to the point clause 29.3 was engaged. In contrast, it is logical that the time periods in subclauses (b) and (c) operate from the point an employer is requested to correct an underpayment or validate a payment and is thereby put on notice that clause 29.3 has been engaged. This is particularly so when subclause (d) of that clause prescribes a consequence for failure to take the required steps which does operate from the point the underpayment arose.

**[124]** While there is no time frame by which the validation in subclause 29.3(a) must occur, there is also no indication that the operation of subclauses (b) or (c) is deferred pending the employer confirming an underpayment or validating the payment that has been made. This is a further indication that the time frames in subclauses 29.3(b) and (c) operate from when the request is made. It is logical for those time frames to commence from the date the request is made given that a potential outcome is that the employee has in fact been underpaid. An interpretation that potentially results in an employer being penalised for failing to rectify an underpayment of which it may not be aware, within time frames that have expired before the employer has been informed of the underpayment, is also unjust. The construction we favour avoids injustice, without straining the language of the relevant provisions.

**[125]** In concluding that a request consistent with subclause (a) of clause 29.3 is a precondition for engaging subclauses (b) or (c), we accept that the HSU, as a party to the Agreement may make such a request on behalf of a group or class of employees, and that it is not necessary that the HSU identify each individual employee concerned, in that request. Nor is it necessary to establish the state of mind of employees who make a request, or on whose behalf a request is made, nor that the employees hold a view that there has been an error on the part of the employer, much less that they identify the error in the request that the underpayment is corrected or validated. An error includes an omission and a failure to correctly pay an employee is an error by omission, whether deliberate or not. We agree with the Commissioner's observation that the existence of an underpayment is a matter of fact, and it is sufficient that there is an alleged underpayment of an employee or employees who can be identified with sufficient specificity for the provisions in clause 29.3 to be triggered.

**[126]** We next consider the requirement in subclause 29.3(c) to take steps to correct an underpayment within 24 hours and to provide confirmation to the employee of the correction. In our view, this provision does not require that the underpayment be corrected within 24 hours and nor does it require that the steps taken are sufficient to correct the underpayment from the employer's end, within 24 hours, subject only to something outside the employer's control preventing the funds from being in the employee's bank account. We reject the submissions of the HSU to this effect. If the employer was required to correct an underpayment within 24 hours the clause would state this, as is the case with the provisions in subclause 29.3(b). Further, it would be unnecessary for a clause requiring a correction within 24 hours to state that the employer is required to "*take steps*" to make such a correction and those words would have no work to do. The clause would simply state that the employer is required to correct the underpayment within that time frame consistent with the wording in clause 29.3(b).

**[127]** Subclause 29.3(c) simply requires that the employer take steps that will result in the underpayment being corrected. It would be sufficient for this purpose, if within a 24-hour period, an instruction was issued to the payroll department that the employee had been underpaid and that the correct payment should be made in the next pay period. However, that is not the end of the matter. Subclause 29.3(c) also requires that the employer provide confirmation to the employee of the correction within 24 hours. For the employee to be provided with "*confirmation of the correction*", on its plain meaning, requires the employee to be advised by the employer that the error has been accepted, an instruction issued for it to be corrected, and when the correction will take effect. We do not accept the argument that the use of the plural "*steps*" indicates that more than one step must be taken to correct the underpayment. The

steps are not limited to steps to correct the underpayment, but also include the provision of confirmation of the correction to the employee concerned.

**[128]** The HSU's construction does not have sufficient regard for the requirement that confirmation of the correction is required to be provided to the employee within 24 hours. This indicates that the actual payment of the underpaid amount, may occur after confirmation of the correction being provided to an employee who has been underpaid. The plain words of the provision do not require that the funds be transferred to the employee's bank account within 24 hours of the employer being requested to rectify the underpayment. Nor do those words require the employer to take all necessary steps to actually correct the underpayment. What is required is that steps that will result in the underpayment being corrected are taken, and advice to the employee that the employer accepts there has been an underpayment and has taken steps to correct it, and that those steps will be implemented within a stated time.

**[129]** It does not follow that because the quantum of an underpayment dealt with in subclause (c) is greater than that in subclause (b), that subclause (c) should be construed as providing a shorter and more rigid time frame for the underpayment to be corrected. It seems logical that a longer time frame for correction would be allowed for a larger underpayment, given that it could involve greater complexity than a smaller underpayment and require more time to rectify. It is also logical that in circumstances where a longer period may be required to rectify an underpayment that exceeds 5% of an employee's fortnightly wage, that subclause 29.3(c) would require the employee to receive confirmation of the correction and when it will be implemented. In contrast, subclause 29.3(b) which deals with an underpayment that is less than 5% of the employee's fortnightly wage rate, does not require confirmation of the correction to be provided to the employee. Instead, the subclause requires that the correction be effected within the next pay period after the request for correction is made. This indicates that the objective of the clause is the requirement that the underpayment will be corrected within a specified period, in contrast with subclause 29.3(c) which simply requires that steps be taken within a specified period that will result in the correction. The fact that subclause (c) requires confirmation of the correction to be provided to the employee, indicates that the date by which it will take effect is not specified. Information on this date is the subject of the confirmation required to be given by the employer.

**[130]** Finally, we agree with Mercy's construction of the calculation of the penalty in subclause 29.3(d). The subclause provides for a penalty payment "*calculated on a daily basis from the date of the entitlement arising*". If the intention was that the penalty should be calculated in the manner contended for by the HSU, the clause would provide that a penalty equal to 20% of the underpayment is payable for each day, from the date of the entitlement arising, until the underpayment is corrected. Mercy's formula results in the penalty being calculated on a daily basis, consistent with the terms of subclause (d). The approach contended for by the HSU results in an amount of 20% of the underpayment being paid for each day until all underpaid moneys are paid.

**[131]** We are also of the view that the purpose of the clause is not to penalise the employer as a court might but rather to compensate employees for the funds to which they are entitled, not being available to them on a date when they were required to have been paid, and for the period of the underpayment. This is evidenced by the requirement in subclause (d) that the employer meet any associated banking, or other fees associated with the late payment, as a consequence

of the error, where those fees exceed the 20% penalty payment. Such fees would result from funds not being available to meet automatic deductions, late fees and other penalties banks may levy on employees because of insufficient funds in their accounts due to underpayment by the employer. The fact that subclause (d) describes the payment as a "*penalty*" does not alter our view. The term "*penalty*" in the context of an enterprise agreement is a payment to compensate an employee for a disability associated with work or for working unsocial hours. It is not a penalty levied on the employer as punishment or deterrent.

**[132]** The construction we favour is consistent with the way most payments to which employees are entitled under the Agreement are made. Wage rates in Schedules of the Agreement are prescribed as weekly amounts. Allowances covering experience, shifts, meals, uniform, laundry, vehicles, ability or disability, are payable on a weekly, daily, per occasion or per kilometre basis. These can be contrasted with the allowances subject of the present disputes, which are annual amounts. To require that 20% of the full annual amount is payable for each day until the amount is paid, is both inconsistent with the plain meaning of the clause, and arbitrary. The outcome proposed by the HSU would involve a windfall to employees simply because the amounts that were underpaid are expressed as annual allowances rather than as weekly, daily, hourly, or per-occasion amounts that are otherwise prescribed.

**[133]** The construction we favour is also one that avoids inconvenience and injustice, does not need to be strained for, and is available on the plain words of the relevant provisions. Further, it is consistent with the history of the clause, which is another important contextual matter. The evidence before the Commissioner included the terms of the predecessor agreement and that in the negotiations for the Agreement the parties consolidated two sets of provisions from different sections of the previous agreement. It is also apparent that the VHIA on behalf of employers, sought amendments to the circumstances in which the penalty in what became subclause 29.3(d), would not apply, including where an error was attributable to an employee failing to correctly fill in a time sheet or the employee agreed to defer the correction of an underpayment to the next pay period.

**[134]** A further contextual matter is the heads of agreement document which makes clear that the provisions in clause 29.3 were intended to provide a detailed method by which alleged underpayments are examined and corrected in a timely manner, rather than penalising employers for underpayment. It is also relevant that the Agreement was said to provide for a detailed method for the correction of overpayments in a timely manner. In summary, our conclusion on the proper construction of clause 29.3 is:

1. The process in clause 29.3 must be engaged by a request to an employer to rectify an alleged underpayment to a particular employee (or an identifiable group or class of employees) or validate a payment that has been made. There are no formal requirements with which a request must conform, but it should be objectively identifiable as a request that engages clause 29.3 of the Agreement.
2. The employer may either accept that there has been an underpayment or validate the payment that has been made.
3. The time frames in subclauses (b) and (c) commence from the making of the request in subclause (a).

4. Where the underpayment is less than 5% of the employee's fortnightly wage, the employer must correct the underpayment in the next pay period being the pay period after the request has been made.
5. Where the underpayment is more than 5% of the employee's fortnightly wage, the employer must take steps by setting a process in train that will result in the underpayment being corrected and confirm the correction including when it will be completed, to the employee concerned.
6. Where the employer does not take the actions required under subclauses (b) and (c) the employer must pay a penalty to the employee calculated as follows: *[Value of the payment for the period it was not made] x 0.20 x ([Number of days delayed] / 365) = Penalty.*

**[135]** An employee who, having received confirmation of the correction and the time by which the underpayment will be corrected, and is dissatisfied with that response (with respect to either the correction or the time frame in which it will be implemented) may notify a dispute to the Commission under the Dispute Resolution Procedure in clause 17 of the Agreement.

***Application of clause 29.3 on the facts in the present case***

Preliminary matters

**[136]** For the reasons set out above, we are satisfied that employees were entitled to the NWA and EIA and were underpaid for the periods as set out in the agreed facts. We note that the provisions of the Agreement prescribing the operative dates for the allowances to be paid are not helpful. The "*heads of agreement*" was finalised in May 2021 and the exchange of letters was sent to the HSU on 26 August 2021. The Agreement was not approved by the Commission until 13 April 2022 and came into effect 7 days later on 20 April 2022.

**[137]** Somewhat confusingly, the tables in the Agreement setting out dates on which the NWA and EIA were payable, not only contain dates prior to the approval of the Agreement, but also purport to require the payments to be made from the first full pay period on or after those dates. Self-evidently, these dates could not be complied with by any of the employer parties to the Agreement and as we have noted, serve only to ensure that subsequent annual payments are brought forward to dates 12 months after the retrospective operation of the first payments rather than being payable 12 months from the date the Agreement commenced operation.

**[138]** Rather than being set by reference to the date the Agreement commenced operation, greater clarity would have been achieved had the reference to FFPPOA not been included in the tables setting out the allowances, and the tables had simply set out the retrospective operative dates, with a note that the payments of the relevant allowances were required to be made from FFPPOA the date the Agreement commenced operation. Further, although well-intentioned, the flexibility granted to employers by the HSU in accepting that the backdated payments could be made by the end of June 2023, is at odds with the position it has now adopted to the effect that the allowances were required to be paid from the first full pay period on or after 20 April 2023. Notwithstanding this lack of clarity, the parties agreed that the backdated amounts for NWA and EIA were payable from the first full pay period on or after 20 April 2023, based on the pay cycles of the relevant employees, and we accept that position.

**[139]** There was no satisfactory explanation for the failure to pay the allowances at or around the time the entitlement for employees to be paid arose. The evidence establishes that human resource management staff of Mercy were alerted to the need to backpay the allowances in question well before the Agreement was approved and before the expiration of the reasonable time frame that the HSU had accepted would be required for employers to process the backpay. The HSU corresponded with Mercy's human resource management staff requesting an update on the backpay as early as 5 May 2022 and did not receive a response as to timing of the payment of backpay, but simply that the matter would be looked into. Ms Barrett, Mercy's HR Business Partner, did not respond to a follow-up email sent by the HSU on 12 May 2022. Subsequent emails sent to various HR staff of Mercy, and questions at AIC meetings, were not responded to or the responses provided did not provide any concrete information about the steps that had or would be taken, to pay the allowances to employees.

**[140]** The variations to the Agreement after its approval do not appear to us to relate to either of the allowances subject of the dispute. Nor do we accept that confusion about the entitlement of employees who had ceased employment to be paid the allowances explains or justifies the delay. The payment could have been made to existing employees while Mercy waited for clarification in relation to former employees.

**[141]** We are left to surmise that the possible explanations for Mercy's failure to pay the relevant allowances in a timely manner, are that Mercy adopted a deliberate strategy of delay or that its human resource management and payroll staff were unable to communicate effectively, so that responsible payroll staff failed to respond to internal requests that the payments be made, and those making the requests failed to follow up to ensure that they were actioned. Mercy did not rely on any of the provisions in subclause 29.3(e) to avoid the effect of subclause 29.3(d) to justify its failure to pay the allowances when they were due to employees.

**[142]** We agree with the Commissioner's view that the four-month delay in rectifying the error does not reflect well on Mercy's internal processes, particularly those of its human resources team. The conduct of the human resources team in essentially ignoring correspondence from the HSU in which the Union made inquiries as to when the back payments would be made, or not responding with appropriate detail, was inappropriate. Finally, the failure to pay allowances to employees within a reasonable time frame, is reprehensible conduct, the effect of which is heightened by the fact that the allowances are respectively for undertaking nauseous work and an education incentive payment to encourage training and to replace a payment that was removed. Those employees are performing important and difficult work in the provision of health services. The amounts involved were not inconsiderable. Withholding amounts that were due to be paid to employees for a period of over four months, without any excuse, much less a reasonable one, is not conduct that is appropriate for any employer, much less, a large and well-resourced employer with human resources staff, which should have known better.

**[143]** Whether the failure to pay the allowances at the appropriate time was deliberate or the result of incompetence or a breakdown in communication between HR and payroll staff, we are satisfied that it was an error on the part of Mercy, of the kind contemplated by clause 29.3 of the Agreement.

<u>Was there a request to Mercy under clause 29.3(a)?</u>

**[144]** We do not accept that any of the general questions asked by officials of the HSU between 5 May 2022 and 9 August 2022 were requests of the kind described in subclause 29.3(a) that Mercy rectify an underpayment as a result of error. The first communication which could be described as a request of the kind referred to in subclause (a) is the email sent by Mr Harika to Ms Barrett at 9.49 am on 9 August 2022. That communication requested confirmation as to when all staff eligible to receive the allowances would be paid, and significantly, referred to subclause 29.3(d) of the Agreement.

**[145]** In our view, that email clearly invoked clause 29.3 and constituted a request for the purposes of subclause (a) of that clause. Mercy could have been in no doubt as to the identity of the employees the subject of the request. On the basis of its own internal communication, instructions had been issued to payroll staff to identify the relevant employees and the amounts owed to them.

Did Mercy take the steps required in subclause 29.3(c)?

**[146]** Mercy had 24 hours from 9.49 am on 9 August 2022, to take steps to correct the underpayment and provide confirmation to the employees of the correction. The steps taken to correct the underpayment after the 9 August email, were not commenced until 12 August 2022. Most significantly, there was no response to the email sent by Mr Harika on 9 August 2022. Despite the considerable number of emails which had previously been exchanged between various HR and payroll staff of Mercy, commencing in May 2022, the lists of employees who were entitled to the back payments were prepared between 12 and 16 August 2022 and the amounts were finally paid between 24 and 31 August 2022.

**[147]** Even if we accept, as the Commissioner did, that Mercy took steps to correct the underpayments that were sufficient for the purposes of subclause 29.3(c) of the Agreement, we do not accept that Mercy took any step to confirm the correction to employees. As the evidence established, neither the HSU nor employees were given confirmation of the correction and only became aware that the allowances had been paid, when the amounts were received by employees into their bank accounts.

**[148]** Accordingly, Mercy did not take the steps required by subclause 29.3(c) and the Commissioner's conclusion to the contrary was in error.

## Disposition

**[149]** We Order as follows:

a. Permission to appeal is granted.
b. Appeal ground 1 is dismissed.
c. Appeal ground 2 is upheld.
d. The decision of Commissioner Mirabella of 3 November 2023 in [2024] FWC 683 is quashed.
e. On a redetermination, we decide that the questions for determination should be answered as follows:

   *Question 1*: Are each of the delayed payments by Mercy to eligible employees of:

a. The nauseous work allowance under clause 11 (Section 2)

b. The educational incentive allowance under clause 16 (Section 2)

an 'underpayment' under clause 29.3 (Section 1) of the Agreement?

*Answer*: Yes.

*Question 2*: If the answer to Question 1 is yes, is Mercy required to make a penalty payment and if so, how is the penalty payment calculated?

*Answer*: Yes. The penalty is calculated as follows: [Value of the payment for the period it was not made] x 0.20 x ([Number of days delayed] / 365) = Penalty.


VICE PRESIDENT

*Appearances*:

*Mr M Harding* SC and Mr *A White* of counsel, for the Appellant
*Mr S Wood KC* and Mr *C Pym* of counsel instructed by MinterEllison, for the Respondent

*Hearing details:*

2024.
Melbourne:
15 February.

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[1] [2023] FWC 683 (Decision).

[2] Appeal Book (AB) page 12.

[3] AB page 12.

[4] AB pages 13 – 14.

[5] AB pages 14 – 15.

[6] AB page 19.

[7] PR735098.

[8] Clause 5.3 in Section 1 of the *Health and Allied Services, Managers and Administrative Workers (Victorian Public Sector) (Single Interest Employers) Enterprise Agreement 2021-2025* (Agreement).

[9] Clauses 5.2, 6.1(o) in Section 1 of the Agreement.

[10] Clause 5.1 in Section 1 and Sch 1A – Employers Covered of the Agreement.

[11] Decision at [34]-[35].

[12] Decision at [103].

[13] Decision at [108]-[109].

[14] Decision at [110].

[15] Decision at [111].

[16] Decision at [113].

[17] Decision at [114].

[18] Decision at [115].

[19] Decision at [116].

[20] AB page 891.

[21] AB pages 1006-1007.

[22] AB pages 1008-1056.

[23] Salary Circular 801 was subsequently replaced by Salary Circular 802.

[24] AB pages 1035-1036.

[25] AB pages 1115-1116.

[26] AB page 1123.

[27] AB page 997.

[28] AB page 1000, witness statement of Tamara Kingsley at [33].

[29] AB page 890.

[30] AB pages 1146-1150.

[31] AB page 890.

[32] AB page 890.

[33] AB page 889.

[34] AB page 1263.

[35] AB page 1000.

[36] AB page 908.

[37] AB pages 908-909.

[38] AB page 1371.

[39] AB page 1371.

[40] AB page 1761.

[41] AB page 1761.

[42] AB page 1760.

[43] AB page 1758.

[44] AB page 1760.

[45] AB page 1766.

[46] AB page 87, Attachment CG-01.

[47] Ibid, AB page 130.

[48] Ibid, AB pages 316 – 317.

[49] AB pages 82 – 83, witness statement of Cameron Granger at [8].

[50] AB page 777.

[51] AB pages 1796 – 1797, Transcript of the first instance hearing at PN101.

[52] AB page 788 item (a).

[53] AB page 816 item 29.

[54] AB page 83, witness statement of Cameron Granger at [11].

[55] AB 765.

[56] AB pages 984 – 987, Attachment DP-1 to the witness statement of Daniel Pullin.

[57] Ibid, AB page 984.

[58] AB 1803, Transcript of Hearing Wednesday 3 May 2023, PN166 – 168.

[59] Appellant's outline of submissions at [41]; Respondent's outline of submissions at footnote 29.

[60] (2018) 264 CLR 541 at 563, 591-593, [2018] HCA 30 at [48]-[49] and [150]-[154].

[61] Ibid at [49].

[62] Ibid.

[63] *Wan v Australian Industrial Relations Commission and Another* (2001) 116 FCR 481 at [30].

[64] AB page 891.

[65] AB page 891.

[66] AB page 890.

[67] AB page 890.

[68] AB page 889.

[69] AB page 882, witness statement of Danny Harika at [18].

[70] AB page 898.

[71] AB page 898.

[72] AB page 885, witness statement of Danny Harika at [26].

[73] AB page 913.

[74] Decision [109], [107].

[75] Decision [108], [117].

[76] Decision [107].

[77] Cf. Decision at [113].

[78] Transcript of Appeal Hearing on 15 February 2024 at PN306

[79] Transcript of Appeal Hearing on 15 February 2024 at PN302.

[80] Transcript of Appeal Hearing on 15 February 2024 at PN307.

[81] Transcript of Appeal Hearing on 15 February 2024 at PN308 – PN309.

[82] [2018] FCAFC 131; 264 FCR 536 at [197].

[83] Subclause 29.3(e)(v).

[84] AB page 890.

[85] The HSU submitted that the evidence before the Commission disclosed that the last thing done before payment of the allowances was an email on 16 August 2022 from Mercy's HR team to its payroll team confirming that it had the information it needed to process payment: Annexure TK-1 to the witness statement of Tamara Kinglsey, AB 1769.

[86] AB page 996, witness statement of Tamara Kingsley at [19]; AB page 1006, annexure TK-1 to the witness statement of Tamara Kingsley.

[87] *Amcor Limited v Construction, Forestry, Mining and Energy Union Minister for Employment and Workplace Relations v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; 222 CLR 241 (*Amcor*) per Kirby J at [96]; Gummow, Hayne, Heydon JJ at [65] - [66], Gleeson CJ and McHugh J at [2], [20]; Callinan J at [131].

[88] *Kucks v CSR Limited* (1996) (*Kucks*) 66 IR 182 per Madgwick J in at [184].

[89] Assuming the three employees to be a true representative of the class, the liability would amount to (($16,977.10 + $21,490 + $8,820) /3) x 220). See Tables, AB 973 – 975.

[90] The HSU also describes the significance of that matter in its submissions on appeal, para [41]; and Notice of Appeal Q3.

[91] See AB page 974.

[92] AB pages 863 – 864; AB page 640.

[93] *Amcor* per Gleeson CJ and McHugh J at [30].

[94] *Coal and Allied v AIRC* [2000] HCA 47; 203 CLR 194; 74 ALJR 1348; 99 IR 309; 174 ALR 585 (31 August 2000).

[95] Appellant's outline of submissions at [8] to [12], cf the third bullet point in [17].

[96] AB page 44. This request cannot be (in a temporal sense) sufficient to cover each of the alleged underpayments, even for the three representative employees. See Tables, AB 973-975.

[97] AB 968 – 969 at paragraphs [63]-[69]; AB 1827 at Transcript PN367-368.

[98] Two positions in Union submissions [70] (AB 68); a third in Union Reply Submissions [69] – [70] (AB 941- 942) a fourth at hearing (TS 248, AB 1812) and a fifth in submissions on appeal at [23]. See also Submissions on appeal [38].

[99] Appellant's outline of submissions at [23].

[100] Appellant's outline of submissions at [23].

[101] Appellant's outline of submissions at [32], [33].

[102] AB page 993 – 1768, witness statement of Tamara Kingsley and the documents attached to that witness statement.

[103] *Fair Work Act 2009* s. 323.

[104] In conjunction with *Fair Work Act 2009* s. 323, ss. 546 and 539, which provides (in cases of a serious contravention) pecuniary penalty orders of 600 PU or $187,800 per contravention.

[105] *Fair Work Act 2009* s. 547.

[106] *Andrews v ANZ Banking Group Limited* (2012) 247 CLR 205 at 227, [45] - [46] and at 236, [78].

[107] *Four yearly review of modern awards* [2015] FWCFB 1549 (11 March 2015) [2015] FWCFB 1549, esp [25].

[108] See, Gleeson CJ in *Carr v The State of Western Australia* [2007] HCA 47. At [7], "the question is: how far does the legislation go in pursuit of that purpose or object?"

[109] (2000) 203 CLR 194 at [14].

[110] Respondent's outline of submissions at [16].

[111] A purposive approach to the interpretation of industrial instruments is preferred to a narrow or pedantic approach: *James Cook University v Ridd* (2020) 278 FCR 566 at [65] (Griffiths and Derrington JJ) citing *Kucks v CSR Limited* [1996] 66 IR 182.

[112] [2021] FCAFC 15, (2021) 284 FCR 489(2021), 304 IR 57(2021), 387 ALR 193.

[113] *Fair Work Act 2009* s. 607(2) and (3).

[114] PR735098.

[115] [2022] FWCA 1295 at [5].

[116] (2021) 284 FCR 489.

[117] [2017] FWCFB 1702.

[118] [2017] FWCFB 3005 at [114].

[119] [2022] FWCFB [7].

[120] [2020] FCAFC 123, 298 IR 50 at [65] per Griffiths and SC Derrington JJ at [65]; see also *WorkPac Pty Ltd v Skene* [2018] FCAFC 131, 264 FCR 536 at [197].

[121] Op. cit. at [29].

[122] (1996) 66 IR 182.

[123] Ibid at 184 – 185.

[124] Op. cit. at [44] citing *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at [70] – [71]; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45 at 80.