DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Construction, Forestry and Maritime Employees Union
v
DP World Melbourne Limited T/A DP World Melbourne;
(C2024/2831)

DP World Brisbane Limited T/A DP World Brisbane;
(C2024/2832)

DP World (Fremantle) Limited T/A DP World Fremantle;
(C2024/2834)

DP World Sydney Limited T/A DP World Sydney
(C2024/2835)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT WRIGHT
DEPUTY PRESIDENT SLEVIN

SYDNEY, 23 JULY 2024

Appeal against decisions [2024] FWCA 1358, [2024] FWCA 1360, [2024] FWCA 1356 and [2024] FWCA 1354 of Commissioner Matheson at Sydney on 16 April 2024 in matter numbers AG2024/1059, AG2024/1061, AG2024/1058 and AG2024/1057 – permission to appeal granted – appeal upheld – enterprise agreements varied – model consultation clause – enterprise agreement construction – award construction – direct or indirect inconsistency – procedural fairness.

Introduction

[1] The Construction, Forestry and Maritime Employees Union (the **MUA** or **appellant**) has lodged four appeals under s 604 of the *Fair Work Act 2009* (Cth) (the **Act**) with respect to four separate decisions of Commissioner Matheson. Each decision approved an enterprise agreement covering specified employing entities of DP World (together, **DP World** or the **respondent**) pursuant to applications made under s 185 of the Act.

[2] The four enterprise agreements cover DP World's stevedoring operations in Melbourne, Brisbane, Fremantle and Sydney respectively (the **Agreements**). The Agreements are relevantly identical, and no different issues are raised in the appeals with respect to the decisions to approve each Agreement. In each case, the MUA complains about the notation made by the Commissioner that, pursuant to s 205(2) of the Act, the model consultation term prescribed by the *Fair Work Regulations 2009* (Cth) (the **Regulations**) is taken to be a term of the agreement.

[3] The background to the applications, as relevant, appears in the chronology below. On 3 April 2024, the respondent made four separate applications to approve single enterprise agreements relating to its employees in Melbourne, Brisbane, Fremantle and Sydney in the stevedoring industry. Shortly thereafter, all four matters were allocated to Commissioner Matheson for determination.

[4] At 4.56pm on 12 April 2024, the Commissioner's Associate sent what can be described as an 'initial issues' email to the parties. These emails are routinely sent to parties for enterprise agreement approval matters once they have been allocated to a member of the Fair Work Commission (the **Commission**). They identify any points of concern that may need to be addressed before an enterprise agreement is approved by a Commission member.

[5] By way of example, the email pertaining to the enterprise agreement for DP World Melbourne, which in substance is identical to the initial issues emails for all other matters on appeal, reads as follows:

> Dear parties,
>
> AG2024/1059 - Application by DP World Melbourne Limited T/A DP World Melbourne
>
> I write in relation to the above application for approval of the DP World Melbourne Enterprise Agreement 2024 (Agreement), which has been allocated to Commissioner Matheson for consideration.
>
> On review of the application, the Commissioner has identified the issues outlined below. The Commissioner has not formed any view about the identified issues. However, as a matter of procedural fairness, you are invited to make submissions to address the issues that have been identified.
>
> Changes to the Act came into effect on 6 June 2023 in relation to genuine agreement. The Form F17A indicates that the notification time for the Agreement was 31 March 2023. In these circumstances and as a consequence of the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (**Amending Act**), clause 66 of Part 13 of Schedule 1 of the Act has the effect that despite the amendments made to the Act by Part 14 of Schedule 1 to the Amending Act, Part 2-4 of the Act continues to apply as if the amendments had not been made. The Commissioner's provisional view is that the application should be assessed on this basis, taking into account the provisions of Part 2-4 of the Act in force immediately prior to the commencement of the amendments.
>
> The Applicant is requested to provide a response to each issue in the column marked 'Response' by no later than **4:00pm (Sydney time) on Wednesday, 17 April 2024**. If you are attaching additional documents or information to support your response, please attach them to your reply email and indicate this in the 'Response' column.
>
> It is noted that the Construction, Forestry and Maritime Employees Union (**CFMEU**) is listed as a union bargaining representative on the Form F16 and that a Form F18 has been filed by the CFMEU.

[6] The email then has a table with the 'issues' highlighted in one column and then a blank column titled 'response' next to each row to allow room for the parties to provide a response. Responses to these issues are usually by way of submissions or a signed undertaking.

[7] The particular issue relevant to these appeal proceedings is the consultation term. The extract in the issues table from the above email is as follows (bold in original):

> **Consultation term**
>
> Section 205(1A) provides that for a change to the employees' regular roster or ordinary hours of work, the consultation term in the agreement must require the employer:
>
> a. a.[sic] to provide information to the employees about the change; and
> b. b.[sic] to invite the employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities); and
> c. c.[sic] to consider any views given by employees about the impact of the change.
>
> The consultation provisions of the Agreement (i.e. clause 45) do not appear to meet the above requirements.
>
> **The Commissioner's provisional view is that, should the Agreement be approved, the model consultation term in accordance with s.205(3) of the Act will be taken to be a term of the Agreement and inserted into the Agreement and this will be noted in the decision.**
>
> **No action is required in relation to this issue however please make submissions if you have any objections to this course of action.**

[8] Immediately after each email was sent from the Chambers of Commissioner Matheson to the parties, an automated 'out of office' email was received from Mr Adrian Evans, the contact person for the MUA. The email read:

> I am on annual leave and will be returning 22 April.
>
> For any urgent MUA matters please contact the National Office on muano@mua.org.au or 02 9267 934.
>
> Cheers
> Adrian Evans

[9] At 10.13am on 15 April 2024, the Employee & Industrial Relations Manager for DP World, Ms Kathryn Winter, responded to the initial issues email. She indicated that her response should be taken to be a response to each of the four applications as the matters raised were the same across each application, save for one minor and administrative correction to an incorrect ABN number.

[10] Mr Luke Edmonds, a legal officer of the MUA, was copied into Ms Winter's email as well as Mr Evans. Although Ms Winter provided a substantive response in relation to a number of other issues, no response was provided in the response column next to the issue marked 'Consultation term'.

[11] Later in the afternoon of 15 April at 4.04pm, the Commissioner's Associate sent another email to the parties, being Mr Evans, Mr Edmonds, Ms Winter and Mr Mark Hulme of DP World. The email traversed what was described as "one residual concern" relating to individual flexibility arrangements and included an indication that the Commissioner's provisional view was that the model flexibility term will be taken to be a term of the agreements. The email also included the following final passage:

> Unless the parties wish to make further submissions and/or be heard in relation to this issue, the Commissioner proposes to publish her decisions in relation to the above applications from **4:00pm (Sydney time) tomorrow Tuesday, 16 April 2024.**
>
> No action is required in relation to this issue however please make submissions if you have any objections to this course of action.

[12] No response was received by any party and the Agreements were then approved on the afternoon of 16 April 2024. In each decision subject of the appeals, the Commissioner included the following notation:

> **[5]** Pursuant to s.205(2) of the Act, the model consultation term prescribed by the *Fair Work Regulations 2009* (Cth) (Regulations) is taken to be a term of the Agreement.

[13] On 6 May 2024, the MUA filed a Notice of Appeal in relation to each of the Commissioner's decisions. The appeal grounds are as follows:

> 1. The Commissioner denied the Construction, Forestry and Maritime Employees Union procedural fairness by determining that the consultation term of the Agreement did not comply with ss 205 (1) and/or 205 (1A) of the Act without affording the CFMEU the proper opportunity to be heard.
>
> 2. The Commissioner erred in:
>
>   a. construing ss 205(1) and/or 205(1A) of the Act; and
>   b. in determining that the consultation term did not meet the ss 205(1) and/or 205(1A) of the Act.

[14] As the grounds of appeal in each of the four matters are identical, these appeals were heard together before a Full Bench of the Commission.

Further Evidence

[15] The Full Bench is able to receive further evidence on appeal.[1] The MUA sought to rely on further evidence on the appeal in the form of a witness statement of Adrian Evans. Mr Evans is the Divisional Assistant Secretary of the Construction, Foresty and Maritime Employees Union, The Maritime Union of Australia Division.

[16] At the commencement of the hearing of the appeal, we were informed that the MUA did not read paragraphs 10 to 31 of the witness statement. DP World objected to paragraphs 32 to 35 of the witness statement on relevance grounds. Those paragraphs deal with the asserted significance of the consultation provisions of the Agreements in light of roster changes proposed to be introduced by DP World during bargaining. DP World did not otherwise object to the witness statement being admitted and indicated that Mr Evans was not required for cross-examination.

[17] We decided to admit the witness statement of Mr Evans as further evidence on the appeal, aside from those paragraphs which were not read. The evidence is relevant to the procedural fairness complaint made by the MUA and to the question of permission to appeal. Mr Evans provides an explanation as to why the MUA did not make submissions at first instance and endeavours to substantiate the prejudice the MUA claims it will suffer if the

decision of the Commissioner is correct. Those were not matters that could have been put into evidence at first instance and are relevant to the task of the Full Bench on appeal.

Legislation

[18] The making and approval of enterprise agreements is dealt with in Part 2-4 of the Act. Once an agreement has been made, ordinarily by a vote of employees who will be covered by the proposed agreement, a bargaining representative is required by s 185(1) of the Act to apply to the Commission for approval of the agreement. The 'basic rule' set by s 186(1) is that the Commission must approve the agreement if the requirements in ss 186 and 187 are met.

[19] Sections 186 and 187 do not themselves require that the Commission be satisfied that an enterprise agreement includes a consultation term. However, s 201 requires that, if it approves an enterprise agreement, the Commission must note particular matters in its decision. Section 201(1) provides as follows:

> **201 Approval decision to note certain matters**
>
> *Approval decision to note model terms included in an enterprise agreement*
>
> (1) If:
>
> (a) the FWC approves an enterprise agreement; and
>
> (b) either or both of the following apply:
>
> (i) the model flexibility term is taken, under subsection 202(4), to be a term of the agreement;
>
> (ii) the model consultation term is taken, under subsection 205(2), to be a term of the agreement;
>
> the FWC must note in its decision to approve the agreement that those terms are so included in the agreement.

[20] Division 5 of Part 2-4 provides for mandatory terms of enterprise agreements. Section 205 requires that an enterprise agreement must include a consultation term. The provision is central to the current appeal, and it is appropriate to set out the section:

> **205 Enterprise agreements to include a consultation term etc**
>
> (1) An enterprise agreement must include a term (a ***consultation term***) that:
>
> (a) requires the employer or employers to which the agreement applies to consult the employees to whom the agreement applies about:
>
> (i) a major workplace change that is likely to have a significant effect on the employees; or
>
> (ii) a change to their regular roster or ordinary hours of work; and
>
> (b) allows for the representation of those employees for the purposes of that consultation.
>
> (1A) For a change to the employees' regular roster or ordinary hours of work, the term must require the employer:
>
> (a) to provide information to the employees about the change; and

> (b) to invite the employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities); and
>
> (c) to consider any views given by the employees about the impact of the change.
>
> *Model consultation term*
>
> (2) If an enterprise agreement does not include a consultation term, or if the consultation term is an objectionable emergency management term, the model consultation term is taken to be a term of the agreement.
>
> (3) The regulations must prescribe the ***model consultation term*** for enterprise agreements.

[21] In summary, the section provides that an enterprise agreement must contain a term requiring the employer or employers to which it applies to consult employees about two matters, namely, major change likely to have a significant effect on employees or a change to the regular rosters or ordinary hours of work of employees.

[22] Subsection (1A) was introduced by the *Fair Work Amendment Act 2013* (Cth) and makes provision with respect to consultation in relation to changes to the employees' regular rosters or ordinary hours of work. With respect to that type of change, the term of an enterprise agreement must require the employer to provide information about the change, to invite employees to give their views about the impact of the change (including in relation to family and caring responsibilities) and that the employer consider any such views given by employees. The amendments fell within Schedule 1 to the *Fair Work Amendment Act 2013* (Cth) entitled 'Family-friendly measures'.

[23] Subsection (2) provides that, if an enterprise agreement does not contain a consultation term, the model consultation term is taken to be a term of the agreement. The subsection operates by force of law such that, if an enterprise agreement fails to contain a consultation term that complies in all respects with s 205(1) and (1A) of the Act, the model consultation term is deemed to be part of the agreement so that consultation must occur only in accordance with the statutorily prescribed mechanism.[2] The model term takes precedence and any deficient consultation obligation in the agreement is supplanted or displaced by the model term.[3]

Permission to Appeal

[24] We have decided to grant permission to appeal as we are satisfied it is in the public interest to do so and we would, in any event, exercise our discretion to grant permission to appeal. DP World opposed a grant of permission to appeal on three grounds, namely, that the decisions were not attended by sufficient doubt to warrant reconsideration, that the MUA could not point to any substantial injustice that would be caused if permission is refused and that the appeal raises no issue of general application or importance.

[25] We disagree with each of those submissions. First, the matters raised in ground 2 were not raised before the Commissioner and, as a result and without any criticism of the Commissioner, were not considered in the decisions. The contentions of the MUA in relation to the consultation provision raise matters of some substance and, we believe, should be considered by the Full Bench.

[26] Second, DP World submits that no injustice is caused to the MUA by the Commissioner's decisions because, if the Agreements do not contain consultation terms which comply with s 205(1) and (1A) of the Act, then the model consultation term is taken to be a term of the agreements by operation of law irrespective of the views of the Commissioner. It also suggests that the MUA is not deprived of important consultation rights which existed under the predecessor agreements. That follows, it is said, because if the predecessor agreements failed to contain compliant consultation terms, then, by operation of the Act, the model consultation term was taken to be part of those agreements to whether or not the Commission noted that matter in the approval decisions.

[27] The underlying legal proposition advanced by DP World is correct. Section 205(2) of the Act operates by force of law. If an enterprise agreement in fact does not contain a compliant consultation term or terms, the model consultation term is taken to be part of the agreement irrespective of the views of the parties or the Commission. However, s 201(1) requires the Commission to note in its decision if the model consultation term is taken to be a term of the agreement. Employers and employees can be expected to conduct themselves based on any notation made, or not made, in accordance with s 201(1). The evidence of Mr Evans, which was not contested, indicates that the MUA had conducted itself on the basis that the consultation provisions of earlier agreements were read in conjunction with the Award provisions.

[28] Third, we consider that the appeal raises at least two matters of general application and importance. The MUA's submissions raise an important question as to the nature of the requirement in s 205(1A)(b) of the Act that an enterprise agreement include a term which requires the employer to invite employees to give their view about the impact of a change in their regular roster or ordinary hours of work. Further, the parties disagree as to the proper approach to assessing whether inconsistency exists between the terms of an enterprise agreement and of an award (or other instrument) incorporated by reference subject to provision that the terms of the agreement prevail to the extent of any inconsistency. That is a common drafting device in enterprise agreements.[4]

[29] There is one further matter that should be mentioned in relation to the question of permission to appeal. Obviously enough, the MUA seeks to raise a point on appeal which was not advanced before the Commissioner. Although it opposed permission to appeal being granted for other reasons, DP World did not object to the MUA being permitted to raise the contentions falling within ground 2 on the basis that the MUA had not raised those matters at first instance. In our opinion, the position of DP World in that respect was appropriate in the circumstances of this matter.

[30] A party that sits on its hands or, seeking some forensic advantage, deliberately does not raise a point at first instance, will be in jeopardy of being denied permission to appeal. However, if a matter of substance has been overlooked because of error or inadvertence, a person aggrieved by a decision may seek permission to appeal.[5] If a reasonable explanation is provided for a matter not having been raised at first instance and the ground gives rise to an arguable case of error, permission to appeal might be granted.

[31] In the context of the approval of enterprise agreement, we note the approach adopted by Gostencnik DP and Bissett C in *Construction, Forestry, Maritime, Mining and Energy Union v Hully Foundations Pty Ltd* [2021] FWCFB 3659 at [51] as follows:

> We are satisfied with the Appellant's explanation about its inaction at first instance. The inaction was erroneous rather than forensic. We accept that it did not make a deliberate decision not to participate in the application for the approval of the Agreement. Although nothing is guaranteed we consider that had it foreshadowed the matters it now raises before the Commissioner, it is likely that it would have been allowed to make submissions. This coupled with the fact that the Appellant has the right under its rules to represent employees covered by the Agreement we consider gives the Appellant an interest in the decision to approve the Agreement beyond that of an ordinary member of the public. As to permission to appeal, we consider that the Appellant's notice of appeal raises an arguable case of appealable error. The matters raised go to the power of the Commission to approve the Agreement, and although the assessment of whether an enterprise agreement passes the BOOT is a question of satisfaction, that satisfaction must be formed reasonably. For the reasons earlier identified, that could not have been the case here. There is a public interest in ensuring that the exercise of the power to approve enterprise agreements is properly discharged. Although we accept that the Appellant did not raise the matters it now raises below, having accepted its explanation and taking into account our assessment of the appeal grounds, we do not consider in this case the absence of the Appellant's participation in the first instance proceeding should weigh against the grant of permission to appeal. Permission to appeal is therefore granted.

[32] Whether permission to appeal will be granted where the grounds sought to be advanced on appeal were not raised at first instance will depend on the circumstances. The existence of a reasonable explanation for the grounds not having been raised at first instance will be relevant to the question of permission to appeal as will the significance of the matter sought to be raised, whether some aspect of the public interest is enlivened and whether the point could have been addressed by evidence below.[6]

[33] Here, the contentions advanced in ground 2 are questions of law and, as we have said, raise matters of significance in relation to s 205 of the Act and the approach to detecting inconsistency between the terms of an enterprise agreement and of an award or other instrument incorporated by reference. We accept that the MUA has provided an explanation as to the failure to raise those matters at first instance. Mr Evans gave evidence, which was again not contested, that the MUA expected to be provided an opportunity to respond to the matters identified by the Commissioner once she had an opportunity to consider the response of DP World. Whether or not it was justified in that expectation, we accept the position of the MUA was genuine.

[34] In those circumstances, we are satisfied that it is appropriate to grant permission to appeal notwithstanding the failure of the MUA to advance the submissions it now makes before the Commissioner.

Ground 1 – Alleged denial of procedural fairness

[35] The first ground of appeal alleges that the MUA was denied procedural fairness in that it was denied the opportunity to make submissions in relation to the question of whether the Agreements contained terms which complied with the requirements of s 205(1) and (1A) of the Act by reason of incorporation of provisions of the *Stevedoring Industry Award 2020* (the **Award**), particularly clause 32.

[36] Mr Boncardo candidly accepted that the MUA's contention that it had been denied procedural fairness turned on a small number of words in the email from the Commissioner's associate to the parties sent at 4.56pm on 12 April 2024. The MUA submitted that the penultimate substantive paragraph of the email (above the table) invited submissions from the applicant (namely, DP World) and not from any other party. Whilst addressed to the parties

generally, the MUA contended that the email of 12 April did not provide an opportunity for the MUA to be heard because it invited submissions only from DP World.

[37] With respect to the email of 15 April 2024, the MUA submitted that it concerned only the issue of the model flexibility term and, to the extent that communication invited further submissions, it was confined to that subject matter. Although the email of 15 April gave notice that the Commissioner intended to publish her decisions in relation to the applications at 4pm on 16 April 2024, the MUA contended that it had not, by that time, had the opportunity to make submissions in relation to the consultation issue.

[38] The Commission is generally required to accord procedural fairness in proceedings before it. That is consistent with the proposition that, where a statute confers a power the exercise of which affects, or is capable of affecting, a person's rights or interests or privileges, it will be implied as a matter of statutory construction that the rules of procedural fairness regulate and condition the exercise of the power.[7] That extends to a situation where a discretionary power may confer a right rather than destroy or prejudice an existing right.[8]

[39] The question of the extent of any obligation to accord procedural fairness to industrial organisations in the course of considering the approval of enterprise agreements has been the subject of some controversy, particularly if the organisation was not a bargaining representative in relation to the agreement.[9] Indeed, for a period, the Commission was prohibited from granting leave for an industrial organisation to intervene in proceedings for certification of a workplace agreement other than in limited circumstances.[10]

[40] Those issues do not arise in the present matter. There is no dispute that the MUA was a bargaining representative for employees to be covered by the Agreements who were its members. DP World might, in a strict sense, be correct that the Commissioner's notation that the model consultation term is a term of the Agreements does not itself alter the legal position as to its consultation obligations. However, the notation has altered the parties' practical understanding of those obligations compared to the predecessor agreements, including in a manner that impacts the rights of the MUA to be involved in consultation. It was required to be accorded procedural fairness.

[41] The content of the requirement to afford procedural fairness, however, varies depending on the nature of the power being exercised and the totality of the circumstances. The concern is that a fair decision-making procedure must be observed.[11] Ultimately, the question is whether a person has been afforded a reasonable opportunity to be heard in the sense that the procedure adopted must be one which conforms to the procedure which a reasonable and fair repository of the power would adopt in the circumstances.[12]

[42] The circumstances in this matter are that the Commissioner was considering an application for approval of a number of enterprise agreements. Although the Act does not impose a statutory time period within which the Commission must determine applications for approval of an enterprise agreement, there is a significant public interest in such applications being resolved expeditiously. One object of Part 2-4 of the Act is to ensure that applications for approval of enterprise agreements are dealt with without delay.[13]

[43] Consistently with that object, interested persons will necessarily be required to respond to the Commission within confined time periods if they wish to be heard in relation to an approval application. In the absence of a response from an interested party, it will not

necessarily be obvious to the Commission that the party wishes to make submissions or to be heard in relation to an application. Furthermore, the task being undertaken by the Commission does not involve conventional adversarial litigation. Rather, the Commission is itself required to be satisfied that the requirements for approval are met.

[44] It is in that context that the MUA's submission that it was denied procedural fairness must be considered. As we understand it, the MUA's sole complaint is that the email of 12 April 2024 invited submissions only from DP World and not any other party. Whilst it may have been preferrable for that part of the communication to have been clearer, we do not believe that the MUA was deprived of a fair opportunity to make submissions and be heard in relation to the approval of the Agreements.

[45] The email of 12 July 2024 must be looked at as a whole. It was sent to Mr Evans of the MUA and commenced with the salutation 'Dear parties'. The email then indicated that 'as a matter of procedural fairness, you are invited to make submissions to address the issues that have been identified'. The table contained in the email simply invited a 'response' to the issues which had been identified in relation to the approval of the Agreements. At the conclusion of the email, the parties were invited to contact the Commissioner's chambers if they had any queries in relation to the matter.

[46] A substantive response was provided by DP World on the morning of 15 July 2024 and copied to Mr Evans and Mr Edmonds from the MUA. Later in the afternoon of 15 April 2024, the Commissioner raised the further issue in relation to the model flexibility term. That email concluded by indicating that the Commissioner proposed to publish her decision the following day and that 'no action is required in relation to this issue however please make submissions if you have any objections to this course of action'.

[47] The reference to 'this issue' might have been understood as a reference to the question concerning the model flexibility clause. However, at least by the afternoon of 15 April 2024, the MUA was on notice that the Commissioner proposed to publish her decision the following day. It was invited to make submissions if it objected to that course. It had an opportunity to make submissions. If it was unable to prepare substantive submissions within the time provided, it could have requested further time to do so. It did not. We do not believe that the procedure adopted by the Commissioner failed to provide a fair opportunity to be heard in circumstances in which the Commissioner was not made aware that the MUA wished to make submissions.

[48] We appreciate that industrial parties may, by inadvertence rather than design, overlook communications from the Commission and we do not mean to be critical of busy union officials, legal representatives or human resources professionals. However, even if there is a reasonable explanation for a failure to make submissions, that does not mean the party has been denied procedural fairness. That question turns on whether the party was denied a reasonable opportunity to advance submissions rather than whether there was a reasonable explanation for its failure to do so. We do not believe the MUA was denied a reasonable opportunity to be heard.

[49] There is a further reason why ground 1 would not succeed in any event. The MUA's procedural fairness complaint is that it was denied the opportunity of making submissions to the effect it seeks to advance in ground 2 of the notice of appeal. We accept that the MUA should be permitted to advance ground 2 notwithstanding that it did not make those submissions to the Commissioner. DP World did not object to that course. In those circumstances, the

procedural fairness complaint is of no moment. It has had the opportunity to advance those contentions on the appeal.

[50] The MUA submitted that the procedural fairness argument, if it were accepted, should result in the decisions being quashed so as to provide it with the opportunity to advance a case to vary the agreements under s 217 of the Act prior to their approval whether or not its submissions with respect to ground 2 are accepted. The MUA expressed a concern that, once the Commission had made a decision which included in a notation that the model consultation term is taken to be a term of the Agreements, it would be difficult for it to contend there was any ambiguity or uncertainty so as to permit their variation.

[51] We understand the concern as it was articulated by Mr Boncardo, but our preliminary view is that the fact of such a notation in the Commission decisions approving the Agreements would not necessarily preclude an argument that they contained an ambiguity or uncertainty. However, it is not appropriate for us to express any concluded view on that matter in the absence of full argument and in circumstances in which we have concluded that the MUA was not denied procedural fairness.

[52] Ground 1 must be rejected.

Ground 2 – Model consultation term

[53] In ground 2, the MUA submits that the Commissioner erred in including a notation in the decisions, for the purposes of s 201(1) of the Act, that the model consultation clause is taken to be a term of the Agreements by operation of s 205(2). The MUA submits that the Commissioner misconstrued s 205 and erred in determining the consultation term or terms in the Agreements did not meet the requirements in s 205(1) and (1A) of the Act.

[54] In summary, the MUA's position is that a number of terms of an enterprise agreement may operate together to satisfy the requirements set out in s 205(1) and (1A) of the Act.[14] It points to the fact that clause 5.1.1 of each of the Agreements provides that the Agreements 'shall be read in conjunction with' the Award. The MUA submits that clause 45 of the Agreements entitled 'Introduction of Change' can be read in conjunction with clause 32 of the Award entitled 'Consultation about changes to rosters or hours of work'. It says that those clauses, when read in conjunction with one another, constitute a consultation term which meets in the definition in s 205(1) and (1A) and, as such, the model term is not taken to be a term of the Agreements.

[55] DP World disagrees. Despite having negotiated and asked its employees to approve an agreement containing clause 45, it says that the clause does not meet the requirements in s 205(1) and (1A) and the model consultation term is taken to be a term of the Agreements displacing clause 45. It points to the fact that clause 5.2 of the Agreements provides that, where there is an inconsistency between the Agreements and any provisions of the Award, the Agreements shall apply to the extent of the inconsistency. DP World submits that clause 45 of the Agreements is inconsistent with clause 32 of the Award and those clauses cannot be read in conjunction with one another so as to remedy the deficiencies said to exist in clause 45.

[56] The submissions require the Full Bench to address a number of questions. The issues appear to us to be: (1) whether clause 45 of the Agreements itself constitutes a consultation term satisfying the requirements of s 205(1) and (1A) of the Act; and (2) if not, whether clause 45 of the Agreements can be read in conjunction with clause 32 of the Award or is inconsistent with that clause and whether, when those clauses are read together, the Agreements contain a consultation term satisfying the definition in s 205(1) and (1A).

Does clause 45 of the Agreements meet the requirements of s 205(1) and (1A)?

[57] The first issue is whether clause 45 of the Agreements complies with the definition of a consultation term in s 205(1) and (1A) without relying on incorporation of the Award. To consider that question, it is necessary to examine Clause 45 of the Agreements, which are entitled 'Introduction of Change' and each provides as follows:

> **45 Introduction of Change**
>
> 45.1 This Agreement recognises that Company management is obligated to carry out its responsibilities in accordance with Company policies and additionally, where such policies relating to production, program, organisation or technology may also affect the rights and interests of its Employees, Company management is also obligated to consider the rights and interests of its Employees in the implementation of such policies. Any change implemented in accordance with this clause shall not be inconsistent with the intent of this Agreement and shall not erode or diminish conditions of employment.
>
> 45.2 **Company duty to notify**
>
> 45.2.1 Where the Company has made a definite decision to introduce changes in production, program, organisation, structure or technology that are likely to have significant effects on Employees, the Company undertakes to notify the Employees who may be affected by the proposed changes and the National Secretary/National Official and relevant Branch Secretary/Official of the Union. For avoidance of doubt where clause 39 has been triggered then this clause will not apply to the proposed changes.
>
> 45.2.2 Without limiting the generality thereof, significant effects includes termination of employment, changes in the composition, operation or size of the workforce or in the skills required, the elimination or diminution of job opportunities, promotion opportunities or job tenure, the alteration of hours of work, the need for retraining or transfer of Employees to other work or locations and the restructuring of jobs and the use of contractors.
>
> 45.3 **Company duty to discuss change**
>
> 45.3.1 The Company undertakes to discuss with the Employees affected and the Union, inter alia, the introduction of the changes referred to in clause 45.2, the effects the changes are likely to have on Employees, measures to avert or mitigate any adverse effects of such changes on Employees and give prompt consideration to matters raised by the Employees and/or the Union in relation to the changes.
>
> 45.3.2 The discussion shall commence as early as practicable after a decision has been made by the Company to make the changes referred to in clause 45.2. For the purposes of such discussion, the Company

undertakes to provide in writing to the Employees concerned and the Union, all appropriate information about the changes including the nature of the proposed changes, the expected effects of the changes on Employees and any other matters likely to affect Employees.

45.4 **Implementation of change**

45.4.1 It is agreed between the parties that after the above notification and discussion have taken place that the Company, after careful consideration of the views of Employees may implement the change with sixty (60) days' notice.

45.5 **Roster Changes**

45.5.1 The rosters within this Agreement are based on current ship berthing arrangements at the commencement of this Agreement and the salaries reflect those rosters. The basis for any roster is to provide secure permanent rostered jobs and maintain as much regularity and predictability of working shifts as possible as well as the flexibility to ensure rostered shifts are generally worked within an Employee's primary skill.

45.5.2 When ship berthing arrangements change and the Company has an essential need for roster changes, the Union/Employees shall provide the flexibility to address the necessary changes. Any such changes will be implemented in accordance with clauses 45.3 and 45.4. In these circumstances, information relating to changed berthing arrangements will be provided to the Union and Employees to facilitate such discussions.

45.5.3 The requirement for roster change may not only be based on changed working arrangements, but also be based on maintaining and increasing, where appropriate, permanent rostered jobs and ensuring shifts are generally worked within an Employee's primary skill so that the integrity of the roster is maintained. Any such change may only vary the internal configuration of each roster and shall not alter the aggregate of working days required or duty free days within the rosters, this includes respecting the aggregate value of the roster.

45.5.4 Any change may occur only after all other mechanisms and alternatives have been considered and proved ineffective.

45.6 **Escalation**

Where a decision is made under clause 45, subject to there being no stoppage of work as a result of the decision of the Company, either Party may refer the matter in dispute to FWC in accordance with clause 47.5.

[58] The subclauses of clause 45 deal with different types of change. Clause 45.2 deals with a situation in which DP World has made a definite decision to introduce changes to production, program, organisation, structure or technology that are likely to have significant effects on employees. In that event, DP World is required to notify the employees who may be affected and that National Secretary/National Official and relevant Branch Secretary/Official of the Union.

[59] Clause 45.3.1 imposes a duty to discuss the introduction of change with employees affected and the Union, including the effect the changes are likely to have on employees,

measures to avert or mitigate any adverse effects of such changes on employee and to give prompt consideration to matters raised by employees and/or the Union in relation to the changes. Clause 45.3.2 then indicates that the discussion shall commence as early as practicable after a decision has been made and makes provision for the information to be provided by DP World about the changes. Clause 45.4 provides that, after notification and discussion has taken place, DP World may implement changes with 60 days' notice.

[60] Clause 45.5 deal with roster changes. Clause 45.5.1 indicates that the rosters in the Agreements are based on current ship berthing arrangements. Clause 45.5.2 deals with changes to rosters. The subclause only contemplates roster changes taking place when ship berthing arrangements change and DP World has an essential need for roster changes. Any 'such changes' are required to be implemented in accordance with clauses 45.3 and 45.4 subject to the clarification that the information to be provided to employees and the Union includes information relating to changed berthing arrangements.

[61] Clause 45.5.3 provides an alternative basis for a roster change, namely, that a roster change may be based on maintaining and increasing, where appropriate, permanent rostered jobs and ensuring shifts are generally worked within an employee's primary skill so that the integrity of the roster is maintained. No reference is made, in relation to that type of change, back to the discussion and notice obligations in clauses 45.3 and 45.4 or otherwise any express consultation requirement imposed for that type of change.

[62] Clause 45.5.4 then indicates that any change may occur only after all other mechanisms and alternatives had been 'considered and proved ineffective'. It is not entirely clear what 'change' is being referred to in clause 45.5.4, although the more natural reading is that it includes all roster changes. The content of the requirement that alternatives have been 'considered and proved ineffective' is obscure. We doubt that the clause would be construed so as to as require actual testing of any alternatives. It presumably envisages that the consideration of the alternatives has resulted in a conclusion that they would be ineffective.

[63] The MUA accepts that clause 45 of the Agreements on its own does not comply with the requirements of s 205(1) and (1A) of the Act in two ways. First, clause 45 does not directly deal with changes to ordinary hours of work. Section 205(1)(a)(ii) requires that a consultation term requires an employer to consult with employees about both changes to their regular roster or ordinary hours of work. Whilst a roster change may involve changes to ordinary hours of work and 'significant effects' are defined in clause 45.2.2 to include 'the alteration of hours of work', the clause cannot be understood to require consultation about any change to an employee's ordinary hours of work. Consultation is required only in respect of changes to hours of work that result from changes in production, program, organisation, structure or technology or from changes to the roster.[15] That does not satisfy s 205(1)(a)(ii).

[64] Second, clause 45.3.1 requires DP World to discuss relevant changes with affected employees and to give prompt consideration to matters raised by the employees and clause 45.3.2 (and clause 45.5.2) require DP World to provide information to employees about a roster change. However, clause 45 does not provide, in terms, that DP World must invite employees to give their views about the impact of a roster change, including any impact in relation to their family or caring responsibilities for the purposes of s 205(1A)(b). In addition, in relation to the type of roster change contemplated by clause 45.5.3, no express consultation provision is provided for at all.

[65] There is some uncertainty as to what is required for a term of an enterprise agreement to comply with the requirements in s 205(1A). We would not construe s 205(1) and (1A) to mean that, to constitute a consultation term as defined, a clause of an enterprise agreement must reproduce in terms the words of subsection (1A). The assessment must be directed at whether the enterprise agreement as a whole imposes obligations on an employer which, in substance, meet the minimum requirements in s 205(1) and (1A). However, it appears to us that a simple requirement to discuss changes with employees is unlikely to be sufficient to comply with s 205(1A)(b).[16] Clause 45 also makes no express reference to a requirement to invite employees to give their views about any impact of a change on family or caring responsibilities. This is a deficiency.

[66] For these reasons, clause 45 of the Agreements on its own does not constitute a consultation term as defined in s 205(1) and (1A). We observe that there are other reasons why clause 45 on its own is insufficient to comply in all respects with the requirements of s 205(1) and (1A). The approach of the Full Court in *Teekay Shipping* suggests that a provision which simply requires consultation with employees and a union does not allow for the representation of employees for the purposes of consultation as required by s 205(1)(b).[17] However, it is unnecessary for us to further consider that matter given the MUA's concession that clause 45 of the Agreements did not meet the definition of a consultation term.

Is clause 32 of the Award incorporated into the Agreements or are the Agreements inconsistent with clause 32 of the Award?

[67] The MUA nonetheless contends that the Agreements do include a consultation term because the Agreements are to be read in conjunction with the Award, including clause 32 of the Award. DP World, for its part, did not dispute that clause 32 of the Award, if able to be read together with clause 45 of the Agreements, is sufficient to meet the definition of a consultation term for the purposes of s 205(1) and (1A). It submits, however, that clause 32 of the Award is inconsistent with clause 45 of the Agreements and, in that situation, clause 45 of the Agreements applies to the extent of the inconsistency and represents the sole source of consultation obligations. For that reason, DP World submits that clause 32 of the Award does not assist the MUA.

[68] Relevantly, clause 5 of the Agreements each provide as follows:

> **5 Operation of Agreement**
>
> 5.1 This Agreement shall be read in conjunction with the following awards:
>
> 5.1.1 Stevedoring Industry Award 2020 as varied; and
> 5.1.2 Stevedoring Industry (Long Service Leave) Award 1992, (Collectively referred to as "the Awards").
>
> 5.2 Where there is any inconsistency between this Agreement and any provisions of the Awards, the Agreement shall apply to the extent of the inconsistency. Provided however that the Award provisions shall cease to apply only to the extent and for the period necessary to permit the operation of this Agreement.

[69] There is a difference of opinion between the parties as to the approach to be applied in determining whether inconsistency exists for the purposes of clause 5.2. DP World submits that clause 5.2 of the Agreements aligns in its operation with s 109 of the Commonwealth

Constitution. As is well-known, s 109 of the Constitution provides that, when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of inconsistency, be invalid. Consistent with the approach adopted in relation to s 109 of the Constitution, it said that inconsistency for the purposes of clause 5.2 could arise either by way of direct inconsistency or 'cover the field' (or indirect) inconsistency.

[70] DP World points to a number of decisions of the Commission that appear to have adopted such an approach in relation to similar enterprise agreement provisions.[18] Those decisions have limited utility in answering the question posed. It is unclear to what extent, in any of those cases, there was any issue between the parties as to the approach to be adopted to detecting inconsistency or whether the Commission had the benefit of submissions in relation to that question. The precise terms of the clauses of the enterprise agreements at issue which incorporated provisions of a modern award, and dealing with interaction between incorporated and express terms, also vary to some extent.

[71] The MUA submits that the approach of DP World is 'wrong in principle' and should be rejected. The MUA relies on the judgment of Wheelahan J in *Maribyrnong City Council v Australian Municipal, Administrative Clerical, and Services Union* [2019] FCA 773. In that matter, the Court dealt with a question as to whether there was inconsistency between a provision of Part A of the relevant enterprise agreement (which contained a number of operative provisions) and Part B (which contained terms drawn from an old award). The relevant interaction provision provided:[19]

> 3.1.3 In relation to employees whose employment is covered by the Victorian Local Authorities Award 2001, the provisions of Part A of this Agreement shall be read and applied in conjunction with the provisions of Part B. Where there is any inconsistency between Part A and Part B, the provisions of Part A shall prevail.

[72] Wheelahan J observed that, although it was necessary to consider the term 'inconsistency' in the context of, and for the purposes of, the particular enterprise agreement, there was utility in making reference to authorities that have considered the reconciliation of different legal obligations through the lens of whether, by reason of inconsistency, one set of obligations prevails over the other.[20]

[73] His Honour considered that the application of inconsistency clauses in contracts involves different considerations than those which arise under s 109 of the Constitution. The paramount nature of the laws of the Commonwealth Parliament underlines the judicial formulations of direct and indirect inconsistency.[21] His Honour concluded (bolding added):[22]

> In relation to the application of clause 3.1.3 of the Agreement in the present case, the Agreement is not a contract: *Toyota Motor Corporation Australia Ltd v Marmara* (2014) 222 FCR 152 at [88]. The Agreement is an instrument that has statutory force by reason of having been approved by the Commission under s 186 of the *Fair Work Act*. The obligation to comply with the Agreement is in the statute: *Fair Work Act*, s 50. Although Part B of the Agreement reproduces substantial parts of the old Award, the Award has no independent force. The source of all obligations under the Agreement is the same, namely the terms of the Agreement as given force by the *Fair Work Act*. **These features distinguish the application and reconciliation of the terms of Part A and Part B of the Agreement from questions of inconsistency that arise in other contexts, such as under s 109 of the *Constitution*. That is because clause 3.1.3 of the Agreement provides – as a commencing point – that Part A shall be read and applied in conjunction with Part B. This mandate tells against construing any terms of Part B that**

> **merely qualify Part A as being inconsistent with Part A. In my view, in order that there be inconsistency between the terms of Part A and Part B, the terms must be such that they cannot sensibly or fairly be read together. Within this concept, there may be terms of Part A which demonstrate an intent to cover a particular subject-matter to the exclusion of corresponding terms in Part B. In these events, the terms of Part A prevail.**

[74] The MUA submits that inconsistency arises for the purposes of clause 5.2 only if a provision of the Agreement and a provision of the Award cannot sensibly or fairly be read together or if the terms of the Agreement demonstrate an intent to cover a subject-matter to the exclusion of the Award.

[75] Where the terms of a modern award (or any other instrument for that matter) are incorporated into an enterprise agreement subject to a test of inconsistency, whether such inconsistency arises will turn on the meaning of that term in the context of, and for the purposes of, the relevant agreement.[23] As such, there are limitations in the extent to which it is possible to make general pronouncements about the approach to be adopted when reconciling the terms of the two instruments. It is sufficient, for present purposes, to say that we accept the submissions of the MUA as to the approach required to detecting inconsistency for the purposes of clause 5.2 of the Agreements.

[76] DP World accepted that clause 5.1 has the effect of incorporating the terms of the Award into the Agreements subject to clause 5.2. The incorporation of the Award into the Agreements means that the terms of Award are terms of the Agreements. The Award does not directly apply to employees covered by the Agreements when the Agreements are in operation and has no independent force.[24] The terms of the Award apply to employees only by reason of incorporation into and as terms of the Agreements. This is not a situation in which one instrument has presumptively paramount operation. The rights and obligations all have the same source, namely, the Agreements as given legal effect by the Act.

[77] Clause 5.1 dictates that the Agreements be read 'in conjunction with' the Award. That language is consistent with the clause examined in *Maribyrnong City Council*. Consistent with the reasoning of Wheelahan J, that mandate tells against construing terms of the Award which merely qualify terms of the Agreement as being inconsistent for the purposes of clause 5.2. The appropriate test in the context of clause 5.2 is to ask whether the Agreement cannot be sensibly or fairly read together with a provision of the Award. That may include a circumstance in which a term of the Agreements evinces an intention to cover a particular subject matter to the exclusion of any provision of the Award.

[78] The application of this approach to clause 45 of the Agreements and clause 32 of the Award is more challenging. Clause 32 of the Award deals with consultation about changes to rosters or hours of work and provides:

> **32 Consultation about changes to rosters or hours of work**
>
> 32.1 Clause 32 applies if an employer proposes to change the regular roster or ordinary hours of work of an employee, other than an employee whose working hours are irregular, sporadic or unpredictable.
>
> 32.2 The employer must consult with any employees affected by the proposed change and their representatives (if any).

> 32.3 For the purpose of the consultation, the employer must:
>
> (a) provide to the employees and representatives mentioned in clause 32.2 information about the proposed change (for example, information about the nature of the change and when it is to begin); and
>
> (b) invite the employees to give their views about the impact of the proposed change on them (including any impact on their family or caring responsibilities) and also invite their representative (if any) to give their views about that impact.
>
> 32.4 The employer must consider any views given under clause 32.3(b).
>
> 32.5 Clause 32 is to be read in conjunction with any other provisions of this award concerning the scheduling of work or the giving of notice.

[79] DP World contended that clause 32 of the Award is both directly inconsistent with clause 45 of the Agreements and that clause 45 of the Agreements covers the field to the exclusion of the Award. In its submissions, DP World did not differentiate between proposed changes to rosters and ordinary hours of work. It is appropriate to initially record that no inconsistency exists in the obligations which arise in relation to proposed changes to ordinary hours of work. Clause 32.1 applies if an employer proposed to change the ordinary hours of work of an employee. Clause 45 of the Agreements does not deal with such a proposal at all. In those circumstances, there is no inconsistency between the consultation obligations which arise under clause 32 of the Award when an employer proposes a change to the ordinary hours of work of an employee. If DP World proposed to change the ordinary hours of work of an employee, it must consult as required by clause 32 of the Award. In that situation, clause 32 of the Award can comfortably be read in conjunction with the Agreements.

[80] The issue which must be considered is whether inconsistency arises in the circumstances of proposed changes to an employee's regular roster. DP World identified four inconsistencies between the provisions. First, it submitted that clause 32 of the Award operates on proposals to change an employee's regular roster but does not otherwise qualify the circumstances in which an employer can introduce such a change. Clause 45, in contrast, fetters the circumstances in which rosters can be changed and the nature of the changes able to be introduced by DP World in clauses 45.5.2 and 45.5.3. That was said to give rise to direct inconsistency between the provisions.

[81] We do not accept that submission. It is correct to say that clause 45 of the Agreements constrains the circumstances in which a roster change may occur. However, clause 32 of the Award does not address that subject. Clause 32 of the Award operates to impose obligations on an employer to consult if it proposes to change the regular roster or ordinary hours of work of an employee. The clause does not confer a right on the employer to change the regular roster or hours of work of an employee nor does it govern the circumstances in which a roster change or change to ordinary hours can be introduced or the nature of the changes an employer is entitled to make. The obligation to consult operates when the employer proposes to introduce a change it is otherwise entitled to make.

[82] The nature of changes able to be made to an employee's regular roster or ordinary hours of work will almost invariably be constrained by other instruments whether it be a contract of employment, enterprise agreement or award. The Award itself, by way of example, provides in clause 14.1(b) for there to be agreement as to the rostering arrangements and that rostering occur in accordance with such an agreement. Clause 14.1(c) provides that the rostering

arrangements may not require an employee to change shifts if it would necessitate working 2 consecutive shifts or more than one shift on any one day.

[83] It cannot sensibly be suggested that inconsistency arises between clause 32, dealing with consultation, and constraints otherwise imposed by the Award on the changes that can be made to rosters. For the same reason, a provision of the Agreements is not inconsistent with clause 32 merely because it imposes limitations on the circumstances in which DP World can propose changes to an employee's roster or the nature of the changes it is able to make. To the extent that clause 45 imposes such limitations, it can be sensibly and fairly read together with clause 32 of the Award. The consultation obligations in clause 32 apply when DP World proposes to change regular rosters or hours of work in a manner it is entitled to do.

[84] The second inconsistency identified by DP World is said to be that clause 32 of the Award sets out a process for consultation which is inconsistent with the process prescribed by clause 45.3 and 45.4. It submitted, for example, that clause 45 does not require the employer to invite employees to give their views on the impact of the proposed change but does require the employer to give prompt consideration to the views of the Union independently of the employees' views.

[85] There are differences in the process required by clause 32 and clause 45. In addition to those raised by DP World, there are differences in the descriptions of the subject-matter of the requisite consultation or discussions and the type of information required to be provided to employees and their representatives in clause 45.3 of the Agreements and clauses 32.2 and 32.3 of the Award. Whether the differences are such as to cause inconsistency for the purposes of clause 5.2 of the Agreements requires examination of the nature of the differences and the circumstances in which the obligations in the clauses operate. In our opinion, the critical feature of the two clauses is when the obligations they impose arise.

[86] In dealing with changes which will have significant effects on employees, clause 45.2.1 only operates once a 'definite decision' has been made to introduce such a change. In relation to roster changes prompted by a change to ship berthing arrangements, clause 45.5.2 operates when, as a result, DP World has an essential need for roster changes. The existence of an 'essential need' for roster changes impliedly contemplates that the company has decided to introduce a roster change. That is explicit in clause 45.3.2 which requires that discussion shall commence as early as practicable after a decision has been made to make the changes and applies to roster changes.

[87] Clause 32.1 of the Award, in contrast, indicates that the consultation arrangements in that clause apply where the employer 'proposes' to change an employee's regular roster or ordinary hours of work. A requirement that consultation occur at the stage when an employer is proposing to introduce a change should be construed as requiring consultation before a definite decision has been made. The issue was considered by the Full Bench in the context of s 145A of the Act in *Re Consultation clause in modern awards* [2013] FWCFB 10165, 238 IR 282. In that decision, the Full Bench concluded:[25]

> An issue in contention in these proceedings was whether a term of the kind mentioned in s 145A required an employer to consult employees about a proposed "change to their regular roster or ordinary hours of work" or whether the obligation to consult could be satisfied after a definite decision to implement a change has been made or a change has been implemented.

> The ordinary meaning of the word "consult" and the legislative context and purpose leads us to conclude that the requirement in s 145A is to consult employees about proposed changes to "their regular roster or ordinary hours of work". It is said against such a construction that the word "proposed" does not condition the word "consult" in s 145A. But it is implicit in the obligation to consult that a genuine opportunity be provided for the affected party to attempt to persuade the decision maker to adopt a different course of action. If a change has already been implemented or if the employer has already made a definite or irrevocable decision to implement a change then subsequent "consultation" is robbed of this essential characteristic.

[88] The Full Bench went on to observe that the clear intent of the provision is that the employer be provided with the employee's views about the impact of the change so that those views may be considered before the change is implemented or a definite decision is made. The same construction should be applied to clause 32.1 of the Award.

[89] As such, the obligations imposed by clause 45 of the Agreements and clause 32 of the Award operate at different points in the decision-making process. Before any definite decision has been made, if DP World is proposing to change the regular roster or ordinary hours of an individual employee, it must consult in accordance with clause 32 of the Award. Where a definite decision is made of a type referred to in clause 45.2 or 45.5 of the Agreements, the process in clause 45.3 and 45.4 must then be followed. It is possible that the same change may require consultation both under clause 32 of the Award and clause 45 of the Agreements albeit at different stages of the process. The question is whether that is sufficient to give rise to inconsistency for the purposes of clause 5.2 of the Agreements.

[90] We do not believe it does. A similar issue was touched upon by the members of the Full Court in *Teekay Shipping*. Wigney J, for example, observed (bolding added):[26]

> The consultation obligations in cl 9 of the Enterprise Agreement come into play at an early stage when Teekay is "likely to introduce changes" which are "likely to have significant effects" on employees. It is at that stage that Teekay is required to discuss the changes with the Union and the employees, though at that stage the changes are only "likely" changes. Clause 8 of the Award, however, operates at a much later stage: when Teekay has made a "definite decision to introduce major changes". **It is, in those circumstances, at least conceivable that cl 9 of the Enterprise Agreement and cl 8 of the Award could operate together, even though the result would be that there would have to be consultation at two stages of the decision-making process: first at the "likely" stage and then, if it comes to it, at the stage where there has been a "definite decision". That is no doubt a somewhat cumbersome and unwieldy scenario, but it is not such that it could be said that it amounts to an inconsistency in and of itself.**

[91] His Honour's view was that the existence of different consultation obligations applicable at different stages of the process might be cumbersome. It did not, however, give rise to inconsistency in and of itself. Rares and Logan JJ, similarly, did not find the two provisions were inconsistent merely because they imposed distinct consultation obligations at different points in the decision-making process.[27]

[92] The inconsistency found in *Teekay Shipping* had a different source. The inconsistency arose not merely from the fact that clause 8 of the relevant modern award required consultation only once a definite decision had been made to introduce a major change whereas clause 9 of the enterprise agreement required consultation about a 'likely' change. It arose from the fact that clauses 9.3 and 9.4 of the enterprise agreement required that, if it disagreed with the decision made after consultation under the clause, the union immediately refer the matter to the

Commission for conciliation and/or arbitration or, if the union and the employees agreed to the change, that Teekay may then implement the change. The effect of the procedure mandated by clause 9.3 and 9.4 of the enterprise agreement was that there was no scope of the operation of the requirement in clause 8 of the modern award to engage in consultation after a definite decision had been made.[28]

[93] That difficulty does not arise in this matter. If DP World is proposing to change the regular roster or ordinary hours of work of an employee, it must consult in accordance with clause 32 of the Award. Having engaged in that consultation, if DP World makes definite decision to introduce a change and it is a change of a type contemplated by clause 45.2 or 45.5.2 of the Agreements, it must engage in discussions as required by clause 45.3 and 45.4. Given those obligations, at most, arise sequentially, we agree with Wigney J that the greatest complaint that can be made is that the process may be somewhat cumbersome and unwieldy, not that it amounts to inconsistency. Both obligations can be complied with. That the content of the process of discussion or consultation has some differences does not advance DP World's contention.

[94] The conclusion is supported by clause 5 of the Agreements. As has been explained, clause 5.1.1 expressly requires that the Agreements be read in conjunction with the Award. Clause 5.2 provides that, where there is an inconsistency, the Award shall cease to apply only to the extent of the inconsistency and for the period necessary to permit the operation of the Agreement. The provisions evince an intention that there is no inconsistency if the provisions of the Agreement are capable of operation together with the provisions of the Award. Because they operate at different stages of the decision-making process, the provisions of the Agreements and the Award can operate together.

[95] The third inconsistency identified by DP World is that an employer that complies with the process prescribed by clause 32 of the Award may implement the proposed change whereas clause 45.5.4 of the Agreements provides that a roster change may occur only 'after all other mechanisms and alternatives have been considered and proved ineffective'. The content of the requirement in clause 45.5.4 is not entirely clear. DP World suggested that the requirement that a change be *proved* to be ineffective demanded some kind of trial implementation of any other mechanisms and alternatives.

[96] As foreshadowed above, we do not accept that construction of clause 45.5.4. In the context of a process of consultation or discussion, the clause is more sensibly understood to involve the alternatives having been considered and demonstrated, through the process of consultation, to not address the needs created by the change in ship berthing arrangements or other business objectives of DP World. Clause 45.5.4 operates only to indicate an aspect of the obligation to engage in discussions as required by clause 45.5.3. As those discussions would occur at a later stage in the decision-making process to the consultation required by clause 32, no inconsistency arises with cluse 32 of the Award.

[97] The fourth inconsistency identified by DP World is that clause 32 of the Award contains no temporal limitation on the implementation of a change beyond compliance with the consultation obligations imposed. Clause 45.4.1, on the other hand, provides that DP World may implement a relevant change after discussion has occurred only with sixty days' notice. We do not accept that this provision gives rise to inconsistency. The requirement for a further notice period represents a discrete obligation which can be sensibly and fairly read together

with the substantive consultation obligations in clause 32 of the Award and only arises after the conclusion of the subsequent process dictated by clause 45.

[98] In the alternative, DP World submits that, even if there is no direct inconsistency, clause 45 of the Agreements covers the field and indirect inconsistency arises with clause 32 of the Award. DP World did not clearly indicate what 'field' it was said was covered by clause 45 of the Agreements and its submissions in relation to indirect inconsistency substantially repeated submissions it made as to why the provisions were directly inconsistent. It contended that indirect inconsistency arose because the two provisions deal with an overlapping subject-matter, clause 32 intrudes into the subject-matter dealt with by clause 45 and because the regime set out in clause 45 is comprehensive.

[99] We do not accept those contentions. Clause 32 of the Award addresses consultation obligations when DP World proposes to change the regular roster or ordinary hours of work of an individual employee, although implicitly it might arise where there is a change affecting a number of employees. Clause 45 of the Agreements is concerned with changes in production, program, organisation, structure or technology that are likely to have significant effects on employees or roster changes arising from changes to ship berthing arrangements or maintaining and increasing permanent rostered jobs. Whilst a change to which clause 45 applies might involve changes to an individual employee's regular roster or ordinary hours, this is not necessarily so. The fields of operation of the two provisions are not the same.

[100] Clause 45 of the Agreements does not expressly address changes to the ordinary hours of work of employees or impose consultation obligations in that event. In those circumstances, it cannot be suggested that the provision is comprehensive. DP World point out that roster changes may result in changes to an employee's ordinary hours of work as might a change to production, program, organisation, structure or technology. That may be so. However, s 205(1) of the Act and clause 32 of the Award contemplate that changes to an employee's regular roster and ordinary hours of work may arise separately and impose a distinct consultation obligation in each circumstance.

[101] Further, as has been discussed at some length, the provisions require discussion or consultation at different points in a decision-making process where it is proposed to introduce a change to an employee's regular roster or ordinary hours of work, on the one hand, and when a definite decision is made to introduce a change to production, program, organisation, structure or technology or roster changes, on the other. This tells against a conclusion that there is any direct clash in the provisions or that the two clauses are intended to comprehensively address consultation or discussion obligations at all stages in a decision-making process.

[102] In our opinion, no inconsistency arises between clause 45 of the Agreements and clause 32 of the Award for the purposes of clause 5.2 of the Agreements and the two provisions are capable of being sensibly and fairly read together. Clause 45 of the Agreements does not cover the field of consultation comprehensively and, rather, imposes particular discussion obligations in relation to certain decisions once the definite decision has been made by DP World.

[103] DP World did not suggest that, if clause 32 of the Award could be read in conjunction with the Agreements, that the Agreements did not contain a consultation term which satisfied the requirements in s 205(1) and (1A) of the Act. Clause 32 of the Award complies in all respects with s 205(1) and (1A) of the Act. The consequence is that the model consultation term is not taken to be a term of the Agreements by operation of s 205(2).

[104] The MUA is entitled to succeed with respect to Ground 2. The appropriate relief in those circumstances is to allow the appeals and to vary the decisions of the Commissioner under s 607(3)(a) of the Act to remove the notation to the effect that the model consultation term is taken to be a term of the Agreements.

Conclusion

[105] Given our conclusion with respect to ground 2 of the appeals, it is unnecessary for us to address the consequences of the model consultation term being taken to be a term of the Agreements or deal with programming the MUA's foreshadowed application to vary the Agreements under s 217 of the Act.

[106] For the reasons set out above, we order that:

(a) Permission to appeal is granted;

(b) The appeals in Matter Numbers C2024/2831, C2024/2832, C2024/2834 and C2024/3835 are allowed; and

(c) The decisions of Commissioner Matheson in [2024] FWCA 1358, [2024] FWCA 1360, [2024] FWCA 1356 and [2024] FWCA 1354 given on 16 April 2024 are varied so as to delete the following notation in paragraph [5] of each decision:

> *Pursuant to s.205(2) of the Act, the model consultation term prescribed by the Fair Work Regulations 2009 (Cth) (Regulations) is taken to be a term of the Agreement.*

[107] An order reflecting paragraph [106] above will issue concurrently with this decision.

VICE PRESIDENT

Appearances:

P Boncardo, counsel, for the Appellant, instructed by *L Edmonds*, Legal Officer, Maritime Union of Australia
A Pollock, counsel, for the Respondents, instructed by *KM O'Brien,* solicitor, MinterEllison

Hearing details:

2024.
Sydney (in person):
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[1] *Fair Work Act* 2009 (Cth), s 607(2).

[2] *Teekay Shipping (Australia) Pty Ltd v Auld* [2020] FCAFC 206, 281 FCR 174 at [80] (Rares and Logan JJ) (*Teekay Shipping*).

[3] *Teekay Shipping* at [77]-[79] (Rares and Logan JJ) and [145] (Wigney J).

[4] See, for example, *Auld v Teekay Shipping (Australia) Pty Ltd* [2019] FWCFB 6047, 289 IR 136 at [79]; *Airservices Australia v Crouch* [2023] FWCFB 21 at [18].

[5] *Fair Work Act* 2009 (Cth), s 604(1).

[6] See also *Maritime Union of Australia v MMA Offshore Logistics Pty Ltd (t/as MMA Offshore Logistics)* [2017] FWCFB 660, 263 IR 81 at [64], [74] and [83] and *McGuire v Sandfire Resources NL* [2020] FWCFB 6492 at [24] and, more generally, *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438 (Latham CJ, Williams and Fullagar JJ) and *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8.

[7] *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23, 241 CLR 252 at [11]-[15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3, 264 CLR 421 at [90] (Nettle and Gordon JJ).

[8] *Plaintiff M61/2010E v Commonwealth* [2010] HCA 41, 243 CLR 319 at [75]-[77] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

[9] See, for example, *Construction, Forestry, Mining and Energy Union v Collinsville Coal Operations* [2014] FWCFB 7940, 246 IR 21 at [69]; *Construction, Forestry, Mining and Energy Union v MGI Piling (NSW) Pty Ltd* [2016] FWCFB 2654, 260 IR 244 at [31].

[10] *Workplace Relations Act* 1996 (Cth), s 43(2).

[11] *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57, 204 CLR 82 at [59] (Gaudron and Gummow JJ).

[12] *Kioa v West* (1985) 159 CLR 550 at 627 (Brennan J); *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40, 256 CLR 326 at [52]-[55] (Gagelar and Gordon JJ).

[13] *Fair Work Act* 2009 (Cth), s 171(b)(iii).

[14] Relying on *United Firefighters' Union of Australia v Country Fire Authority* [2015] FCAFC 1, 228 FCR 497 at [241].

[15] See approach in *Teekay Shipping* at [110] (Wigney J).

[16] Ibid at [63] (Rares and Logan JJ) and [112] (Wigney J).

[17] Ibid at [57] (Rares and Logan JJ) and [107] (Wigney J).

[18] *Auld and Ors v Teekay Shipping (Australia) Pty Ltd* [2019] FWCFB 6047, 289 IR 136 at [85]; *AMWU v The Trustee For Regal Cream Products Trust T/A Bulla Dairy Foods* [2022] FWC 2146 at [9]; *Airservices Australia v Crouch* [2023] FWCFB 21 at [19]; *UWU v Flavour Makers Pty Ltd T/A Flavour Makers Pty Ltd* [2023] FWC 2662 at [19]; *CEPU v Acciona Construction Australia Pty Ltd* [2023] FWCFB 219 at [15]; *Application by Ballestrin Construction Services Pty Ltd* [2024] FWCA 1220 at [25]-[27].

[19] *Maribyrnong City Council v Australian Municipal, Administrative Clerical, and Services Union* [2019] FCA 773, 369 ALR 704 at [4].

[20] Ibid at [44].

[21] Ibid at [46]-[47].

[22] Ibid at [53].

[23] *Maribyrnong City Council* at [43].

[24] *Fair Work Act* 2009 (Cth), ss 52(1) and 57(1).

[25] *Re Consultation clause in modern awards* [2013] FWCFB 10165, 238 IR 282 at [34]-[35].

[26] *Teekay Shipping* at [118] (Wigney J).

[27] *Teekay Shipping* at [52]-[54] (Rares and Logan JJ).

[28] *Teekay Shipping* at [51]-[55] (Rares and Logan JJ) and [119]-[122] (Wigney J).