DECISION

Fair Work Act 2009
s.604—Appeal of decision

Mining and Energy Union
v
EnergyAustralia Yallourn Pty Ltd
(C2023/8160)

JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT ASBURY
DEPUTY PRESIDENT BELL
DEPUTY PRESIDENT HAMPTON

SYDNEY, 14 AUGUST 2024

Appeal against decision [2023] FWC 2705 of Commissioner Mirabella at Melbourne on 22 December 2023 in matter number C2023/3998.

[1] The Mining and Energy Union (MEU) has appealed against a decision of Commissioner Mirabella issued on 22 December 2023[1] pursuant to s 604 of the *Fair Work Act 2009* (Cth) (FW Act). It is not in dispute that permission is required for the appeal. The decision the subject of the appeal concerned a dispute which came before the Commission pursuant to the dispute resolution procedure in clause 29 of the *EnergyAustralia Yallourn Enterprise Agreement 2020*[2] (Agreement), which authorises the Commission to arbitrate disputes concerning the application or interpretation of the Agreement if they could not be resolved through conciliation. It was not in dispute, and the Commissioner accepted on the basis of the Full Bench decision in *CFMMEU v Falcon Mining Pty Ltd*,[3] that the Commission retained under s 739(4) of the FW Act the power to arbitrate the dispute notwithstanding that the Agreement ceased to have effect on 16 August 2023, some time after the matter was programmed for arbitration.

[2] The subject matter of the dispute was the practice of the employer to which the Agreement applied, EnergyAustralia Yallourn Pty Ltd (Energy Australia), not to make superannuation contributions in respect of earnings for periods during which certain employees took time off in lieu of overtime (TOIL). The employees in question (relevant employees) were those who were '2 x 12' Operations shift workers and were members of the Equipsuper Superannuation Fund Division D. The MEU contended that this practice was inconsistent with Energy Australia's superannuation contribution obligation under clause 9.5.3 of the Agreement, which provides:

> **9.5.3 DIVISION D ONLY MEMBERS**
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> From 1st January 2014 Employees whom are members of ***Equipsuper*** Superannuation Fund Division D, but not Division B or Division C, the Company shall make contributions to the Employee's superannuation account equal to twelve percent (12%) of their superannuation salary or two percent more than the Federal Government Superannuation Guarantee, whichever is the greater.

[3] The MEU and Energy Australia agreed that the dispute should be arbitrated by the Commissioner answering the question: 'Is the company's existing practice consistent with the correct application of clause 9.5.3 of the Agreement?' As recorded in paragraph [34] of the Commissioner's decision, the parties agreed and the Commissioner accepted that the expression 'superannuation salary' in clause 9.5.3 was to be construed in accordance with the definition of 'ordinary time earnings' (OTE) in s 6 of the *Superannuation Guarantee (Administration) Act 1992* (Cth) (SGA Act), notwithstanding that 'superannuation salary' was the subject of a definition in clause 9.3 of the Agreement. The Commissioner determined that payments to employees in respect of TOIL were not OTE as defined in the SGA Act and, on that basis, gave the answer 'Yes' to the question she was asked to decide.

[4] The MEU contends in its appeal that the Commission gave the incorrect answer to the question. Its grounds of appeal are:

1. The Commission's decision was predicated on an incorrect interpretation of clauses 12.3 and 10.3.4 of the Agreement.

2. The Commission's decision is inconsistent with the Full Court of the Federal Court of Australia's decision in *Bluescope Steel (AIS) Pty Ltd v Australian Workers' Union*[4] (*Bluescope*).

[5] The appeal was initially listed for hearing before us on 15 March 2024. In its written and oral appeal submissions, the MEU contended that the Commissioner erred in determining that TOIL payments were not OTE within the meaning of the definition in s 6 of the SGA Act. However, the MEU also submitted in its written submissions:

> … it is arguable that, contrary to that approach, on its proper construction, clause 9.5.3 requires 'superannuation salary' (and not 'ordinary time earnings' as defined in the SGA Act) to be used as the relevant denominator for each of the alternatives…

[6] In oral submissions, counsel for the MEU, in response to various questions from members of the Bench, said:

> I accept that there's a great deal of force in the reading that what 9.5.3 establishes is 12 per cent, and when the federal rate exceeds 10 per cent it will become 12.5 per cent and then 13 per cent measured in relation to the same underlying amount which is superannuation salary.[5]

[7] In light of these submissions, and given that we must ultimately determine whether the correct construction of the Agreement was reached, we determined that the proper course was to allow the MEU an opportunity to develop this alternative case by filing further written submissions and then for Energy Australia to file further submissions in reply. The hearing was adjourned on this basis. The MEU filed its further submissions on 29 March 2024 and Energy Australia on 15 April 2024. In its submissions, Energy Australia contended, among other things, that:

- The MEU should not be permitted to introduce a new argument on appeal, noting that it had offered no explanation for its change of position.

- In the alternative, if the MEU were permitted to change its position and, in doing so, fundamentally change the character of the dispute, then the matter should be remitted first for conciliation and then (if no agreement is reached) for a hearing where the parties would have the opportunity to lead evidence to support their competing constructions.

[8] Having received these submissions, we invited the parties to provide their views about whether the appeal could now be determined 'on the papers' or whether a further hearing was required. Both parties were amenable to the former course, but Energy Australia opposed the MEU's request to be able to file submissions in reply. On 26 April 2024, we caused the following communication to be sent to the parties:

> The Full Bench has considered the submissions filed by both parties in the above matter since the hearing on 15 March 2024. The Full Bench has determined to grant leave to the appellant to rely on their most recent submissions provided on 29 March 2024 for the purposes of the appeal. Reasons for this determination will be provided in the final decision issued in this matter.

[9] On 2 May 2024 we issued the directions requiring Energy Australia to file an outline of submissions and any evidence upon which it sought to rely by 23 May 2024, with the MEU to file any submissions and evidence in reply by 13 June 2024. These dates were later extended, with Energy Australia filing its evidence and submissions by 28 May 2024 and the MEU on 18 June 2024. A further directions hearing was conducted on 1 July 2024 at which the parties agreed that we should determine the appeal on the basis of the materials filed without a further hearing.

[10] For the reasons which follow, we have decided to grant permission to appeal, uphold the appeal, and substitute the answer 'No' for the answer given by the Commissioner to the question posed for determination.

Relevant provisions of the Agreement

[11] Clause 2 of the Agreement relevantly provides that it applies to employees of Energy Australia employed to work in any of the classifications in Appendix 1. Clause 8.1 requires employees to be paid in accordance with Appendix 1, which sets out in tabular form two discrete classification and pay structures. The first is concerned with Maintenance employees, and the pay rates set out (with increases operative from specified dates) for each classification are described as 'Base Rate of Pay $ per week'. The second is for Operations employees, which is the MEU's area of interest. For each classification, there are two hourly rates of pay specified (with, again, increases operative from specified dates): the 'Base Rate of Pay' and the 'Normal Rate of Pay'. These terms are defined in clause 1 of the Agreement as follows:

> **Base Rate of Pay:** means an employee's base salary, which does not include any applicable Shift Allowance, Yallourn Allowance, Weekend Penalty, or other loadings, allowances or penalty payments;
>
> **Normal Rate of Pay:** means an employee's rate of pay including the following elements (as defined in clause 8.12) – Base Rate of Pay, Yallourn Allowance, plus any applicable Shift Allowance, Weekend Penalty and Availability Allowance normally received.

[12] Appendix 1 also sets out the quantum of various allowances, including the 'Yallourn Allowance' (a flat rate hourly site allowance: clause 8.14) and shift allowance.

[13] Clause 8.3 provides that employees are to be paid fortnightly and, importantly, also provides:

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

[14] We have already set out clause 9.5.3 of the Agreement, which contains the superannuation contribution requirement which is the subject of the dispute between the parties. Clause 9 as a whole, in which clause 9.5.3 is located, deals with the subject matter of superannuation generally. The introduction to clause 9 identifies the Equipsuper Superannuation Fund (ESF) as the default fund for employees covered by the Agreement and requires Energy Australia to abide by the rules of the ESF provided that the superannuation terms of the Agreement prevail to the extent of any inconsistency. It also provides that the provisions of the Agreement are not intended to reduce or remove any benefit provided by the ESF rules.

[15] Clause 9.1 deals with 'Membership Options', and provides that employees in Division B of the ESF may opt to transfer to Division C, and Divisions B or C members may opt to transfer to Division D. Divisions B and C are defined benefits schemes and Division D is an accumulation scheme.[6] Clause 9.2 deals with salary sacrificing. Clause 9.3 provides:

> The Fund Salary (or superannuation salary) of Employees for superannuation benefit purposes shall be equal to their salary shown in Appendix 1 plus normally received shift allowance and weekend penalties.
>
> Except where payments are in relation to overtime, and provided an Employee is in regular receipt of such payment, the Yallourn Allowance, Shift Allowance, and Weekend Penalties shall be included as part of the salary used to calculate:
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> (a) Superannuation Fund Salary; and
> (b) Final Average Salary; and
> (c) the Company's Superannuation Guarantee (Administration) Act obligation.

[16] Clause 9.4 concerns the calculation of 'Final Average Salary' (FAS) for Division B and C members, and provides:

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

[17] Clause 9.5, which included clause 9.5.3, is entitled 'Accrual Rates'. Clauses 9.5.1 and 9.5.2 deal with the calculation of benefits for Division B and C members respectively and, as

earlier set out, clause 9.5.3 is concerned with contributions for Division D members. Clause 9.6 concerns the provision to employees of details of superannuation contributions made in their name. Finally, clause 9.7, entitled 'Maintenance of FAS', provides:

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

[18] As earlier stated, the dispute the subject of the Commissioner's decision concerned employees rostered to work '2 x 12' shifts. Clause 10.3.1 provides that the ordinary hours of work for shift workers generally are 36 hours per week averaged across the roster cycle. Clause 10.3.4 specifically concerns '2 x 12' shift workers and relevantly provides:

> **10.3.4 2x12 SHIFT**
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> An Employee rostered to 2x12 shift shall be paid weekend penalties of 21% of their Base Rate of Pay shown in appendix 1, plus the shift allowance shown in Appendix 1, on a continuous basis including when the Employee is absent on paid leave. The 2x12 shift roster cycle shall be either ten days and consist of two 12-hour nightshifts followed by one rostered day off followed by two 12-hour dayshifts, followed by five rostered days off (RDOs) or ten days and consist of two 12-hour day shifts followed by one day off followed by two 12-hour night shifts followed by six days off as agreed between the Parties.
>
> In addition to the roster cycle, two additional day shifts (known as RDs) shall be rostered in each ten week period.
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> . . .

[19] Such shift workers, like all employees under the Agreement who work on Energy Australia's site at Yallourn, are entitled under clause 8.14 to the Yallourn Allowance. The Normal Rates of Pay specified in Appendix 1 for Operations employees are, mathematically, the sum of the Base Rate of Pay, the 21 per cent loading for weekend penalties, and the shift and Yallourn allowances calculated as hourly amounts.[7]

[20] Clause 10.3.6 contains pay grandparenting provisions applicable to shift workers, (which would include '2 x 12' shift workers) who are moved onto day work:

> **10.3.6 DIRECTED OFF SHIFT WORK**
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> Where an Employee is directed off shift work by the Company, the following shall apply:
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> (a) The Employee's shift payments (shift allowance and weekend penalties) will be sustained for ten years from the date of moving off shift or until the date of leaving the Company, whichever is sooner.
> (b) Shift allowance and weekend penalties will be frozen at the point of coming off shift.
> (c) Three months' notice is to be given to persons moving off shift onto day work.
> (d) No annual leave loading is payable because of shift change compensation arrangements.
> (e) The Employee's superannuation salary shall not reduce even after the ten year period of sustained shift payments.
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> (underlining added)

[21] Clause 12 of the Agreement concerns overtime work. Clause 12.1 specifies the penalty rate for overtime work, namely double the employee's 'Base Rate of Pay' (except on public holidays, when the rate is double time-and a-half) plus 'the applicable daily proportion of the Yallourn Allowance at single time'. In respect of '2 x 12' shift workers, clause 12.1 provides:

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

[22] Clause 12.2 provides that an employee may be required to work reasonable overtime at overtime rates, subject to a right to refuse working hours that are unreasonable having regard to a number of specified factors. Clause 12.3 concerns TOIL or 'DILs' (days in lieu) and relevantly provides:

> **12.3 TIME OFF IN LIEU OF OVERTIME (DILs)**
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> Where overtime is worked and payment is due in the terms of this clause, time off in lieu may be granted on the following basis:
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> One day off in lieu may be substituted for a portion of the payment due with the balance of the payment being made in money where:
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> (a) at least a full shift of overtime is worked on a rostered day off by a shift work Employee, or where a shift work Employee works a double shift in the absence of the incoming shift relief.
> (b) Where a maintenance worker on arranged overtime or overtime continuous with normal hours and a minimum of 4 hrs has been worked the Employee shall have the option to be paid the actual hours worked at single time and 'bank' the equivalent time in off in lieu.
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> . . .
>
> In the event that an Employee's employment ends after they have been granted a request to take time off in lieu of overtime (DILs) pursuant to this clause 12.3, but before some or all of the time off is taken, the balance of the overtime entitlement that was to be taken as time off in lieu will be paid out at the Base Rate of Pay.

The decision under appeal

[23] As earlier noted, the Commissioner's consideration of the question posed to her for determination proceeded on the premise, agreed between the parties at first instance, that the reference to 'superannuation salary' in clause 9.5.3 was to be construed in accordance with the definition of OTE in s 6 of the SGA Act. The Commissioner said in this respect:

> [36] As the parties have agreed that the OTE is the remuneration amount to be used in calculating superannuation entitlements, and the dispute relates to whether TOIL that is taken in partial substitution of an overtime payment should be included in the calculation of the relevant employees' superannuation entitlements, I need to determine whether TOIL accrued because overtime was worked pursuant to clause 12.3 is part of OTE.[8]

[24] The Commissioner considered that the logical approach was to first determine whether earnings are in respect of the employee's ordinary hours of work before they can be included

in the calculation of superannuation salary because not all salary can be used in the calculation of superannuation.[9] The Commissioner reasoned as follows:

> [42] Overtime provisions are contained within clause 12 of the Agreement which is titled 'Overtime'. Clause 12.3 allows an employee to convert part of an overtime payment to TOIL. It is not in dispute that had a relevant employee not worked overtime, there would be no ability to take off time under clause 12.3. The payment made to employees when taking TOIL is a result of the employee having earned overtime earnings and I do not agree with the union's submission that the payment made to relevant employees when taking TOIL is a payment that arises under clause 10.3.4.
> . . .
> [44] The words of clause 12.3 refer to TOIL as a substitution for a portion of overtime earnings. Part of the value of the overtime payment is substituted or converted to TOIL. That is, the portion of the overtime payment converted to TOIL is effectively the reconstitution of the overtime earnings.
> . . .
> [46] I accept the company's submission that it is a sensible industrial outcome to have consistent treatment of all overtime benefits. It is not controversial that overtime payments are exempt from superannuation. It would be illogical to convert part of the overtime benefit to an amount that is subject to superannuation because an employee has elected to convert part of the benefit to a paid leave entitlement in the form of TOIL. That is, there is a distinction between OTE and overtime earnings. It does not logically follow that the TOIL, which results from a conversion of part of overtime earnings, then morphs into OTE.
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> [47] Where a relevant employee works overtime and payment is due, including as per clause 12.3, the benefit obtained by the relevant employee, whether taken in cash or taken as TOIL or as some other type of benefit, is referable to the overtime worked. Whatever the benefit is called and however it is structured, it is because the overtime has been worked.
> . . .
> [49] As such, the benefits, including the TOIL, are not OTE and ought not be included in the calculation of the relevant employees' superannuation salaries.

Submissions

[25] The MEU's case, as ultimately advanced, is that:

- clause 9.5.3 obliges the employer to make superannuation contributions in respect of the Division D employees which are calculated by reference to the two limbs set out in the clause;
- properly understood, each of the two limbs in clause 9.5.3, identifies a percentage rate for the calculation of the contributions;
- once the higher percentage rate is identified, that rate is applied to the amount which is equal to the employee's 'superannuation salary';
- 'superannuation salary' is defined in clause 9.3 of the Agreement;
- the Agreement does not circumscribe the term 'superannuation salary' by reference to the definition of 'ordinary time earnings' in s 6 of the SGA Act;
- payments for TOIL or DILs are payments of, or equal to, superannuation salary, being the salary in Appendix 1, in respect of which superannuation contributions are required to be made; and
- accordingly, the correct answer to the decision posed for determination is 'No'.

[26] The MEU submitted that clause 9.5.3 is to be construed on the basis that it identifies two alternative 'numerators' — being the higher of 12 per cent or two per cent more than the percentage rate for the superannuation guarantee provided for by the SGA Act — that is to be applied to a single 'denominator', namely the 'superannuation salary' as defined in clause 9.3. It submitted that the definition in clause 9.3 is to be applied according to its terms, not by reference to the definition of OTE in the SGA Act, and that definition does not exclude payments made to employees when they take TOIL. The MEU submitted that:

- when an employee performs overtime, they are prima facie entitled, pursuant to clause 12.1, to remuneration at double the Base Rate of Pay, plus the Yallourn Allowance;
- where the employee takes a DIL, instead of simply receiving payment for their overtime at the loaded rate, clause 12.3 provides that they may substitute the DIL for a portion of the payment, with the balance payable in money;
- clause 12.3 does not itself make provision for the quantum of payment but rather proceeds on the assumption that the employee is paid for TOIL at the rate that would usually apply on the shift that they take off, that is, the Normal Rate of Pay specified in Appendix 1, with the balance of the value of the overtime paid out to the employee;
- the provisions effectively treat the overtime hours worked as discharging the employee's obligation to work their normal ordinary hours shift in the manner of an accrued day off, and leaves the payment provisions of the Agreement to operate in the normal fashion; and
- the amount payable in respect of such a shift is payable pursuant to clause 8.1 and Appendix 1, and is therefore 'superannuation salary' within the meaning of clause 9.3.

[27] Energy Australia's primary submission is that the MEU should not be permitted to raise a new argument in the appeal, representing the reversal of the position it took at first instance. It submitted that the MEU's change of approach in the appeal, which has not been explained at all let alone demonstrated to be attended by the requisite exceptional circumstances, has fundamentally changed the nature of the dispute — a matter of significance in a private arbitration in which the Commission is only empowered by the dispute resolution procedure in clause 29 of the Agreement to deal with 'matters that are in dispute'. In this respect, Energy Australia referred to the originating application lodged by the MEU, which expressly referred to its position being predicated on the proposition that on 'the correct construction of the Agreement "superannuation salary" equates to Ordinary Time Earnings'. It submitted that the MEU should not be allowed to change its position, and that we should either refuse permission to appeal or, alternatively, remit the matter so that the reformulated dispute may be the subject of conciliation and, if not resolved, a new hearing.

[28] As to the MEU's constructional argument advanced in the appeal, Energy Australia submitted that:

(1) The better construction of clause 9.5.3 of the Agreement is that 'superannuation salary' is to be read consistently with OTE in the SGA Act and payments in lieu of overtime under clause 12.3 are not part of OTE.

(2) Alternatively, even on the MEU's construction of 'superannuation salary', payments in lieu of overtime under clause 12.3 of the Agreement are excluded from the definition.

[29] As to the first of the above propositions, Energy Australia submitted that clauses 9.3 and 9.5.3 should be construed by reference to the statutory context of the SGA Act, which establishes a scheme of obligations applicable to superannuation contributions which cannot be contracted out of via enterprise agreements or other means. Clause 9.3 describes a scheme consistent or 'conterminous' with the SGA Act whereby employees receive superannuation contributions on base pay for their ordinary hours of work plus additional amounts payable provided these do not relate to overtime. It was submitted that although clause 9.3 does not deal with all payments to be made under the Agreement which would be OTE under the SGA Act, it ought to be read as 'essentially summarising, or attempting to clarify for the reader, the operation of the SGA Act' — a construction consistent with the listing of 'Superannuation Fund Salary', 'Final Average Salary' and 'the Company's Superannuation Guarantee (Administration) Act obligation' in clause 9.3 together and as comprising the same components. The MEU's argument that the reference to the 'Federal Government Superannuation Guarantee' in clause 9.5.3 ought to be read as referring merely to a percentage rate should be rejected since, if this was the intent, it would have been straightforward for the drafters to refer to 'the percentage rate prescribed by the SGA Act' or words to that effect. It was submitted that the plain meaning of 'Federal Government Superannuation Guarantee' is to refer to the entitlements of the statutory scheme as a whole, and no difficulty arises providing the legislative scheme and 'superannuation salary' are construed synonymously. However, if 'superannuation salary' in clause 9.5.3 is given a different meaning from OTE in the SGA Act, Energy Australia submitted that it would be required to maintain two sets of calculations, which was unlikely to have been intended.

[30] In relation to its alternative submission, Energy Australia submitted that the entitlement under the Agreement to payments associated with overtime, including the ability to take TOIL, derives from clause 12. The words 'one day off in lieu' in clause 12.3 create an entitlement to be paid for not working, with the balance of the entitlement under clause 12.1 also to be paid out. As such, the entitlement is referable to clause 12.3 and the fact the employee has worked overtime. It was submitted, contrary to the MEU's submission, that the payment is not referable to clause 8.1 and Appendix 1 (that is, an employee's entitlement for performing their ordinary hours of work). Rather, all payments for overtime under clause 12, however they are structured, are referable to that clause (not Appendix 1) and the fact that an employee has worked overtime. Accordingly, they do not form part of an employee's superannuation salary.

[31] Energy Australia relied in the appeal upon a witness statement made by Evan Henley, who is employed by the EnergyAustralia group as its Workplace Relations, People Risk & Compliance Leader, dated 28 May 2024. Mr Henley's statement was relied upon to provide historical context which Energy Australia relied upon to support its primary construction of the Agreement. This statement referenced and annexed documents relevant to bargaining for two predecessor agreements, the *EnergyAustralia Yallourn Enterprise Agreement 2013* (2013 agreement) and the *EnergyAustralia Yallourn Enterprise Agreement 2017* (2017 agreement), and also annexed these agreements and some earlier agreements. It was submitted that this material demonstrated that the parties had intended at all stages that the amount of

superannuation contributions prescribed by the agreements be paid by reference to OTE as defined in the SGA Act.

Consideration

[32] Notwithstanding that the argument concerning the construction of clauses 9.3 and 9.5.3 of the Agreement which the MEU now seeks to advance in the appeal was not raised before the Commissioner, we have determined that leave should be granted to allow the MEU to proceed on this basis, for three reasons. *First*, the argument has substantial merit. *Second*, in respect of the arbitration of a dispute under s 739(4) of the FW Act, s 739(5) relevantly requires that a decision not be made that is inconsistent with the relevant instrument. Therefore, if there is a strongly arguable case that the Commissioner has made a decision inconsistent with the proper construction of the Agreement, as we think there is, that case should be the subject of appellate consideration. *Third*, to the extent that Energy Australia was denied the opportunity to adduce evidence at first instance that might have answered the case that the MEU now advances in the appeal, we have remedied this by providing Energy Australia with the opportunity to adduce this evidence in the appeal — an opportunity it has taken advantage of. For the same reasons, we consider that permission to appeal should be granted.

[33] Turning directly to the superannuation provisions of the Agreement, we accept the MEU's submission that clause 9.5.3 identifies the 'numerator' of superannuation contributions to be applied to a common 'denominator' of salary. The numerator is a percentage figure, being the greater of 12 per cent or two per cent more than 'the Federal Government Superannuation Guarantee'. While the former amount is expressed as a percentage of the employee's 'superannuation salary' but the latter is not, we do not consider that any difference in the denominator was intended. Were the reference to 'the Federal Government Superannuation Guarantee' to be read as identifying a different salary denominator as well as an alternative numerator, that would mean that clause 9.5.3 would potentially require a dual calculation to be made. This would be impractical, contrary to business efficacy and unlikely to have been intended. A straightforward and practical reading of clause 9.5.3 is that it requires Energy Australia to make superannuation contributions of the greater of 12 per cent, or two per cent more than the percentage amount of the Federal Government Superannuation Guarantee (as prescribed by s 19 of the SGA Act), of the employee's superannuation salary. We do not understand Energy Australia to dispute this construction of clause 9.5.3.

[34] The key issue in contention is the proper construction of clause 9.3, which supplies the definition of the 'denominator' for clause 9.5.3, and its application to remuneration paid for any DIL taken by a relevant employee. As earlier stated, Energy Australia maintains the position adopted by both parties below that the definition of 'superannuation salary' in clause 9.3 is to be construed as incorporating, or aligning with, the definition of OTE in s 6 of the SGA Act. We do not consider that either the text, or the context, of clause 9.3 supports that position. Textually, the clause plainly establishes a bespoke definition of 'superannuation salary' (or the interchangeable term 'fund salary') which operates by reference to the specific remuneration entitlements for which the Agreement provides. These include the 'salary shown in Appendix 1', 'Yallourn Allowance', 'Shift Allowance' and 'Weekend Penalties'. The definition therefore operates entirely by internal reference to the terms of the Agreement itself. It does not reference s 6 of the SGA nor does it use terminology reflective of that statutory provision.

[35] This position is confirmed once the wider context of the superannuation provisions is considered. Clause 9, taken as a whole, is drafted in a way which is intended to integrate the superannuation-related provisions of the Agreement with the rules of the ESF. Thus:

- the introduction to the clause requires compliance with the rules of the ESF, makes it clear that the Agreement is not intended to reduce or remove benefits provided by the ESF rules, and continues the ESF as the default fund;
- clause 9.1 describes the membership options under the ESF;
- clause 9.2, although it does not expressly reference the ESF in respect of salary sacrificing, does so indirectly when it refers to the 'Fund Division';
- clause 9.4 identifies the calculation of FAS for members of Divisions B and C of the ESF;
- clause 9.5 prescribes the 'Accrual Rates' for each of Divisions B, C and D of the ESF; and
- clause 9.7 is concerned with maintenance of FAS when an employee changes shift patterns or moves to day work.

[36] In this context, paragraphs (a), (b) and (c) of clause 9.3 are significant. They identify that the second sentence of the clause, which refers to a number of additional entitlements under the Agreement for the purpose of the definition in the clause, applies for multiple purposes under the Agreement. The first is that it is used to calculate 'Superannuation Fund Salary'. This term is not used elsewhere in the Agreement, but the best inference is that it refers to the 'denominator' for superannuation contribution obligations under the Agreement, which renders it referable to clause 9.5.3. The second purpose is that it is used to calculate FAS for the members of the defined benefits schemes, being Divisions B and C of the ESF. This harmonises with clause 9.4, which uses the terms 'superannuation salary' and 'Fund Salary' to prescribe the amount of FAS for Division B and C members. This is a purpose entirely separate from compliance with the superannuation guarantee legislation and relates directly to the benefits payable under the ESF. The third references Energy Australia's 'obligation' under the SGA Act. These disparate purposes make it unsustainable to read the provision as if it were simply a reference to the OTE definition in the SGA Act. Paragraph (c) of clause 9.3 may be taken as an indication that those who made the Agreement believed that the use of the 'superannuation salary' definition would result in satisfaction of Energy Australia's SGA Act obligation, but it does not follow that it is indicative of an intention that clause 9.3 have precisely the same meaning as the OTE definition in the SGA Act.

[37] Finally, returning to clause 9.5.3, two matters may be noted. The first is that the provision establishes a direct obligation on Energy Australia to make superannuation contributions on behalf of the relevant employees. Such an obligation did not separately exist at the time of the making of the Agreement, since the SGA Act only imposes a taxation liability on employers who do not make the prescribed superannuation contributions.[10] The second is that the prescribed contribution rate is intended always to be higher than the rate in the SGA Act. Both these matters confirm, contextually, that clause 9, including the definition of 'superannuation salary' in clause 9.3, operates differently from and independently to the scheme in the SGA Act.

[38] We do not accept Energy Australia's submission that an interpretation of clause 9.3 which might require it to undertake a 'double calculation' of superannuation contributions

under clause 9.5.3 of the Agreement and under the SGA Act respectively results in an impractical outcome unlikely to have been intended. As earlier stated, the multiple purposes of the 'superannuation salary' definition are indicative of an intention on the part of the makers of the Agreement that the application of the definition would result in satisfaction of the SGA Act obligation as well as operating harmoniously with the other provisions of the Agreement and the rules of the ESF. Such a belief would be supported by the fact that clause 9.5.3 prescribes a permanently higher contribution rate than the SGA Act, meaning that the SGA Act obligation would likely be met even if there was not perfect alignment between the 'superannuation salary' definition in clause 9.5.3 and the OTE definition in the SGA Act.

[39] The historical context described in Mr Henley's witness statement and the annexed document does not contain anything which might operate to displace the meaning to be discerned from the text of clause 9.3 and the context provided by the terms of the Agreement. That material makes it clear that the 'superannuation salary' definition in clause 9.3 of the Agreement, and the terms of the contribution requirement in clause 9.5.3 of the Agreement, originated in the 2013 agreement and continued into the 2017 agreement. However, no extrinsic evidence of any relevant common intention concerning the meaning of these provisions is apparent in the material.

[40] Clause 9.3 is therefore to be applied according to its terms and not by reference to the statutory OTE definition. The first sentence of the clause identifies three elements of 'superannuation salary': (1) 'salary shown in Appendix 1'; (2) 'normally received' shift allowance; and (3) 'normally received' weekend penalties. For Operations employees, the first element carries with it some difficulty because Appendix 1 prescribes two rates of salary, the Base Rate of Pay and the Normal Rate of Pay. However, because the second and third elements are separately identified in clause 9.3 but are rolled into the Normal Rate of Pay in Appendix 1, the better view must be that the first element refers to the Base Rate of Pay.

[41] The second sentence adds the qualification '[e]xcept in relation to overtime' in respect of the second element of shift allowance and the third element of weekend penalties, and also applies the qualification to a fourth element, namely the Yallourn Allowance. It is significant however that the qualification does not apply to the first element of the 'salary shown in Appendix 1', which we consider refers to the Base Rate of Pay. That means that, on any view, the Base Rate of Pay is always included in the 'superannuation salary' regardless of whether it is capable of being characterised as 'in relation to overtime'.

[42] In the case of '2 x 12' shift workers taking a DIL, the Yallourn Allowance, the shift allowance and weekend penalties are included in the Normal Rate of Pay which they receive for all ordinary hours worked. That satisfies the requirements in clause 9.3 that they be normally or regularly received by the employees. The remaining question is whether they are 'payments in relation to overtime' when paid to employees taking a DIL as part of the Normal Rate of Pay.

[43] Answering this question requires identification of Energy Australia's payment obligations in respect of ordinary time for '2 x 12' shift workers. This payment obligation consists of two elements: the first is the requirement in clause 10.3.1 that ordinary hours of work for shift workers are 36 per week, averaged across the roster cycle, and the second is that the combined effect of clauses 8.1, 8.14, 10.3.4 and Appendix 1 is that '2 x 12' shift workers are to be paid the Normal Rate of Pay specified in Appendix 1 for ordinary time. Thus, '2 x 12'

shift workers are entitled to a 'salary' per week for ordinary time calculated at the applicable Normal Rate of Pay for their classification multiplied by 36 (noting that the Agreement consistently uses the term 'salary' to describe wage payments to employees). Alternatively, the salary payment required per 12-hour ordinary-time shift is the applicable Normal Rate of Pay multiplied by 12. These payment obligations apply when an employee is on any form of paid leave (clause 8.3). The only circumstance identifiable in the Agreement when this does not apply is when an employee is stood down (clause 7) or is on approved leave without pay (as contemplated in a number of provisions including clauses 18.1 and 20.3).

[44] This analysis of Energy Australia's ordinary-time payment obligations provides the context for the proper characterisation of the taking of TOIL under the Agreement. As earlier stated, clause 12.1 provides that all overtime is paid at double the employee's Base Rate of Pay plus the Yallourn Allowance (except on public holidays, when a higher rate applies). The payment of this rate for overtime work might reasonably be characterised as being 'in relation to overtime'. However, as the second sentence of clause 12.3 provides, when TOIL (or a DIL) is taken, it is 'substituted for a portion of the [overtime] payment due'. That is, a day of absence or leave from rostered ordinary working hours is provided *instead of* payment of the requisite portion of the overtime due.

[45] It is not in dispute that when a '2 x 12' shift worker takes a DIL, which will involve the worker not being required to attend for work for a rostered 12-hour shift, they are to be paid for 12 hours at the Normal Rate of Pay. However, this payment obligation is not prescribed by clause 12.3. Clause 12.3 does not contain any payment obligation with respect to taking TOIL. The requirement to pay the Normal Rate of Pay for the length of the shift arises under clauses 8.1, 8.14, 10.3.4 and Appendix 1 as part of the normal obligation for payment for rostered ordinary hours or, alternatively, if TOIL is characterised as a form of paid leave, under clause 8.3. However it is viewed, it is a payment obligation which exists independently of the overtime provisions of clause 12, and subsists whether TOIL is taken or not. The Commissioner, in our view, was therefore in error in concluding that '[t]he payment made to employees when taking TOIL is a result of the employee having earned overtime earnings…'.[11]

[46] Accordingly, our conclusion is that no element of the Normal Rate of Pay, when paid to a '2 x 12' shift worker taking a DIL, falls within the exclusion in the second sentence of clause 9.3. The payment falls within the definition of 'superannuation salary' in clause 9.3, and Energy Australia is required to make superannuation contributions in respect of that payment under clause 9.5.3.

[47] We add that, even if clause 9.3 was to be read as incorporating or aligning with the OTE definition in the SGA Act, we doubt whether any different result would prevail. The definition in s 6 of the SGA Act provides:

> ***'ordinary time earnings'***, in relation to an employee, means:
> (a) the total of:
> (i) earnings in respect of ordinary hours of work other than earnings consisting of a lump sum payment of any of the following kinds made to the employee on the termination of his or her employment:
> (A) a payment in lieu of unused sick leave;
> (B) an unused annual leave payment, or unused long service leave payment, within the meaning of the *Income Tax Assessment Act 1997*; and

(ii) earnings consisting of over-award payments, shift-loading or commission; or

(b) if the total ascertained in accordance with paragraph (a) would be greater than the maximum contribution base for the quarter — the maximum contribution base.

[48] Section 6 of the SGA Act therefore distinguishes between *ordinary time earnings* and other earnings. In *Bluescope*, the Federal Court Full Court considered whether s 6 of the SGA Act applied to hours 'usually' worked or instead to hours based on an objective standard. The latter was held to be applicable.[12] In doing so, it is now clear that the identification of earnings in respect of *ordinary hours of work* for the purpose of s 6 of the SGA Act is ascertained by reference to the relevant industrial instrument or contract of employment, where they exist. As stated by Allsop CJ:

> [56] … The meaning that best reflects these considerations and the text, context, purpose and history of the provision is earnings in respects of ordinary or standard hours of work at ordinary rates of pay *as provided for in a relevant industrial instrument, or contract of employment*, but if such does not exist (and there is no distinction between ordinary or standard hours and other hours by reference to rates of pay) earnings in respect of the hours that the employee has agreed to work or, if different, the hours usually or ordinarily worked.
>
> (emphasis added)

[49] The proposition that clause 9.3 of the Agreement is to be interpreted consistently with the definition of ordinary time earnings in s 6 of the SGA Act — a position adopted by both parties[13] before the Commissioner — is, with respect, is apt to mislead as it inverts the correct reasoning process. The SGA Act applies on its own terms, according to the terms of the statute. As that statute applies to earnings in respect of ordinary or standard hours of work at ordinary rates of pay *as provided for in a relevant industrial instrument, or contract of employment*, it is necessary to consider the earnings established by the relevant industrial instrument.

[50] The 'earnings' in dispute before the Commissioner were the particular payments made to an employee when that employee took TOIL in accordance with cl 12.3 of the Agreement. By reason of our analysis in paragraphs [43]–[45] above, we would conclude that the payment made to a '2 x 12' shift worker in respect of a DIL constitutes 'earnings in respect of ordinary hours'. Clause 9.5.3 establishes a binding and enforceable[14] obligation on Energy Australia to make superannuation contributions with respect to those payments.

[51] In its initial written submissions, Energy Australia contended that the position advanced by the MEU displaces 'the fundamental principle of "no work, no pay"'[15]. We do not accept that proposition. First, it does not account for the substitution of legal obligations under cl 12.3 of the Agreement, where monetary obligations 'due' for overtime worked are 'substituted' with the discharge of a different obligation, namely the obligation by the employee to perform rostered ordinary time work to obtain ordinary time pay.

[52] Second, s 6 of the SGA Act 'is not a provision directed to compensating an individual for the time of his or her labour, or for loss sustained in not being able to work his or her normal hours; rather it is part of a regime implemented by legislation using the taxation power to encourage and facilitate national savings.'[16] Section 6 of the SGA Act simply directs attention to earnings and whether those earnings are 'in respect of ordinary hours of work'.

[53] The fact that the employee does not work but is absent on leave makes no difference to the characterisation of earnings in respect of ordinary hours, as *Superannuation Guarantee Ruling SGR 2009/2* makes clear:

> [32] … salary or wages that an employee receives, at or below his or her normal rate of pay for ordinary hours of work, in respect of periods of paid leave is simply a continuation of his or her ordinary time pay. It is OTE. It does not matter whether the entitlement to take the paid leave accrued gradually over time, arose in a specified circumstance or following a specified event, or was simply granted to the employee in the exercise of the employer's discretion.
>
> [33] Similarly, salary or wages received at the ordinary time rate in respect of public holidays, rostered days off and the like is OTE.[17]
>
> (underlining added)

[54] The reference to rostered days off (RDOs) is significant because, analogously to TOIL, RDOs are usually accrued on the basis that the day off substitutes for payment for working rostered hours that would otherwise constitute overtime. The above ruling was applied in *CFMEU v CSR Limited*[18] to determine that superannuation contributions are payable in respect of payment for RDOs accrued in this way. In addition to the example of RDOs, payment for a paid day off for rostered hours falling on a public holiday attracts superannuation, even though it is not worked (albeit perhaps not the earnings in respect of penalty rates on public holidays[19]).

[55] For the above reasons, we conclude that the Commissioner erred in answering 'Yes' to the question posed for determination. The correct answer is 'No'. The appeal is upheld.

Orders

[56] We order as follows:

(1) Permission to appeal is granted.

(2) The appeal is upheld.

(3) The decision of Commissioner Mirabella issued on 22 December 2023 ([2023] FWC 2705) is quashed.

(4) The dispute in matter C2023/3998 is determined as follows:

Q: Is the company's existing practice consistent with the correct application of clause 9.5.3 of the Agreement?

A: No.

PRESIDENT

Appearances:

L Doust, counsel, with *J Patrick* for the Mining and Energy Union.
W Spargo, solicitor, with *E Henley* for EnergyAustralia Yallourn Pty Ltd.

Hearing details:

2024.

Melbourne:
15 March.

Sydney by video link using Microsoft Teams (directions):
2 May, 1 July.

Final written submissions:

Mining and Energy Union: 29 March 2024, 18 June 2024.
EnergyAustralia Yallourn Pty Ltd: 15 April 2024, 28 May 2024.

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[1] [2023] FWC 2705.

[2] AE508007.

[3] [2022] FWCFB 93.

[4] [2019] FCAFC 84, 270 FCR 359, 288 IR 145.

[5] Transcript, 15 March 2024 PN 216.

[6] Witness statement of Evan Henley, 28 May 2024 [16], annexure EH-16.

[7] The 'Availability Allowance' provided for in clause 8.12, where applicable, is payable in addition to the Normal Rate (notwithstanding the definition in of 'Normal Rate' in clause 1), as the footnote to the table of rates for Operations employees in Appendix 1 discloses.

[8] [2023] FWC 2705.

[9] Ibid [40].

[10] *Bluescope* (n 4) [13] (Allsop CJ), [215]–[218] (Collier J). Such an obligation is now found in s 116B of the FW Act, introduced by the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023* (Cth).

[11] [2023] FWC 2705 [42].

[12] *Bluescope* (n 4) [56] (Allsop CJ), [356]–[358] (Rangiah J).

[13] As f`or the MEU, its Form F10 application states at [11]: 'the correct construction of the Agreement "superannuation salary" equates to Ordinary Time Earnings (OTE)'.

[14] *Bluescope* (n 4) [21].

[15] Energy Australia submissions, 23 February 2024, citing *Automatic Fire Sprinklers Pty Ltd v Watson* [1946] HCA 25, 72 CLR 435, 465.

[16] *Bluescope* (n 4) [37] (Allsop CJ).

[17] Commissioner of Taxation, *Superannuation Guarantee Ruling SGR 2009/2* (13 May 2009).

[18] [2012] FMCA 983 [41], [47]–[51].

[19] *Bluescope* (n 4) [106] (Allsop CJ).