



DECISION

Fair Work Act 2009

s.319 - Application for an order relating to instruments covering new employer and non-transferring employees

Adelaide Metro Operations Pty Ltd

(AG2020/1961)

RAIL COMMISSIONER TRAM OPERATIONS ENTERPRISE

AGREEMENT 2020

[AE508183]

COMMISSIONER HAMPTON

ADELAIDE, 17 JULY 2020

Application for an order relating to instruments covering new employer and non-transferring employees to be employed by Adelaide Metro Operations Pty Ltd.

[1] Adelaide Metro Operations Pty Ltd (Adelaide Metro Operations) has made an application pursuant to s.319(1)(b) of the *Fair Work Act 2009* (the Act) for an order that the *Rail Commissioner Tram Operations Enterprise Agreement 2020*¹ (the Agreement) covers it and any non-transferring employees who perform the work contained within the classification structure of the Agreement.

[2] The Agreement was approved by the Commission on 1 June 2020 and has a nominal expiry date of 30 June 2023.

[3] The background to the application is that Adelaide Metro Operations, as a sub-contractor; took over the running and maintenance of the Adelaide Tram operations on 5 July 2020, from The Rail Commissioner, being the employer originally covered by the Agreement. The Rail Commissioner is a statutory Authority of the South Australian Government.

[4] The application was subject to a telephone hearing on 16 July 2020. Mr D Langridge, Industrial Relations Manager of UGL Pty Ltd appeared with Ms S Evans on behalf of Adelaide Metro Operations. Mr D Phillips of The Australian Rail, Tram and Bus Industry Union, the relevant union covered by the Agreement, also appeared and confirmed that the Union did not oppose the application.

¹ AE508183.

The transfer of business

[5] Section 311 of the Act sets out the circumstances in which a transfer of business occurs. It states:

“S.311 When does a transfer of business occur

Meanings of transfer of business, old employer, new employer and transferring work

- (1) There is a transfer of business from an employer (the old employer) to another employer (the new employer) if the following requirements are satisfied:
 - (a) the employment of an employee of the old employer has terminated;
 - (b) within 3 months after the termination, the employee becomes employed by the new employer;
 - (c) the work (the transferring work) the employee performs for the new employer is the same, or substantially the same, as the work the employee performed for the old employer;
 - (d) there is a connection between the old employer and the new employer as described in any of subsections (3) to (6).”

[6] Section 312 of the Act also indicates that a “transferable instrument” includes “an enterprise agreement that has been approved by the FWC”.

[7] Section 313 of the Act provides that “If a transferable instrument covered the old employer and a transferring employee immediately before the termination of the transferring employee’s employment with the old employer”, then:

- “(a) the transferable instrument covers the new employer and the transferring employee in relation to the transferring work after the time (the *transfer time*) the transferring employee becomes employed by the new employer”.

[8] I am satisfied that there was a transfer of business and that the relevant employees of the Rail Commissioner transferred to Adelaide Metro Operations under the terms of the Act. I am also satisfied that the Agreement is a transferable instrument and that it now covers Adelaide Metro Operations and the transferring employees.

[9] Section 314 of the Act also provide for a transferable instrument to cover other employees in certain circumstances. It states:

“314 New non-transferring employees of new employer may be covered by transferable instrument

(1) If:

- (a) a transferable instrument covers the new employer because of paragraph 313(1)(a); and

- (b) after the transferable instrument starts to cover the new employer, the new employer employs a non-transferring employee; and
- (c) the non-transferring employee performs the transferring work; and
- (d) at the time the non-transferring employee is employed, no other enterprise agreement or modern award covers the new employer and the non-transferring employee in relation to that work;

then the transferable instrument covers the new employer and the non-transferring employee in relation to that work.

- (2) A non-transferring employee of a new employer, in relation to a transfer of business, is an employee of the new employer who is not a transferring employee.
- (3) This section has effect subject to any FWC order under subsection 319(1).”

[10] In this case, Adelaide Metro Operations contend that there is a modern award that would otherwise apply to the non-transferring employees; being the *Passenger Vehicle Transportation Award 2020* (the Award); however the Agreement overall provides greater minimum entitlements than the Award.

[11] As indicated above, the provisions contained in s.314 are subject to s.319 of the Act, which permits the Commission to make an Order that a transferring instrument covers non-transferring employees. This is the intended effect of the present application.

Consideration of the s.319 application

[12] Section 319 of the Act states:

“Orders that the FWC may make

- (1) The FWC may make the following orders:
 - (a) an order that a transferable instrument that would, or would be likely to, cover the new employer and a non-transferring employee because of subsection 314(1) does not, or will not, cover the non-transferring employee;
 - (b) an order that a transferable instrument that covers, or is likely to cover, the new employer, because of a provision of this Part, covers, or will cover, a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer;
 - (c) an order that an enterprise agreement or a modern award that covers the new employer does not, or will not, cover a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer.

Note: Orders may be made under paragraphs (1)(b) and (c) in relation to a non-transferring employee who performs, or is likely to perform, the

transferring work for the new employer, whether or not the non-transferring employee became employed by the new employer before or after the transferable instrument referred to in paragraph (1)(b) started to cover the new employer.

Who may apply for an order

- (2) The FWC may make the order only on application by any of the following:
- (a) the new employer or a person who is likely to be the new employer;
 - (b) a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer;
 - (c) if the application relates to an enterprise agreement--an employee organisation that is, or is likely to be, covered by the agreement;
 - (d) if the application relates to a named employer award--an employee organisation that is entitled to represent the industrial interests of an employee referred to in paragraph (b).

Matters that the FWC must take into account

- (3) In deciding whether to make the order, the FWC must take into account the following:
- (a) the views of:
 - (i) the new employer or a person who is likely to be the new employer; and
 - (ii) the employees who would be affected by the order;
 - (b) whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment;
 - (c) if the order relates to an enterprise agreement--the nominal expiry date of the agreement;
 - (d) whether the transferable instrument would have a negative impact on the productivity of the new employer's workplace;
 - (e) whether the new employer would incur significant economic disadvantage as a result of the transferable instrument covering the new employer;
 - (f) the degree of business synergy between the transferable instrument and any workplace instrument that already covers the new employer;
 - (g) the public interest.

Restriction on when order may come into operation

- (4) The order must not come into operation in relation to a particular non-transferring employee before the later of the following:

- (a) the time when the non-transferring employee starts to perform the transferring work for the new employer;
- (b) the day on which the order is made.”

[13] Adelaide Metro Operations is entitled to bring the application, which relies upon the terms of s.319(1)(b) of the Act to, in effect, extend the coverage of the Agreement to the non-transferring employees.

[14] In dealing with the application, the Commission is required to have regard to each of the matters in s.319(3) in determining whether an Order should be made. I now turn to deal with each of those considerations.

The views of the new employer – s.319(3)(a)(i)

[15] Adelaide Metro Operations as the applicant and the new employer supports the application and the Order that it proposes should be made.

The views of the new employees – s.319(3)(a)(ii)

[16] It is not possible to obtain the views of the new employees who will be affected by the Order because there are no non-transferring employees currently employed by Adelaide Metro Operations. I note however that the ARTBIU is covered by the Agreement and does not oppose the application.

Whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment – s.319(3)(b)

[17] I am satisfied that the employees would not be disadvantaged in relation to their terms and conditions of employment by the making of an Order.

Expiry date of the agreement – s.319(3)(c)

[18] The nominal expiry date of the *Rail Commissioner Tram Operations Enterprise Agreement 2020* is 30 June 2023.

Negative impact on Productivity – s.319(3)(d)

[19] I am satisfied that there will be no negative impact on productivity if the Order is made. In contrast, if the Order is not made and transferring and non-transferring employees are on different terms and conditions of employment, this may have a negative impact on team engagement and in turn upon workplace productivity.

Economic disadvantage – s.319(3)(e)

[20] The Agreement’s coverage of non-transferring employees will not cause any significant economic disadvantage.

Degree of business synergy – s.319(3)(f)

[21] “Business synergy” may have wide connotations in the present context. The Agreement and the Award contain a number of different terms and conditions of employment. If the Order is granted it will confirm a single framework of regulation that has been negotiated and approved in the same general context in which it has applied, and will continue to apply. This is likely to enhance the degree of synergy that exists within the acquired business. That is, granting the order will result in a greater degree of synergy for both Adelaide Metro Operations and the relevant employees who perform the transferring work.

Public interest – s.319(3)(g)

[22] The public interest in this context is influenced by the objects of this Part of the Act in s.309 and those adopted by the Act more broadly.

[23] The public interest in this matter is served by facilitating arrangements that permit the maintenance of the presently approved employment conditions across the entire acquired business pending the making of any new instrument that might apply in the years to come.

Conclusions

[24] Having considered each of the matters in s.319(3) of the Act I am satisfied that it is appropriate for an Order to be made.

[25] In accordance with s.319(4) of the Act, the Order will not come into operation in relation to each non-transferring employee until the later of the following:

- the time when the non-transferring employee starts to perform the transferring work for the new employer; or
- the day on which the order is made.

[26] The Order² is issued in conjunction with this decision.



COMMISSIONER

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² PR721040.