FAIR WORK COMMISSION

Commission Matter No.:
AG2018/97

Applicant:
Clinpath Laboratories Pty Ltd

APPLICANT'S INITIAL SUBMISSIONS

1. On 11 January 2018, the Applicant filed a Form F17 with the Fair Work Commission applying for the approval of the *Clinpath Laboratories Enterprise Agreement 2017* (**2017 Agreement**). On 16 January 2018, the Health Services Union SA/NT lodged a Form F18 not supporting the approval of the 2017 Agreement.

2. These submissions provide an initial response to the issues raised by the HSU. These may resolve concerns and or allow approval of the 2017 Agreement to progress.

Opening remark

3. The 2017 Agreement is an improvement on the *Clinpath Laboratories Enterprise Agreement 2015* (AG2015/6462) (**2015 Agreement**) and the *Clinpath Laboratories Enterprise Agreement 2012* (AG2012/13203) (**2012 Agreement**).

4. The terms and conditions in the 2012 Agreement, the 2015 Agreement and the 2017 Agreement are the same or similar and represent long standing terms agreed by the parties (and approved by this Commission). It is appropriate to have regard to these previously approved agreements, including as to the significance of the non-monetary arrangements to employees: *University of New South Wales re University of New South Wales (Professional Staff) Enterprise Agreement 2010* [2010] FWAA 9588 at [96].

Response to the Form F18

5. The Applicant will respond under the same headings as are in the Form F18.

<u>Notice of employee representational rights</u>

6. The HSU says the NERR was not correctly completed because the coverage in the 2017 Agreement ended up being different. It does not follow that no valid NERR was issued.

7. Section 173 of the FW Act provides:

> *(1) An employer that will be covered by a proposed enterprise agreement … must take all reasonable steps to give notice of the right to be represented by a bargaining representative to each employee who:*
>
> *(a) will be covered by the agreement; and*
>
> *(b) is employed at the notification time for the agreement.*
>
> *Notification time*
>
> *(2) The **notification time** for a proposed enterprise agreement is the time when:*
>
> *(a) the employer agrees to bargain, or initiates bargaining, for the agreement; or*
>
> *(b) a majority support determination in relation to the agreement comes into operation; or*

> *(c) a scope order in relation to the agreement comes into operation; or*
>
> *(d) a low-paid authorisation in relation to the agreement that specifies the employer comes into operation.*
>
> *When notice must be given*
>
> *(3) The employer must give the notice as soon as practicable, and not later than 14 days, after the notification time for the agreement.*

8. The NERR is to identify the *proposed* coverage of the enterprise agreement *at the time* of its issue: see s 174(1A) and schedule 2.1 of the *Fair Work Regulations 2009*.

9. As is therefore readily apparent, it is the employees who are proposed to be covered by the enterprise agreement at the notification time who are to receive the NERR.

10. The HSU in its Form 18 refers to the decision in *AMOU v Harbour City Ferries Pty Ltd* (2015) 250 IR 1 at [29]. That case goes onto to say, at paragraph [30] (our emphasis added):

> *That the **proposed coverage may evolve** as bargaining progresses does not matter. … that fact does not mean that when bargaining commences the employer is not obliged to identify what it is **then** intending to be the coverage of the proposed enterprise agreement.*

11. At the notification time, the proposed coverage of the agreement was as stated in the NERR "*employees that are currently covered by the Clinpath Laboratories Enterprise Agreement 2015 and the Clinpath Laboratories Nursing Employees Enterprise Agreement 2013*". There is no dispute that those employees received their NERR.

12. The fact that the proposed coverage of the 2017 Agreement evolved during the bargaining period does not mean that the Applicant has not complied with its obligations under s 173 of the FW Act.

13. The HSU asserts that the Applicant did not attach copies of the 2017 Agreement to the NERR. This is correct. However, the Applicant is not required by the Act or the Regulations to do so. This does not affect the NERR's validity.

<u>Ballot Process</u>

14. The HSU asserts that the voting process began on 11 December 2017 and therefore there is some non-compliance with the FW Act. The HSU relies on the decision of *Australian Char Pty Ltd* [2011] FWA 1627.

15. We refer to paragraphs 2.4 and 2.8 of Form F17. The following dates are relevant:

11 December 2017	Ballot papers and an explanatory letter was sent to each relevant employee.
14 December 2017	2017 Agreement was emailed to relevant employees and posted on the Applicant's intranet (accessible by all employees proposed to be covered by the 2017 Agreement).
21 December 2017	First date on which employees are able to cast a vote.
28 December 2017	Voting closed.

16. Section 180 (3) and (4) of the FW Act provides:

> *(3) The employer must take all reasonable steps to notify the relevant employees of the following by the start of the access period for the agreement:*
>
> *(a) the time and place at which the vote will occur;*
>
> *(b) the voting method that will be used.*
>
> *(4) The access period for a proposed enterprise agreement is the 7-day period ending immediately before the start of the voting process referred to in subsection 181(1).*

17. The Full Bench in *Australian Municipal, Administrative, Clerical and Services Union v TAB Agents Association (SA Branch) Inc.* [2015] FWCFB 3545 stated:

> *[16] … However, if the employer has advised the employees who will be covered by an agreement of the date, method and place of voting and without more merely distributes ballot papers to employees before the date on which the voting is to commence or take place, in our view it cannot be said that the "voting process" commenced at the time the employer distributed the ballot papers*
>
> *…*
>
> *[20] … Thus, we consider that the voting process starts when an employee is first able to cast a valid vote to approve the agreement and not at some earlier time when an employer may provide to employees the ballot paper.*

18. The Full Bench decision is consistent with the plain words of s 180 of the Act. The voting process began on 21 December 2017 (and not 11 December 2017 as alleged).

19. The HSU further submits that information provided to employees regarding the voting process was deficit as it did not disclose when the ballot opened.

20. The letter sent to employees on 11 December 2017 did not include the date on which voting opened. However, the opening and closing dates for voting was subsequently provided to employees by emails on the following dates:

    20.1. 13 December 2017;

    20.2. 14 December 2017; and

    20.3. 18 December 2017.

21. The employees were aware of, and on notice of, the opening time for voting within a reasonable time of it commencing.

22. Finally, contrary to the HSU's statement at 2.5 of the Form 18:

    22.1. the ballot box was accessible during the voting process, including on public holidays; and

    22.2. the Christmas period did not cause any frustration or confusion. A voting process can validly include the Christmas period.

Misleading information provided to employees

23. The Applicant submits that its correspondence on 1 December 2017 to employees was not misleading. On 13 December 2017 the HSU raised concerns and the Applicant replied addressing the concerns.

24. Further, to avoid any misunderstanding, Clinpath provided further clarity to employees in the following ways:

    24.1. On 13 December 2017, Clinpath emailed relevant employees a copy of its letter to the HSU clarifying the issue of incremental increases; and

    24.2. On 20 December 2017, Clinpath emailed employees again.

25. These communications made clear the meaning of the statements made about the changes, and what remains unchanged, in the 2017 Agreement. No employees raised, or have raised, any concerns with the Applicant.

Agreement does not meet BOOT

26. Section 193(1) of the FW Act provides:

> *An enterprise agreement that is not a greenfields agreement **passes the better off overall test** under this section if the FWC is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee*

27. The mere fact differences exist between an enterprise agreement and the modern award does not suggest or indicate that an enterprise agreement does not satisfy BOOT. An enterprise agreement is drafted to contain terms that are suited to the enterprise. BOOT is designed to allow variation and departure from provisions of relevant modern awards, in order to create an agreement that properly reflects the varying complexities and needs of the particular enterprise. The Full Bench in *Shop, Distributive and Allied Employees Association v Beechworth Bakery Employee Co Pty Ltd t/a Beechworth Bakery* [2017] FWCFB 1664 stated at [12]:

> The application of the better off overall test is not to be applied as a line by line analysis. Rather it is a global test requiring consideration of advantages and disadvantages to award covered employees and prospective award covered employees of an agreement's application compared to the application of a relevant modern award.

28. Therefore, BOOT adopts a holistic approach, as at the test time, to ensure that employees are better off *overall* under the enterprise agreement than they would be under the relevant modern award.

29. Care needs to be taken to not simply assert or find that the 2017 Agreement does not meet BOOT simply because there are differences. Naturally, there will be differences.

30. The HSU in the Form 18 raise a number of differences between the 2017 Agreement and the Award.

Part-time employees

31. In relation to part-time employees, the HSU note differences between the 2017 Agreement and the modern award. Other than noting differences, the HSU have not engaged in the balancing exercise required by BOOT, including against the many benefits provided by the 2017 Agreement.

32. At paragraph 4.4 of the Form 18, the HSU states that there is no requirement for written agreement between the Applicant and part-time employees as to their regular pattern of work in the 2017 Agreement. This is incorrect. Clause 5.3 of the 2017 Agreement provides (our emphasis):

> *Each employee shall receive at the commencement of their employment a **letter** clearly setting out the status of their employment and for part-time employees, the initial **agreed** working hours.*

33. At paragraph 4.5 of the Form 18, the HSU complains about when overtime is payable for part-time employees. Clause 23.3 of the 2017 Agreement provides (our emphasis):

> *Part time employees will be paid at overtime rates if they are **required** to work an extended shift beyond the time they had been rostered at the beginning of the shift. Part time employees working **optional** extra shifts will be paid at normal rates (plus shift penalties and loadings if appropriate) until 8.0 hours have been worked in a day, or 38 hours have been worked in a week, when overtime rates will apply*

34. This clause is long standing in this enterprise, similar to clauses in past iterations of the 2017 Agreement. The clause, properly viewed, is a benefit to part-time employees (also demonstrated by the fact it has been agreed and approved in earlier agreements: see [2010] FWAA 9588 at [96]).

Overtime rates

35. At paragraph 4.6 (a) of the Form 18, the HSU raises the issue that overtime rates are paid at time and a half for first three hours under the 2017 Agreement compared to time and a half for the first two hours under the Award. Again, this submission is merely noting a difference and not having regard to, or balancing, the benefits under the 2017 Agreement – including higher wages.

36. This provision is long standing in this enterprise, similar to clauses in past iterations of the 2017 Agreement (and approved by this Commission).

37. It is also the case that this difference will not actually result in a detriment when assessing that extra hour for a significant number of employees. For example, a Clinpath Scientist G1, L7 PPT is paid $9.55 an hour above the award minimum. Three hours overtime under the award would be $116 for them, but under the 2017 Agreement they receive $147.38.

38. Also, historically and in reality, the incidences of overtime are not high meaning that the prospect of eroding benefits in higher pay due to this one difference, is unlikely.

Shift penalties

39. At paragraph 4.6 (b) of the Form 18, the HSU complains about differences when shift penalties become payable. This matter was not raised during the seven months of negotiations.

40. Employees are entitled to the same quantum of shift penalty under the relevant modern award and the 2017 Agreement, namely 15%; it just is applied at a different time.

41. This provision in the 2017 Agreement is long standing in this enterprise, similar to clauses in past iterations of the 2017 Agreement (and approved by this Commission).

42. The 15% loading is not paid in respect of a two hour difference. The Applicant respectfully submits that any detriment suffered is offset against the overall financial

benefit received by these employees from higher hourly wages at all other times. There are other benefits under the 2017 Agreement to also be considered.

Higher duties

43. At paragraph 4.6(c) of the Form 18, the HSU again complains about a difference in the award and 2017 Agreement terms.

44. This provision in the 2017 Agreement is long standing in this enterprise, similar to clauses in past iterations of the 2017 Agreement (and approved by this Commission).

45. Other than noting this difference, the HSU have not engaged in the balancing exercise required by BOOT, including against the many other benefits provided by the 2017 Agreement, including higher wages.

46. If this is however a real issue for the Commission, Clinpath asks to be heard on undertakings.

Rest breaks

47. At paragraph 4.6(d) of the Form 18, the HSU complains about the absence of a provision dealing with rest breaks.

48. The 2017 Agreement is similar to previous agreements approved by this Commission.

49. Other than noting this difference, the HSU have not engaged in the balancing exercise required by BOOT, including against the many benefits provided by the 2017 Agreement.

50. If this is however a real issue for the Commission, Clinpath asks to be heard on undertakings. Clinpath notes that work health and safety laws also govern the issue.

Conclusion

51. Employees will be better off overall under the 2017 Agreement than under the applicable modern award. The Applicant urges the Commission to approve the 2017 Agreement.

52. If required, Clinpath can provide evidence in support of these submissions – and would like the opportunity to do so if there are any concerns.

Undertakings

53. While not raised by the Union, the Applicant notes that all wage rates under the 2017 Agreement are higher than those provided for under the modern award, except for employees in the following classifications:

Applicable Modern Award classification	2017 Agreement Classification
Health Professional 4.3	Clinpath Scientist G5 L1 PPT
Health Professional 3.1	Clinpath Technical Officer G3 L1 PPT
Health Professional 3.1	Clinpath Technical Officer G3 L2 PPT

54. This has occurred by omission rather than design. In relation to these classifications, the Applicant proposes to provide undertakings to pay the classifications as follows:

2017 Agreement Classification	Hourly rate (yr 1)
Clinpath Scientist G5 L1 PPT	$47.20
Clinpath Technical Officer G3 L1 PPT	$33.45

Clinpath Technical Officer G3 L2 PPT	$33.70

55. The Applicant respectfully submits that the proposed undertakings should meet any concerns the Commission may have in relation to the difference in wage rates for these classifications under the 2017 Agreement.

56. For completeness, in relation to the 2017 Agreement wage rates, it is noted that s 206(2) of the FW Act provides that "*if the agreement rate is less than the award rate, the agreement has effect in relation to the employee as if the agreement rate were equal to the award rate*". The Applicant is cognisant of the requirement to always ensure employees are paid above the award minimum base rate of pay.

57. Despite what is referred to in the 2017 Agreement, the Applicant will also undertake to pay the following employees the amounts listed below to eliminate any possibility that the difference as to when double time overtime rates applying has a negative effect:

Modern Award Classification	2017 Agreement Classification	Hourly rate under Award	Proposed new hourly rate (yr 1)	Occurrences of overtime needed to erode benefit
Support Services Lvl 1	Clinpath Cleaner G1 PPT	$19.44	$19.64	44.81
Support Services Lvl 2	Clinpath Clerk G1 L1 PPT	$20.25	$20.44	40.5
Support Services Lvl 1	Clinpath Courier 20 Yrs PPT	$17.50	$17.90	113.7
Support Services Lvl 2	Clinpath Courier G1 PPT	$20.25	$20.44	40.5

58. If the Commission has any further questions or concerns, please let us know. We look forward to approval of the 2017 Agreement with the above undertakings.

Liz Main
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