



Red flags for deal that underpaid workers ignored

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A senior member of the Fair Work Commission approved a construction agreement in opposition to the commission's own analysis that it paid workers below the industry minimum.

A full bench overturned NSW excavator Al Earthworx Mining and Civil's agreement after finding deputy president Geoff Bull approved the deal in a three-paragraph decision that failed to raise any concerns over the "better off overall test" (BOOT), despite some rates almost 4 per cent below the award.

"It may be noted that an internal analysis of the agreement prepared prior to the decision being issued, which we presume the deputy president had access to, indicated that the agreement did not pass the BOOT in respect of the building award," the bench said.

The Construction, Forestry, Maritime, Mining and Energy Union, which launched the appeal against Earthworx's agreement, has used the case to question whether the commission was letting through other underpaying deals.

"It is alarming that, if not for the union's intervention in this matter, the Fair Work Commission would have allowed an agreement to stand that removed workers' basic rights," CFMEU national secretary Dave Noonan said.

"It raises the question of whether the Fair Work Commission has allowed other agreements to stand which undermine the minimum wages and conditions that workers should be confident are bedrock protections."

The 21-page analysis, prepared by the commission's own staff, found the agreement reduced access to Sunday penalty rates and included some classi-

fications that were 3.8 per cent below the award's rates.

The deal also included a provision that may have breached the National

Employment Standards by allowing for a 40-hour working week but averaged out over a month.

"Plausible" roster scenarios prepared by the CFMEU for a 50-hour and 55-hour work week saw workers paid \$73 to \$169 a week less than the award.

The advice also raised other concerns, including that Earthworx may not have explained the effect of the agreement to its employees before they voted on it.

However, records of the approval hearing did not indicate Mr Bull raised any concerns with the company or sought undertakings to address them.

"Nor did the decision address any of the issues raised by the analysis," the bench said. "It simply records that the deputy president was satisfied that the requirements of ss 186, 187 and 188 of the Fair Work Act, as relevant to the application, were met."

Mr Noonan said that the analysis had "raised a raft of issues that should have stopped [the agreement] being certified".

"Workers should be able to be confident that the Fair Work Commission is actively engaged in protecting their minimum wages and conditions rather than being complicit in their theft," Mr Noonan said.

The deputy president has been ordered to reconsider the agreement.

The case comes as employers are calling on the Morrison government to make the BOOT more flexible after accusing the commission of being too rigid and to speed up approvals after agreements averaged 76 days to get certified in 2017.

Average approval times recently halved to just 35 days. However, Industrial Relations Minister Christian Porter has stressed he wants the improvement on a "continued and sustained basis" and is examining improvements to make the system "simpler and less resource-intensive".

The Australian Mines and Metals Association has also identified union intervention in agreement approvals as a "significant and growing problem" that needs to be reviewed, accusing unions of sidelining terms and conditions agreed between employers and employees to pursue their own interests.

Key points

The senior deputy of the Fair Work Commission approved a deal that underpaid workers.

A full bench of the commission has overturned the deal, after an appeal.



The situation is alarming, said the CFMEU's Dave Noonan, and raises the question of whether other such agreements have been passed. PHOTO: ALEX ELLINGHAUSEN