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Secret emails show BHP deal left workers worse off

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A Fair Work member appointed by the Coalition secretly emailed in-house modelling to BHP that showed its controversial new enterprise agreement left workers worse off than the award minimum, two hours before he approved the deal.

A full bench judgment revealed deputy president Gerard Boyce's "curious" emails as it overturned his approval of the mining giant's highly contested agreements, championed by chief executive Mike Henry, due to concerns they may fail the Fair Work Act's better off overall test (BOOT).



Fair Work Commission deputy president Gerard Boyce.

Neither the emails nor the modelling, prepared by commission staff, were shown to the unions challenging the agreements, as revealed in the deputy president's

to the unions challenging the agreements or referred to in the deputy president's reasons approving the deal.

"Therefore, it must be presumed, [the modelling] was not considered by the deputy president," the bench said.

The incident will bring further scrutiny on the deputy president, a former barrister appointed by the Morrison government at the end of 2018 and who has previously been criticised for approving contested agreements before providing reasons and once having a life-size cut-out of [Donald Trump](#) in his chambers.

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Opposition industrial relations spokesman Tony Burke said the deputy president's latest actions had damaged the commission's independence and the government needed to justify his continued appointment.

"This man is a joke," he said.

"The problem for the taxpayer is he is a \$460,000-a-year-joke. The problem for workers is there is mounting evidence he's just not up to the job."

BHP's operation services agreements covered more than 2300 staff for tasks previously done by labour-hire contractors.

'Erroneous' comparisons

Mining unions strongly opposed the deals and argued they undermined long-

standing industry agreements that ensured higher pay for coal miners.

A full bench majority, headed by vice president Adam Hatcher, found Mr Boyce made "erroneous" comparisons with the award including that workers' rates were 125 per cent more under the agreements but without considering penalty rates, overtime or allowances.

While the appeal decision did not turn on the secret modelling because it was presumed the deputy president's decision had not considered it, the majority highlighted what it described as "the curious episode".

According to the bench, at 2.57pm on December 19, Mr Boyce's chambers emailed modelling to BHP that showed salary rates in its production agreement failed the BOOT but unusually did not copy in the unions.

The email started with the words "as discussed" but the bench said the "circumstances and context of this prior discussion are not apparent".

At 4.43pm, BHP's lawyers replied that the modelling was inaccurate and that the agreement passed the BOOT.

Fifteen minutes later, the deputy president published decisions approving the agreements.

'Gratuitous' criticism of unions

Construction, Forestry, Maritime, Mining and Energy Union senior legal officer Alex Bukarica said the union was "surprised" to discover the email exchange and questioned why the deputy president had only asked BHP for information on the modelling.

"Whether an agreement leaves workers better off overall than the award is critical as a matter of law and community expectation.

"Had we been included in this important exchange, we would have raised issues about discrepancies in the calculations being relied on."

The commission has previously criticised Mr Boyce for approving Hungry Jack's agreement [without reasons](#) and then handing down a statement three months later disagreeing with his own decision, one week before an appeal hearing.

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in the BHP case, it took more than a year for Mr Boyce to approve the agreement and he didn't hand down his reasons until a month later, more than two weeks after unions had appealed his ruling.

The bench said that delay was "inappropriate" and even then, his reasons were primarily about his decision to allow unions to appear in the case, "replete" with criticism of the unions for participating.

"We consider that the aspersions of obstructionism and delay on the part of the unions to have been gratuitous, particularly in circumstances where the deputy president took an entire year to complete his consideration of the applications before him," the majority said.



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Mr Burke noted that since Mr Boyce's appointment he had been counselled for making partisan and anti-union posts on LinkedIn, attracted complaints for allegedly decorating his office with [scantily-clad figurines](#), and accused of setting up spy cameras in his office.

"Now this," he said. "He has damaged the commission's reputation as a professional, fair and impartial umpire.

"The government should explain why they think Mr Boyce is a fit and proper person to hold his position."

Asked for comment from Mr Boyce, a commission spokeswoman said it was not appropriate for members to comment on decisions.

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