



## DECISION

*Fair Work Act 2009*

s.229 - Application for a bargaining order

### **Application by Construction, Forestry, Maritime, Mining and Energy**

**Union**

(B2020/834)

DEPUTY PRESIDENT ASBURY

BRISBANE, 2 JULY 2021

*Application for bargaining order – Whether CFMMEU is entitled to represent the industrial interests of employee – Construction of union rules – Principal or primary purpose test – Whether employee principally or primarily employed as forklift driver or warehouse operator – Finding that employee is principally or primarily employed as warehouse operator – Employee not principally or primarily employed to drive a forklift – CFMMEU is not entitled to represent industrial interests of employee – CFMMEU has no standing to bring application for bargaining order based on membership of employee.*

### **Overview**

[1] The Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) has applied to the Fair Work Commission (the Commission) for a bargaining order. The application has been brought under s.229 of the *Fair Work Act 2009* (the FW Act). The application relates to bargaining being conducted by DuluxGroup (Australia) Pty Ltd (Dulux) for a proposed enterprise agreement to cover employees at the Rocklea Site at which Dulux operates a paint manufacturing facility and distribution centre.

[2] The proposed agreement is to replace the *Dulux Rocklea Enterprise Agreement 2016* (2016 Agreement) which applies to employees at the Rocklea Site. Dulux and the United Workers Union (UWU) are also covered by the 2016 Agreement. The 2016 Agreement reached its nominal expiry date on 3 March 2020 and bargaining for the proposed agreement commenced on 18 November 2019. The 2016 Agreement covers employees in a range of classification levels undertaking tasks associated with the manufacturing and distribution of paint. Dulux generically refers to these employees as Production Operators and Warehouse Operators.

[3] In summary, the CFMMEU has enrolled some employees covered by the 2016 Agreement as members and contends that it is entitled to represent the industrial interests of those members in negotiations for the proposed agreement. The CFMMEU seeks orders requiring that Dulux:

- Recognise and bargain with the CFMMEU in accordance with s. 228(1)(f) of the FW Act; and

- Attend and participate in meetings with the CFMMEU at reasonable times in accordance with s. 228(1)(a) of the FW Act.

[4] Dulux contends that the CFMMEU is not entitled to represent the industrial interests of Warehouse Operators or Production Operators at the Rocklea Site and that on this basis, the CFMMEU does not have standing to make an application for a bargaining order under s.229 of the Act. The parties agreed that the question of the CFMMEU's standing to make the application would be dealt with as a preliminary matter.

[5] The matter was heard over several days in March 2021. The CFMMEU and Dulux sought and were granted permission to be represented by lawyers. Permission was granted pursuant to s.596(2)(a) of the Act on the basis that I was satisfied that the matter involves significant complexity involving, as it does, construction of union rules and the operation of the bargaining framework within the Act. No issue of fairness arises as between the parties. The CFMMEU was represented by Ms L Saunders of Counsel, instructed by the CFMMEU's Senior National Legal Officer, Ms L Weber. Dulux was represented by Mr T Spence of Counsel instructed by Ms W Fauvel and Mr C Scott of Herbert Smith Freehills.

[6] Other bargaining representatives, including the UWU, were notified of the application and the hearing and were provided with all documentation. The UWU and other bargaining representatives did not seek to be heard or otherwise participate in the hearing of this matter.

[7] A number of procedural issues arose between the parties prior to the hearing. The first such issue was whether the CFMMEU or Dulux would file its material first. The CFMMEU maintained that as the Applicant, it should file first and have an opportunity to respond to material filed by Dulux. Dulux contended that it should file its material first on the basis that it was objecting to the CFMMEU's application. Ultimately the parties agreed that they would file their material at the same time and that each would respond to the other at the same time. Directions providing for this were issued. Dulux also sought that the Commission conduct a site visit. When the parties were unable to agree on the timing of the visit and other related matters, I declined this request.

[8] At the hearing the following persons gave evidence on behalf of the CFMMEU:

- Mr Wayne Lambert, Warehouse Operator and CFMMEU delegate;<sup>1</sup>
- Mr Arturo Menon, Southern Co-Ordinator of the Queensland/Northern Territory Divisional Branch of the CFMMEU;<sup>2</sup> and
- Ms Lucy Weber, Senior National Legal Officer of the CFMMEU.<sup>3</sup>

[9] Evidence for Dulux was given by Mr Peter Holden, Site Manager of the Rocklea Site.<sup>4</sup>

### **The issues for determination**

[10] An issue arose during the hearing about the scope of the issues for determination. Dulux contended that the Commission should determine whether the CFMMEU has the right to represent the industrial interests of Production and Warehouse Operators at the Rocklea Site. In this regard, Dulux pointed to the fact that the application for bargaining orders filed by the CFMMEU asserted coverage of both Warehouse and Production Operators, and that it would be more efficient for the Commission to determine coverage generally.

[11] The CFMMEU sought to confine the proceedings before the Commission so that the issue for determination is whether it has the right to represent the industrial interests of one member, Mr Wayne Lambert, who is employed as Warehouse Operator.

[12] The CFMMEU contended that the task before the Commission does not involve a roving inquiry in relation to the coverage of the Union or its density on site. Instead, the CFMMEU's application raises a discrete question as to whether it is a bargaining representative within the meaning of s. 176(2)(b) of the FW Act. This threshold is satisfied if there is a single employee who is a valid member of the CFMMEU – that is, an employee who has as a matter of fact joined – and is, as a matter of interpretation, within the scope of the CFMMEU's coverage rule.<sup>5</sup>

[13] The CFMMEU also contended that it has advanced one such employee, Mr Lambert, and all that the case requires is a consideration of whether he is employed as a forklift driver within the meaning of the CFMMEU's rules. If the answer is yes, then the CFMMEU has standing to bring this application and Dulux's obligation under s. 228 are enlivened.

[14] Further, the CFMMEU contends that if Dulux has other questions it wants determined – notably the coverage of production operators – about which the CFMMEU makes no concession or contention, it must commence proceedings of its own. Dulux cannot hijack the CFMMEU's application to agitate these other questions and the CFMMEU cannot be compelled to answer a case that it has not put before the Commission.

[15] I accept the submissions of the CFMMEU in relation to the matters for determination. The CFMMEU is the applicant for a bargaining order under s. 229 of the FW Act. While the Respondent has raised an objection based on the standing of the Union to make the application, it is the CFMMEU which must establish that it has standing. As a Full Bench of the Commission observed in *Piyush Jain v Infosys Limited T/A Infosys Technologies Limited*:

*“In most cases the question of where an evidentiary onus (or something analogous to it) resides will be answered by asking; in relation to each matter about which the Commission must be satisfied, which party will fail if no evidence or no further evidence about that matter were given? The evidentiary onus will generally be the party that will fail in that event.”*<sup>6</sup>

[16] In the present case, the CFMMEU does not have standing to make an application for a bargaining order unless it is a bargaining representative for the proposed agreement: see s.229(1). In relation to a proposed enterprise agreement that is not a greenfields agreement, an employee organisation is a bargaining representative of an employee who will be covered by the agreement if the employee is a member of the organisation: see s.176(b)(ii). However, an employee organisation cannot be a bargaining representative of the employee member unless the organisation is entitled to represent the industrial interests of the employee in relation to work that will be performed under the agreement: see s.176(3). Accordingly, it is the CFMMEU which will fail if these matters are not established and the Union bears the onus to make its case.

[17] It is also apparent from the Form F32 Application for a bargaining order filed by the CFMMEU and the correspondence between the Union and Dulux that preceded it, that the claimed coverage and the basis upon which it was asserted, centred on forklift drivers. The CFMMEU asserts that Mr Lambert is principally employed as a forklift driver. As a result, no unfairness to Dulux arises from the narrowing of the CFMMEU's case. Further, where the

CFMMEU has not claimed coverage on any other basis and has called no evidence other than that of Mr Lambert, it would not be appropriate for the Commission to determine a broader question.

[18] There were also a range of objections made about evidence in the proceedings. In relation to paragraph 6 of Mr Lambert's third statement, the Respondent contended that the work allocation documents referred to and annexed are the property of Dulux and that the CFMMEU as the Applicant had not sought the production of those documents through appropriate means. Mr Lambert stated in response that he had sought permission from the supervisor from whom he obtained the documents and informed the supervisor that he intended them to be used in these proceedings. Those documents relate to allocation of work by Mr Lambert's supervisor and were received into evidence as there was no basis for excluding them.

[19] The CFMMEU, in response to objections to some of the matters in Mr Lambert's witness statements also accepted that it would not press certain parts of those witness statements.

[20] More significant issues arose with Mr Holden's evidence about the proportion of time spent by Mr Lambert on various tasks. Mr Holden's evidence on this subject was set out in spreadsheets attached to his witness statement. Those spreadsheets were prepared by other persons. It became apparent during cross-examination that there were other documents, referred to as pivot tables, which underpinned calculations of the percentage of time Mr Lambert spent operating Materials Handling Equipment (MHE). Mr Holden was permitted to give additional oral evidence-in-chief in an attempt to rectify the issues with these calculations.

[21] Ms Saunders for the CFMMEU contended that the additional evidence of Mr Holden did not adequately address the way in which the calculations about use of MHE had been undertaken and called for the documents referred to by Mr Holden in his evidence. Dulux through its legal representative asserted that the documents setting out the underpinning calculations are subject to legal professional privilege and declined to provide them. Ms Saunders submitted that without the underpinning data contained in the documents subject of the call, the calculations provided by Mr Holden were meaningless and that this was unfair to the CFMMEU as it could not test his evidence.

[22] After some debate, during which I expressed the provisional view that the assertions made by the CFMMEU about the calculations set out in Mr Holden's were correct and that Mr Holden's evidence was meaningless without that information, Dulux withdrew paragraphs in Mr Holden's written statements referring to the calculations and accepted that his oral evidence attempting to resolve these issues would not be considered.<sup>7</sup> As a result the raw data set out in Mr Holden's witness statements remains in evidence and the parties were at liberty to perform their own calculations about what it shows and to place those before the Commission. The parties did undertake their own calculations.

[23] Dulux, in its written closing submissions (which were prepared before Mr Holden was cross-examined), asserted that the CFMMEU could have called the persons who provided the data to Mr Holden to deal with its objections. I do not accept that submission. The CFMMEU is not required to call a witness to assist in the resolution of issues with the evidence called by Dulux. The resolution of any such issues is a matter for Dulux. In circumstances where Mr Holden did not perform the calculations about which he gave evidence and Dulux did not lead evidence about the basis of the calculations which was capable of being properly tested in cross-

examination, it would have caused significant unfairness to the CFMMEU for the Commission to have accepted the calculations about the percentage of time spent by Mr Holden operating MHE. Dulux opted to resolve the issue by withdrawing parts of Mr Holden’s witness statements and accepted that oral evidence in chief given by him in relation to those parts of his statements would not be received by the Commission. Dulux’s complaint about the CFMMEU not calling evidence in relation to this matter cannot be maintained in those circumstances.

## Legislation and applicable principles

### *Bargaining representatives and the entitlement to represent industrial interests*

[24] The CFMMEU application is made pursuant to s.229 of the FW Act. Section 229 specifies the persons who may apply for a bargaining order as follows:

“A bargaining representative for a proposed enterprise agreement may apply to the FWC for an order (a bargaining order) under section 230 in relation to the agreement.”<sup>8</sup>

[25] The definition of “*bargaining representative for a proposed enterprise agreement*” is provided for in the dictionary in s. 12 of the FW Act in the following terms:

“bargaining representative” for a proposed enterprise agreement: see sections 176 and 177.”<sup>9</sup>

[26] Section 177 relates to greenfields agreements only and is presently irrelevant. Section 176 provides

“(1) The following paragraphs set out the persons who are bargaining representatives for a proposed enterprise agreement that is not a greenfields agreement:

(a) an employer that will be covered by the agreement is a bargaining representative for the agreement;

(b) an employee organisation is a bargaining representative of an employee who will be covered by the agreement if:

(i) the employee is a member of the organisation; and

(ii) in the case where the agreement is a multi-enterprise agreement in relation to which a low-paid authorisation is in operation--the organisation applied for the authorisation;

unless the employee has appointed another person under paragraph (c) as his or her bargaining representative for the agreement, or has revoked the status of the organisation as his or her bargaining representative for the agreement under subsection 178A(2); or

(c) a person is a bargaining representative of an employee who will be covered by the agreement if the employee appoints, in writing, the person as his or her bargaining representative for the agreement;

(d) a person is a bargaining representative of an employer that will be covered by the agreement if the employer appoints, in writing, the person as his or her bargaining representative for the agreement.

...

(3) Despite subsections (1) and (2):

- (a) an employee organisation; or
- (b) an official of an employee organisation (whether acting in that capacity or otherwise);

cannot be a bargaining representative of an employee unless the organisation is entitled to represent the industrial interests of the employee in relation to work that will be performed under the agreement.”

**[27]** For a person to be a “bargaining representative” for a proposed enterprise agreement the person must meet the description in one of ss.176(1)(a) – (d). For an employee organisation to be a bargaining representative for a proposed enterprise agreement it must meet the description in s.176(b). That coverage is subject to the exclusion in s.176(3) of the Act.<sup>10</sup>

**[28]** The expression “*entitled to represent the industrial interests of the employee*” is used extensively throughout the Act. The Act does not expressly define the expression. It is not in dispute between the parties<sup>11</sup> that for an employee organisation to be entitled to represent the industrial interests of an employee who is a member, it is sufficient if the employee is eligible for membership within the organisation’s rules.<sup>12</sup>

**[29]** The general principles applicable to the interpretation of union eligibility rules are also not in dispute. They are articulated by a Full Bench of the Commission in “*Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*” known as the *Australian Manufacturing Workers’ Union (AMWU) v ResMed Limited*<sup>13</sup> (*ResMed*) at [34] as follows:

“(1) Union eligibility rules will be construed objectively...

(2) The nature of union eligibility rules means that they should be construed liberally rather than narrowly or technically...

(3) It is permissible to have regard to any common understanding among people concerned with relevant industries and particularly with industrial matters of the ordinary application of the words used, and to the previous use of the words in the relevant organisation’s rules and in statutory provisions, decisions, determinations, awards, reports and other papers concerned with the relevant industry or industries... Federal awards, including consent awards, made by Commonwealth industrial tribunals at a time when the legislative award-making power was founded upon the industrial disputes power in s.51(xxxv) of the Constitution, are important sources in this respect since a union may only be a party to an industrial dispute involving employees eligible to be its members...

(4) If there is ambiguity as to the meaning of words in the eligibility rules, assistance may be sought in the terms of the industry rule (subject to it being understood that the scope of the eligibility rule is not restricted by the scope of the industry rule)...

(5) Words in an eligibility rule should not be read in isolation such as to give the rule a wide and indefinite scope of operation that is unlikely to have been intended...

(6) Terms used in union eligibility rules should not be interpreted statically in accordance with the meaning they bore at the time that they were first introduced into the rules. Although such terms will have a fixed connotation, they bear a changing

denotation - that is, they may be interpreted in accordance with their appropriate current meaning, taking into account changing technologies and methods of work... This may mean that eligibility rules may cover industries or callings not known when the rules were originally drafted...

(7) The words “in or in connection with” are words of expansion. However, for the requisite connection to be established, the work of the employees in question must be referable or significant to the work of the second group of employees with whom there is said to be a connection. It is not sufficient that the work of the relevant employees makes it possible for an employer to conduct a business involving the performance of work by the second group of employees...<sup>14</sup> (citations and case references omitted)

### **The Rules of the CFMMEU**

[30] The current Rules of the CFMMEU (the National Rules) were certified by a Delegate of the General Manager of the Commission incorporating alterations of 24 July 2019. Relevantly in the present case, rule 2(E)(a) provides:

“(E) Without limiting the generality of the foregoing and without being limited thereby the following are eligible to be members of the Union:-

(a) An unlimited number of all classes of engine drivers, firemen, crane drivers, mobile crane drivers, forklift drivers, tow motor drivers, excavation drivers, pump attendants, pile drivers, motor drivers or attendants, greasers, cleaners, trimmers and any other workers assisting in and about the work incidental to any engine, boiler or machinery connected with the production or utilisation of power on land or any harbour or river, and boiler attendants attending boilers not generating steam for power purposes and such persons as have been elected or appointed as paid officers of the Union or a branch of the Union or whilst financial members of the Union are elected representatives of any working-class organisation to which the Union or a branch thereof is affiliated, or as a working-class member of Parliament.

Provided that mobile crane drivers, operators of fork lifts and/or tow motors engaged on the waterfront upon which such work being that of a waterside worker or engaged in the transport of goods by road, or motor truck drivers wherever employed, shall not be eligible for membership.”

[31] The current Rules of the Construction and General Division and Construction and General Divisional Branches (the Divisional Rules) were certified by a Delegate of the General Manager of the Commission incorporating alterations of 22 December 2020. Clause 2 of the Divisional Rules deals with eligibility for membership of the Construction and General Division. It provides that a member of the CFMMEU, who is a member by virtue of Rule 2(A), (B) and (N) of the National Rules shall belong to the Construction and General Division. A member of the CFMMEU by virtue of Rule 2(E) of the National Rules is also eligible for membership of the Construction and General Division.

[32] Rule 2(E)(a) is sometimes referred to as the “*FEDFA rule*” and was the result of an amalgamation between an earlier iteration of the CFMMEU and the Federated Engine Drivers and Firemen’s Association of Australasia (FEDFA). It is necessary to consider the history of this rule. The rule was established in 1947 and is discussed in an unreported Decision of the Industrial Registrar issued on 21 December 1947. That decision was tendered by the CFMMEU in the hearing of the present matter. It dealt with two applications made by the FEDFA seeking changes to its rules. The first application sought to change the conditions of eligibility for

membership of the FEDFA. The proposed rule was in the following terms with the additional wording underlined:

“The Association shall consist of an unlimited number of all classes of engine drivers, firemen, crane drivers, mobile crane drivers, operators of fork lifts and/or tow motors, dynamo attendants, motor drivers or attendants, greasers, cleaners, trimmers, and any workers assisting in and about the work incidental to any engine, boiler or machinery connected with the production or utilization of power on land or any harbour or river and boiler attendants attending boilers not generating steam for power purposes and such persons as have been elected as paid officers of the Association or whilst financial members of the Association are elected as representatives of any working class organization to which the Association or a Branch of the Association is affiliated or as a working class member of Parliament.”

[33] The second application sought to change the description of the industry in connection with which the FEDFA was registered as follows:

“the group of industries comprised within the calling service employment occupation or avocation of persons employed on land or any harbour lake or river as drivers of or attendants to any engine, winch, crane, mobile crane, fork lift, tow motor, pile driver, excavator, pump, boiler, generator, dynamo or motor used in or in connection with the generation production distribution or utilization of power and persons assisting in or about any work incidental thereto.”

[34] The Waterside Workers Federation of Australia (WWF) objected to the first application. The Transport Workers Union of Australia (TWU) objected to both applications. The Industrial Registrar records the grounds advanced by the FEDFA in support of the first application as:

“1. THAT the driving and operating of mobile cranes, fork lifts, and/or tow motors, is a comparatively new development in industry generally.

2. THAT since their introduction into industry these machines have been driven and operated by employees members of the application Association.

3. THAT the introduction and development has been gradual and until recently this Association has not become cognizant of the need to protect the interests of its members engaged in driving and operating these machines.

4. THAT in order to adequately protect the interests of all members of the applicant Association it is essential that the Conditions of Eligibility for Membership of the said Association be brought into line with the considerable developments and changes that have taken place in the industry.”

[35] The relevant parts of the FEDFA’s submissions to the Industrial Registrar were as follows:

“From the circumstance that the applicant is a ‘craft’ organization its members are to be found in all industries wherein the generation or utilization of power is an ordinary incident; employment of its members on the units now in question accordingly would not be any innovation...

...

In heavy industry the use of traverser cranes manned by members of the applicant is a necessary incident under present industrial practice. The increasing use of mobile cranes and fork lifts (and to a lesser degree tow motors) has a tendency to reduce the need for, or work done by, traverser cranes, but the functions to be discharged remain unaltered as should the personnel necessary for the performance of that work...

...

In all the circumstances there is no reason why the applicant should be deprived of its opportunity to admit as members these employees whose employment basically comprises the generation by a unit of power which is utilized by means of the unit itself.”

[36] The Industrial Registrar concluded that the FEDFA was a union organised on “*craft lines*”. It comprised members who habitually followed given occupations and associated activities and “*callings comparable to the given occupation*”. The “*craft*” in relation to which the union was comprised was “*that of employees concerned principally with the generation of power and the direct utilization of power*”. It was noted that members of the union are “*naturally*” found in those industries in which the generation and utilisation of power is a common incident. The rules as they existed prior to the application included “*crane drivers*” amongst the union’s ranks. The Registrar also concluded that the new terms sought to be introduced – mobile crane drivers and operators of forklifts – have common to them the self-generation of propelling power, a power used for the purpose of raising, lowering and transporting goods.

[37] The Industrial Registrar, having considered that a change should be made as a result of the first application, stated in relation to the second application:

“The conditions of eligibility for membership and the registered description of the industry should be identical in area but the former would to an extent control any unintentional excess in the latter.”

[38] Both amendments were granted. The amendment to the membership rules was subject to an exclusion for mobile crane drivers, operators of forklifts and/or tow motors engaged on the water-front on work being that of a waterside worker or engaged in the transport of goods by road. As can be seen, the rule is still essentially in this form.

[39] Some 37 years later, rule 2(E)(a) was considered by the High Court in *Re Coldham; Ex parte Australian Workers’ Union*<sup>15</sup> (*Re Coldham*). The background to that matter was that employers challenged findings by the Australian Conciliation and Arbitration Commission, that an industrial dispute existed with between the FEDFA and employers in a number of States involving employees engaged in a range of work. When a draft award was being considered by Deputy President McKenzie in 1983, the AWU supported by the Chamber of Western Australian Industry maintained that the FEDFA did not have eligibility under its rules to generate an industrial dispute with respect to crane driving in the civil construction industry. The matter was referred by the President to a Full Bench of the Commission constituted by Justice Coldham, Deputy President McKenzie and Commissioner Maher.

[40] In its decision issued on 21 December 1983, the Full Bench set out the FEDFA’s Eligibility Rule at that time, as it was relevant to the matters in dispute. The rule stated that the FEDFA shall include:

“...all classes of engine drivers, firemen, crane drivers, mobile crane drivers, fork lift drivers, tow motor drivers, excavator drivers, pump attendants, pile drivers, motor drivers or attendants, greasers, cleaners, trimmers, and any other workers assisting or about the work incidental to any engine, boiler or machinery connected with the production or utilization of power on land or any harbour or river, and boiler attendants attending boilers not generating steam for power purposes...”

[41] The FEDFA’s Industry Rule at that time, also set out by the Full Bench, comprised:

“The group of industries comprised within the calling, service, employment, occupation or avocation of persons employed on land or any harbour, lake or river, as drivers of, or attendants to any engine, winch,

crane, mobile crane, forklift, tow motor, pile driver, excavator, pump, boiler, generator, or motor used in or in connexion with the generation, production, distribution or utilisation of power, and persons assisting in or about any worker incidental thereto.”<sup>16</sup>

[42] In its Decision<sup>17</sup>, the Full Bench noted that the essence of the AWU’s submission objecting to an award being made was an assertion that the scope of FEDFA activity was limited to specified callings in the industry of employers engaged in the generation, production, distribution or utilisation of power, described as the power generation industry. The Full Bench also noted that in support of this submission, the AWU relied on the 1947 decision of the Industrial Registrar (referred to above). In rejecting this submission, the Full Bench said:

“We are not persuaded that the eligibility rule of the FEDFA contemplates an employer’s industry to which eligible members of the FEDFA are to be confined. It has been acknowledged since the time of its registration that the FEDFA is a craft union based on the callings of employees.”<sup>18</sup>

[43] The Full Bench also noted that in a 1913 decision relating to the first award for the FEDFA, Justice Higgins extended the coverage to the prescribed classifications working in connection with a variety of engines including crane engines, “*whether the motive-power be steam, electricity, coal, gas, suction gas, pressure gas, air, oil, or any other motive power, other than hand-power or animal-power*” and that these engines provided their own motive power rather than providing power for other purposes.<sup>19</sup> The Full Bench then considered whether the callings set out in the rule were intended to be limited to those pursued in power undertakings or divisions or departments which generate power within undertakings performing wider industrial functions.<sup>20</sup>

[44] In finding that the rule was not so limited, the Full Bench noted that the FEDFA Rules had been considered in earlier cases as being open to a wider interpretation than submitted by the AWU. In particular, the Full Bench noted that a 1917 Award affecting the FEDFA included as respondents mining establishments, flour millers, municipal councils, breweries, iron works, food preservers and paper mills. Further, it was noted by the Full Bench that by 1940 Judge O’Mara had made a mixed industries award covering crane drivers on the basis that:

“The operation of a crane such as a foundry or workshop crane is frequently as much a part of a production or maintenance process as that of any other machine installed in a plant.”<sup>21</sup>

[45] The Full Bench went on to find that:

“It is clear from this history that the FEDFA has extended its coverage of crane drivers under Federal awards and agreements to industry generally. This being so, its coverage should not be confined in any limited sense contended for by the AWU in the present matter unless the rules themselves afford some compelling reason for following the narrow interpretation.

We are satisfied that no such reason is afforded by those rules. On the contrary, the eligibility rule of the FEDFA may clearly be given a meaning of sufficient width to include within its terms persons whose industrial activities are not confined merely to the production or generation of power. There is also ample room for including within the rule crane drivers who operate in industrial areas beyond that a limited industrial activity. This is so whether the rule is read as referring to the classifications of ‘engine drivers, firemen, crane drivers, mobile crane drivers, fork lift drivers, tow motor drivers, excavator drivers, pump attendants, pile drivers’ and ‘motor drivers’ alone and independently of the remainder of the rule or whether all those classifications, including crane drivers, should be qualified not only by the geographical limitation relating to

land, harbours and rivers in the rule but by the words ‘about the work incidental to any engine, boiler or machinery connected with the production or utilisation of power...’ Either interpretation is reasonably open and historical development dictates acceptance. The rule must therefore be taken to include crane drivers employed in civil construction in Western Australia.”<sup>22</sup>

[46] The AWU made an application to the High Court challenging the jurisdiction of the Commission to make an award settling disputes arising from the FEDFA log of claims. That application was the subject of the High Court decision in *Re Coldham*. The judgement of the High Court records that the objection made by the AWU was that the FEDFA was not competent to generate an industrial dispute with respect to mobile crane driving in the civil construction industry and that the submission, based on the eligibility clause of the FEDFA’s Constitution, was that “...[T]he scope of FEDFA activity was limited to specified callings in the industry of employers who are engaged in the generation, production, distribution or utilisation of power whether that power be electrical, gas or otherwise”. The High Court concluded that the Decision of the Full Bench was correct, holding that:

“The AWU’s submission is that the description which follows the words ‘any other workers’ applies also to all the specific categories of workers which precede these words. The submission pays insufficient attention to the structure of the clause which naturally falls into three parts. The first part consists of ‘all classes of’ the specific categories, including ‘mobile crane drivers’ down to and including ‘motor drivers’. With the exception of ‘firemen’ and ‘pump attendants’ the categories in the first group comprise drivers of various kinds. And all the employees described in this group, with the possible exception of ‘pump attendants’ have some degree of special skill. The second part of the clause commences with the disjunctive ‘or’ and include ‘attendants, greasers, cleaners, trimmers, and any other workers assisting in or about the work incidental to any engine, boiler or machinery connected with the production or utilization of power’. We note in passing that it is unnecessary for the purposes of the present case to decide whether the words ‘on land or any harbour or river’ qualify the first part of the clause. The third part of the clause includes ‘boiler attendants not generating steam for power purposes’”.

[47] Consequently, the High Court considered that the structure of rule (2)(E)(a) indicated that membership of FEDFA comprised three groups:

“(1) all classes of enumerated drivers, firemen and pump attendants;  
 (2) attendants, greasers, cleaners, trimmers, and any other workers who answer the general description contained in the second part of the clause; and  
 (3) boiler attendants who answer the description contained in the third part of the clause.”

[48] The description governing the second group – “*connected with the production or utilization of power*” – did not apply to the first group. The High Court also said:

“...in the result, we do not regard the eligibility clause as ambiguous and, accordingly, there is no occasion to look to the industry clause for the purpose of resolving an ambiguity.”

[49] In short compass the effect of the High Court decision in *Re Coldham* was that for the purposes of considering the first part of the FEDFA’s Eligibility Rule, the reference to crane drivers (and by extension other enumerated drivers) in the term “*all classes of engine drivers, firemen, crane drivers, mobile crane drivers, forklift drivers...*” was not limited by other occupations listed in the Eligibility Rule or by the Union’s Industry Rule. In particular the Eligibility Rule was not limited to persons employed “*in connexion with the generation, production, distribution or utilisation of power*”.

[50] The operation of rule 2(E)(a) of the CFMMEU's Eligibility Rule has more recently been considered by the Full Court of the Federal Court in *Construction, Forestry, Mining and Energy Union v CSBP Limited*<sup>23</sup> (*CSBP*). It is instructive to consider this case in some detail. The facts as set out by the Full Court were that CSBP manufactured and produced chemicals and employed Process Technicians to undertake this work. Process Technicians classified at various levels operated plant and were encouraged by CSBP to have a turbine and boiler ticket. Each plant that operated a boiler or turbine was required to have the holder of such a ticket present while in operation. CSBP sought a declaration from the Court that the CFMEU (as the CFMMEU was then known) was not entitled to represent the industrial interests of persons employed by CPSBP as Process Technicians.

[51] McKerracher J at first instance, held that Process Technicians did not fall within the ambit of the CFMEU's eligibility rule and that the Union was not entitled to represent the industrial interests of those employees.<sup>24</sup> A significant factor in the decision at first instance was the evidence of CSBP's witnesses about the complex nature of the training activities and responsibilities of Process Technicians. It is also evident that the CFMEU witnesses asserted that the engine driving activities were an integral part of the process of producing chemicals and that the production process was work in connection with or incidental to the engines, boilers and machinery found in CSBP's plant. The CFMEU further asserted that while some skill was required to carry out the work of process technicians, those employees were not "*highly skilled*." McKerracher J concluded, contrary to the CFMMEU's submissions, that:

"All of the evidence shows that the chemical process which is highly sophisticated, does not exist to serve the turbines, boilers and generators. They are merely tools by which the chemical production process, which is the undoubted primary purpose of the Process Technicians, are used to achieve the production. The machinery has no reason for existence other than to be used as a tool in that production. Although it must be accepted that electricity is critical to the running of the plants, that does not change the nature of the function of the machinery and the primary purpose which it is designed to serve. Nor does it change the sophisticated nature of the employment of the Process Technicians."<sup>25</sup>

[52] The CFMEU appealed to the Full Court of the Federal Court.<sup>26</sup> The part of rule (2)(E) that was specifically considered by the Full Court was the third part (as identified by the High Court in *Re Coldham* concerning: "...*any other workers assisting in and about the work incidental to any engine, boiler or machinery connected with the production or utilisation of power on land ... and boiler attendants attending boilers not generating steam for power purposes*."). Also considered was rule 3 (the Industry Rule) which provides at (F):

"The group of industries comprised with in (sic) the calling, service, employment, occupation, or avocation of persons employed on land or any harbour, lake or river, as drivers of or attendants to any engine, winch, crane, mobile crane, forklift, tow motor, pile driver, excavator, pump, boiler, generator, or motor used in connection with the generation, production, distribution, or utilisation of power, and persons assisting in or about any work incidental thereto."

[53] Before the Full Court, CSBP contended that the primary role of Process Technicians was to make chemicals and to monitor, manage and optimise the production of the various chemical products made in each business unit. CSBP also contended that the manufacture of chemicals was not "*incidental to*" any engine, boiler or machinery connected with the production or utilisation of power. In this regard, CSBP submitted that while the turbines, generators and boilers at the plant generate and use power, the primary purpose of a process technician is not to assist in and about work which appertains to engines, boilers or machinery connected with the production or utilisation of power.

[54] CSBP also submitted before the Full Court that the words “*any engine, boiler or machinery connected with the production or utilisation of power*” should not be construed in isolation but read harmoniously with the CFMEU’s Industry Rule. Further, CSBP submitted that “*utilisation*” is concerned not simply with the use of power but with the facilitation of the use of power and that the words “*connected with the production or utilisation of power*” refer to power generation or utilisation as an industrial activity rather than to the use of any and all machines that use power. Accordingly, rule 2(E)(a) of the Eligibility Rule is concerned with employees whose principal purpose of employment work of a subordinate or subsidiary nature in relation to engines, boilers and machinery and that while Process Technicians may perform some work in relation to turbines, generators and boilers, that is not the principal purpose of their employment.

[55] The CFMEU argued before the Full Court that if an engine, boiler or machinery produces or uses power, the Eligibility Rule will be satisfied if the relevant employees are attendants assisting in and about work incidental to any engine, boiler or machinery and that the “*incidental*” work at CSBP’s plant was the production of chemicals. The CFMEU also argued that the primary purpose test is only applicable where some of the relevant duties fall outside the broad meaning of the words in the relevant eligibility rule.

[56] The CFMEU pointed to the construction of its eligibility rule determined by the High Court in *Re Coldham* and argued that the primary judge erred by:

- failing to have regard to the term “*utilisation of power*” and in construing the eligibility rule by finding that the engines, boilers and machinery were not “*connected with the production of power*” notwithstanding that they actually produce power;
- limiting the Eligibility Rule by reference to the Industry Rule when the Eligibility Rule was not ambiguous; and
- not giving the words “*incidental to*” their ordinary meaning so that the Eligibility Rule covers activities which are apt to actually happen in connection with the engines, boilers and machinery.

[57] The CFMEU also argued before the Full Court that “*the work*” referred to in the Eligibility Rule is the work of the enterprise being conducted by the employer and that “*incidental to*” should be understood as meaning “*naturally appertaining to*” rather than “*subordinate*” or “*subsidiary to*” that work. Further, the CFMEU argued that the primary purpose test of employment was not appropriate and that in times of technological change, it is to be expected that general words will be used to give wide coverage even though some specific callings are already included in the rule.

[58] The Full Court began its consideration by making two general observations. The first being:

“...the CFMEU’s attempt to analyse three parts of the Eligibility Rule in isolation from each other ignores the assistance legitimately and necessarily to be gained from reading the Eligibility Rule as a whole. One should seek to understand the rule by considering it as a whole so that its parts may shed light on each other. This is so apart from the question raised by the CFMEU as to the legitimacy of reference to the Industry Rule as an aid to the construction of the Eligibility Rule...The first point to be made is that the CFMEU’s attempt to present what is truly one question of interpretation as if it were three distinct exercises in construction to be performed separately is an invitation to error.”<sup>27</sup>

[59] The Full Court also considered that the statutory context in which the construction question arises is s. 166(1) of the *Fair Work (Registered Organisations) Act 2009* which relevantly provided (and still provides) as follows:

“(166)(1)...a person who is eligible to become a member of an organisation of employees under the eligibility rules of the organisation that relate to occupations in which, or the industry or enterprise in relation to which, members are to be employed is,...entitled, subject to payment of any amount properly payable in relation to membership:

(a) to be admitted as a member of the organisation[.]”

[60] The Full Court noted that the eligibility rule in question confers an entitlement to membership by reference to the occupations of employed persons and not by reference to the industry or enterprise of the employer. The Court observed that the circumstance that the focus of the eligibility rule is upon the occupations of the employees covered by it as opposed to the industry in which their employers are engaged means that the primary purpose test of employment is appropriate. The Court went on to cite with approval the approach to the primary purpose test set out in the judgement of Burt CJ in *Federated Engine Drivers and Firemen’s Union WA v Mt Newman Mining Co Pty Ltd (FEDFU v Mt Newman)*.<sup>28</sup>

[61] That case involved determination by the Western Australian Industrial Appeals Court of whether workers employed by the Company as “*machine drillmen*” were eligible to be members of the Federated Engine Drivers and Firemen’s Union (FEDFU) or the AWU. The FEDFU had coverage of “*engine drivers*” and “*stationary motor drivers*”. The AWU had coverage in the industry of metalliferous mining and had made an agreement with the Company in relation to a calling within that industry of “*drilling*”. In determining that the employees were not engine drivers or stationary motor drivers, Burt CJ said:

“...not every worker, who in doing the work he is employed to do, drives an engine, is an engine driver within the meaning of the eligibility rule of the appellant union. There are today many vocations which involve the driving in the sense of the control and operation of an engine which no-one would ever think fell within that description. ... The question in any particular case is, I think, whether the worker is employed to drive an engine so that he earns his wages by doing that, or whether he is employed to do something else. And if the answer is that he is employed to do something else then he is not an engine driver merely because he operates a machine and drives the engine of the machine to do what he is employed to do. No doubt this distinction will when applied to certain facts produce what one might call borderline cases.”<sup>29</sup>

[62] Wickham J in that case also said:

“...It is to be observed that what the worker may be described as doing does not determine the matter. The subsidiary question is the capacity in which he is employed or usually employed. The worker literally in this case could be said to be doing three things, driving an engine, operating a machine and drilling holes or he could be said to be doing one thing, namely drilling holes with an engine-driven machine, or another thing, driving a machine which drilled holes.

The capacity or calling of such a worker is a question of fact and the Commission correctly approached that question when it said that ‘The duties of the workers involved should be viewed as a whole’...”<sup>30</sup>

[63] The Full Court in *CSBP* also cited with approval the observation of Gray J in *Joyce v Christoffersen*<sup>31</sup> that: “*the primary function of an employee must be determined by looking at*

*what he or she does in the context of the employer's organisation of work.*"<sup>32</sup> The Court went on to hold that:

"The process technicians employed by CSBP perform duties more sophisticated and extensive than those contemplated by any of the particular occupational descriptions listed in the Eligibility Rule. Moreover, their duties are directed not to the use of machinery for the generation or utilisation of power but to the use of machinery which uses power for the production of chemical products."

[64] Further, the Court said:

"Senior Counsel for the CFMEU fought a gallant, but, in our respectful opinion, ultimately unsuccessful battle to maintain that the construction for which the CFMEU contended would not lead to an impossibly wide operation for the rule. It is difficult to see how, on the CFMEU's construction of the rule, any worker who turns on an electric switch in the course of his or her employment would not be within the Eligibility Clause.

It may be accepted that the eligibility rules of a trade union must be broadly construed; and that the scope of a membership clause should not be read narrowly or read down by reference to the membership clauses of other industrial organizations .... It may also be accepted that it is not relevant to the construction of the Eligibility Rule that there may be another industrial organisation that might be a more natural representative of a given employee ...

That having been said, one should not accede to attempts to promote exorbitant claims which, if allowed, would render otiose the efforts of those who laboured long and hard to produce explicit statements intended to mark out the scope of a union's coverage of occupations in the workplace.

In this regard, the context afforded by the Industry Rule, r 3(F), limits the scope of the Eligibility Rule so that it does not include those employees engaged in the generation of use of power only as an aspect of their role in an integrated process directed to the production of some other product... This provision indicates that the Eligibility Clause is not concerned with the occupations of all workers who operate machinery which uses power, but with those occupations who assist in the operation of machinery which is used in connection with the utilisation of power.

The CFMEU's argument that record to the Industry Rule is impermissible because there is no ambiguity in the Eligibility Rule is difficult to accept...

In our respectful opinion, it is legitimate to have regard to the Industry Rule for the purpose of resolving doubt as to the proper construction of the Eligibility Rule. It is also legitimate to eschew a construction which is so 'extremely wide or indefinite as to be unlikely to have been intended'...". [citations omitted]<sup>33</sup>

[65] The Full Court in *CSBP* was considering a different part of the CFMMEU's Eligibility Rule than the part that was the focus of the High Court in *Re Coldham*. In *CSBP* the Full Court found that it was legitimate to have regard to the CFMMEU's Industry Rule (rule 3(F)) to resolve doubt as to the proper construction of the part of the Eligibility Rule under consideration. In *Re Coldham* the High Court determined that the part of the Eligibility Rule concerning "*enumerated drivers, firemen and pump attendants*" was not ambiguous and that reference to the Industry Rule for the purpose of resolving ambiguity was not necessary.

[66] Notwithstanding its reference to the CFMMEU’s Industry Rule, the Full Court in *CSBP* ultimately applied the principal or primary purpose test to conclude that the process technicians were principally employed to manufacture chemicals and were not within the Eligibility Rule of the CFMMEU.

[67] The approach to applying the principal or primary purpose test is to consider holistically the major, substantial or principal aspect of the work performed by the employee including what the employee is employed to do, the tasks undertaken, the amount of time spent undertaking particular tasks, and the circumstances of the employment.<sup>34</sup> Further, the primary purpose of employment for which an employee is employed must be determined by looking at what the employee does in the context of the employer’s organisation of work.

[68] While the time spent undertaking tasks is a relevant consideration, it is not determinative of an employee’s primary or principal purpose, and the test is not merely a matter of quantifying the time spent on various elements of work performed by the employee. The quality of the different types of work done is also a relevant consideration.<sup>35</sup> This is illustrated by the example used by Gray J in *Joyce v Christoffersen*<sup>36</sup> as follows:

“Much of the evidence before the court in the present case was concerned with the proportion of the time of each employee concerned which was occupied by what might be described as clerical duties. No doubt the time occupied in the performance of such duties is to be taken into account, but the test of whether a person is engaged in a clerical capacity or in performing clerical work is not a quantitative one. Many people are employed in jobs which require them to do a great deal of recording, but which could not be described as clerical jobs. For instance, a doctor in a twenty-four hour medical clinic might spend the majority of his or her time writing detailed histories, records of diagnosis and of prescription, so that other doctors seeing the same patient at the same clinic would have a clear indication of what had gone before. Even though the majority of the doctor’s time might be spent in writing such records, it could not be said that the doctor was engaged in a clerical capacity. The primary functions of the doctor’s employment would be diagnosis and treatment.

...A motor vehicle workshop might employ a number of motor mechanics. Each motor mechanic might be required to record on job cards the results of his or her labours. Plainly, the primary function of each motor mechanic would be the repair of motor vehicles, and the recording would be the secondary function. If, however, it were decided that motor mechanics should be relieved of the recording function, and a separate person were to be employed for this purpose, going from mechanic to mechanic and recording details of work done, that person would undoubtedly be engaged in a clerical capacity. His or her primary function would be the recording of work done.”<sup>37</sup>

[69] The parties are in agreement that in applying the relevant part of the CFMMEU’s Eligibility Rule, the appropriate test is the primary purpose test, sometimes referred to as the principal purpose test.<sup>38</sup> The CFMMEU succinctly summarised the test as a consideration of:

“the totality of the employee’s duties, in the context of the employer’s organisation of work, in order to ascertain the principal function of their employment.”<sup>39</sup>

[70] The Respondent does not disagree with the various components of this formulation. I also accept this formulation and consider that it is synonymous with the principal or primary purpose of employment test. This the approach I have applied to the evidence in the present case, which I now turn to consider.

## Evidence

### *The Rocklea Site*

[71] Mr Holden's evidence about the operations at the Rocklea Site was generally not contested. At the Rocklea Site Dulux has a paint manufacturing facility and a warehouse which is a distribution facility. Production Operators work in the manufacturing area in four areas: raw materials, paint manufacturing, quality control and filling. In the distribution facility, Warehouse Operators fulfil customer orders for product produced in the manufacturing facility at the Rocklea Site and at other Dulux manufacturing facilities in Australia. Mr Lambert said that the warehouse facility is the size of two soccer fields. Mr Holden said that the area is approximately 9500 square meters, less than the two full-size soccer fields stated by Mr Lambert (noting that a full-size soccer field is 7140 square meters). I accept that the warehouse is a large facility.

### **The 2016 Agreement**

[72] Clause 1.3 of the 2016 Agreement relates to the coverage of the agreement and states as follows:

#### **"1.3 Application and Coverage**

1.3.1 This Agreement shall have application to the Dulux Rocklea site located at 1477-1519 Ipswich Road, Rocklea, in the State of Queensland, to employees employed in or in connection with the manufacture, processing, treatment, handling, distribution, maintenance (but not retailing) or storage of materials or products used in or in connection with decorative or technical surface coatings or coverings and associated products and covered by the Agreement's classifications.

1.3.2 This Agreement will cover:

- (a) Employees engaged in the classifications listed in Clauses 4.1 and 4.2.
- (b) United Voice, the Union, and
- (c) DuluxGroup, the Employer or Company or Dulux."

[73] The classification structure of the 2016 Agreement is set out at clause 4.1 as follows:

#### **"4.1 Classification Structure**

4.1.1 An employee shall commence as a Trainee and progress on the demonstration of competency at each level.

4.1.2 Trainee to Grade 1.6 shall be comprised of the following skill areas:

- Filling, labelling and can store;
- Order picking;
- Collect order centre and machine tinting;
- Unloading trucks and FS/RM replenishment;
- Loading trucks;
- Paint making and pot wash thinner manufacturers

4.1.3 Grade 1.7 shall be comprised of the following skill areas:

- Operation of robotic palletiser & depalletiser
- Operation of automatic filling stations
- Operation of automated paint transfer system
- Operation of automated stretch wrapping system
- Operation of automatic denester
- Operation of automatic labellers

4.1.4 Grade 2 shall be comprised of the following skill areas:

- Colour matching and testing;
- Coordination of warehouse despatch and claims;
- Dispersion.

4.1.5 Grade 2.1 shall be comprised of the following skill areas:

- Raw materials- pigment preparation/handling;

4.1 .6 Grade 3 shall be comprised of the following skill areas:

- Bulk tinting
- Bead plant

4.1 .7 All levels include the skill of Forklift Driving.

4.1.8 Promotion to Team Leader, Leading Hand, Grade 2 and Grade 3 positions, shall be by appointment. It is a condition that at all these levels incumbents shall act down as required.

4.1 .9 Training in Grade 2, 3, Leading Hand and Team Leader skills will be provided on the basis of an intention to appoint that employee to the Grade concerned subject to the demonstration of competency in the tasks and skills. The Company shall not unreasonably withhold such appointments.

4.1.10 All rates are inclusive of relevant shift allowances.

4.1.11 Employees are required to maintain competency at their relevant level as per the classification structure. Failure to demonstrate competency will result in the employee reverting to the level as per the classification structure that reflects their current duties.”

[74] It is not in dispute that the 2016 Agreement covers Mr Lambert. After the hearing concluded the parties were requested to confirm Mr Lambert’s classification under the 2016 Agreement and agreed that he is classified at Level 1.6.

**Warehouse Operator position description**

[75] Both Mr Holden and Mr Lambert tendered different versions of a position description for the position of Warehouse Operator. The position description for the position of “*Warehouse Operator*” appended to Mr Lambert’s first statement<sup>40</sup> is as follows:

- “• Manage delivery of bulk quantities of incoming stock on wrapped pallets from large delivery transporters. This work is done using a forklift and/or sideways moving Reach truck
- Bulk stock is stored on wrapped pallets (weighing up to 1 ton) in warehouse racking. The Operator is required to use a Reach Truck to elevate the pallet up to high racking (up to 8.5 meters)
- Receipting of incoming goods and stock returns using a hand held computer unit/gun (RF Gun)
- Picking & packing and dispatch of orders. The Warehouse Operator walks behind a motorised pallet mover or rides on a Low level Order Picker while he/she collects the stock required onto a pallet prior to wrapping in preparation for despatch. The hand held computer unit is also used when assembling outgoing orders.
- Experienced driving of Forklift (forward/backward driving) or Reach truck (sideways driving in either direction)
- Computer skills are also required to manage inbound and outbound stock on a SAP computer program
- Warehouse Operator are expected to accumulate stock movement of 5 ton per shift
- Operators are required to work 8 hour dayshift with some overtime and occasional Saturday work”.
- 

[76] The work environment is described as:

“This is a large purpose built warehouse environment with stock being moved from pallet to racking and racking to order picking by several operators at one time. Warehouse operators are required to stand and walk on concrete floors during their shift and/or sit in a forklift/reach truck. Comfortable safety shoes/boots are provided.

The work is a physically demanding requiring manual tasks with picking and packing of a variety of paint, stain, building maintenance & horticultural products for Dulux, Cabots, Selley’s, Yates and associated brands to be sent out to various locations.

Reach trucks are used in the aisles (sideways driving required), motorised pallet movers are used during picking and packing and forklifts are used in the yard for loading and unloading of delivery trucks. The delivery/despatch vehicles range from very large transporter trucks to small courier delivery vans.

Some of the work involves elevating 1 ton of product on a pallet to racking 8.5 meters in the air.”

[77] Next to the heading “*Work tasks & fitness requirements*” the position description goes on to say:

- “• Experienced forklift and Warehouse Operators are required for this role
- Good hearing, normal vision, peripheral vision, balance & depth perception are essential as per the Australian Transport Council “Assessing Fitness to Drive” guidelines for drivers

- Good mobility, strength & agility is required for strenuous physical work and for driving forklifts & reach trucks where the driver is required to twist and turn in their seat to ensure good visibility and precision placement of pallets onto racking or floor space
- Personal Protective Equipment is required to be worn including safety vests; safety shoes/boots; gloves
- While this is not a noisy work environment, good hearing is required for communication and to be able to hear warning sirens & beeping of moving machinery & vehicles.”

[78] The version of the position description tendered by Mr Lambert has an address for Dulux at Clayton in Victoria and indicates that the position title is Warehouse Operator and the Workplace is the “*DuluxGroup Distribution Warehouse*”. There are spaces on the version tendered by Mr Lambert for information to be inserted in relation to the name of the employee, the location, Manager’s name and telephone. Those spaces are blank. The version of the position description tendered by Mr Holden<sup>41</sup> states also states that the workplace is the “*DuluxGroup Distribution Warehouse*”. Unlike the version tendered by Mr Lambert, that position description states that the location is Rocklea, the Manager’s name is Peter Holden and the position is titled “*Warehouse Storeman and Paint Manufacturing*”. The position description tendered by Mr Holden is as follows:

- “• Able to perform all tasks from receiving, storing, picking and dispatching of Goods associated within the DuluxGroup of business’, and flexibility to work in Paint Manufacturing when required
- Receipt and inbound goods from DG factories, warehouses and suppliers
- Putaway of product into warehouse racking systems at 8m high
- Replenishment of stock
- Picking and packing of customer orders in a condition that meets statutory regulations and requirements
- Dispatching of customers’ orders onto various transport units, meeting Statutory Regulations and Chain of Responsibility requirements
- Participation in safety programs, and execution of all tasks in a safe manner.
- Work collaboratively with different site teams, management, vendors/contractors.
- Work to the Values and Behaviours of DuluxGroup
- Deliver performance expectations while performing all tasks in a safe manner
- Operation of Low Level Order pickers and Counterbalance and Reach forklifts, and a range of warehouse machinery
- Perform tasks using company supplied PPE where required
- Hazardous Materials and Dangerous Goods are handled and stored onsite and needs to be manage appropriately.
- Competent use of technologies supplied to perform all tasks (e.g. RF devices)”

[79] Next to the heading “*Work Environment*” the position description states:

- “• Site consists of a Paint Manufacturing Plant and a Warehouse Distribution Centre. DG has Protocols, Values and Behaviours, and Work Procedures that all staff must comply to.
- The work is physically demanding requiring manual tasks in handling a range of products, frequently lifting material up to 15 kilos, and often over 16kgs. Frequently

posture positions of standing, walking, bending, reaching, twisting, gripping, neck, arm and trunk movements.

- Operators are required to stand/walk on concrete surfaces and or sit on counterbalance/Reach forklifts
- MHE of Reach Trucks, Counterbalance forklifts and Low Level Order pickers are utilising for moving palletise stock in racking up to 8 meters, and various configurations of trucks and vans requiring licensed operators.
- Dangers Goods Site where work practices adhere to regulatory requirements and best practice.”

[80] The fitness required for the position is said to be:

- “• Good hearing, normal vision balance and depth perceptions are essential
- Good mobility, strength and agility are required for physical work of manual handling, and the operation of MHE which requires twist and turning for visibility and precision placement of stock.
- Personal Protective Equipment is required to be work and supplied by the company.”  
(errors in original)

### **Materials handling equipment**

[81] While they are at odds over whether all materials handling equipment (MHE) in the warehouse are forklifts, Mr Lambert and Mr Holden agree that three pieces of such equipment are used by Warehouse Operators. According to Mr Lambert the three pieces of MHE used at the Rocklea site are forklifts which Mr Lambert terms Truck forklifts, Reach Truck forklifts and Low level order pickers (also known as LLOPs). Mr Lambert describes each of these machines as follows:

“The largest forklifts are the Truck forklifts. There are 4 of these in the warehouse. These are gas and petrol forklifts which lift up to about 2.5 tonne. These forklifts are primarily used outside the warehouse to load and unload pallets of stock that is delivered and despatched to and from the warehouse. Truck forklifts are also used to move stock on and off the automatic pallet wrapper (which wraps shrink wrap around pallets)...

The second-largest forklifts are the Reach Truck forklifts. There are two types of reach truck forklifts used in the warehouse: Toyota and Hyster. There are 9 orange Toyota High Reach truck forklifts, and 3 yellow Hyster High Reach Truck Forklifts. These are battery operated forklifts which can lift up to about 1600kg. These forklifts are used inside the warehouse and reach up to about 8.5m. They are used to put inbound freight onto racks for storage, and to replenish and top-up stock from racks on higher levels onto lower levels....

Finally, there are also Low level order pickers, which are smaller than Reach Truck forklifts. They can lift about 600kg and can be used to about 1 to 1.5m. They are used for order picking on the low racks... There are 13 of these.”<sup>42</sup>

[82] Mr Lambert tendered photographs of each of the machines he describes. Mr Lambert accepts that the LLOP has a height restriction of between 880 and 890mms.<sup>43</sup> However, Mr Lambert maintained that they are capable of going higher than 900mm.<sup>44</sup> The LLOPs at Dulux are locked off to restrict their height to below 900mm. Mr Lambert states:

“The truck has a capability of obviously lifting over 900 millimetres but it’s been modified to restrict that height by two pieces of – it appeared to me to be steel blocks that actually stop the forks from actually going any higher than 900.”<sup>45</sup>

**[83]** A forklift licence is required to operate the Truck and High Reach Truck forklifts. The LLOP does not require a licence.<sup>46</sup> All Warehouse Operators are required to hold a forklift licence. In Mr Lambert’s opinion, LLOPs are not generally referred to as “*forklifts*” by Warehouse Operators for this reason and mostly to distinguish them from the Truck and Reach Truck forklifts. Despite this, Mr Lambert understands that they are a type of forklift. In this respect Mr Lambert tendered a printout from the website of Toyota Forklifts. That website shows that these machines are described, by Toyota, as “*Order Picker Forklifts*”.

**[84]** Mr Menon also disputes the characterisation given to the classification of LLOPs by Mr Holden. Mr Menon annexed to his statement an extract from the website of WorkSafe Queensland (WorkSafe). WorkSafe describes the two types of licences for forklifts being and LF and an LO licence. An LF licence allows the holder to operate “*forklift trucks*”. A “*forklift truck*” is described as follows:

“A forklift truck is a powered industrial truck equipped with a mast and an elevating load carriage which has a pair of fork arms attached (that can be raised 900mm or more above the ground) or other load holding attachment.”

**[85]** A “*forklift truck*” does not include order-picking forklift trucks. The LO licence allows the holder to operate “*order-picking forklift trucks*” which are described as:

“An order-picking forklift truck has the operator’s control as part of the load carriage/lifting media and lifts with it. Order-picking trucks are generally referred to as “stock pickers”. They can be fitted with a platform extension for use in furniture warehouses, or can be a turret truck in narrow aisle warehouses.”

**[86]** During an inspection of the Rocklea site, assisted by a work health and safety inspector, Mr Menon observed that the site was “*chock-a-block*”<sup>47</sup> with forklifts. That included LLOPs. Mr Menon did not measure the height of the LLOPs or view anyone else measuring the height. However, Mr Menon maintained that the requirement to hold a licence “*doesn’t stop a forklift being a forklift*”.<sup>48</sup>

**[87]** Mr Holden agrees that there are three types of MHEs used at the Rocklea Site; reach trucks, LLOPs and gas counterbalance forklifts. Operation of the reach trucks and counterbalance forklifts requires a forklift licence. Mr Holden’s evidence in his second witness statement is that only two of the pieces of MHE are forklifts and that the LLOP is not a forklift. Mr Holden has reviewed the relevant WH&S Regulations and maintains that the LLOP is not a forklift truck because it has been modified so that it cannot be raised 900mms or more above the ground.<sup>49</sup> The LLOP is also not an order picking forklift truck because the operator controls do not rise with the lifting media. Therefore, a warehouse operator does not need a licence to operate the LLOP.

**[88]** Mr Holden maintains that the LLOP is not used to pick stock off pallet racks; warehouse operators manually perform this task while standing on the warehouse floor. The purpose of the LLOP is to act as a pallet mover. The lifting mechanism of the LLOP is simply to allow the manual picking and stacking of product at an ergonomic height. Mr Holden also said that the LLOP used at the Rocklea site is not similar to a reach truck and does not require the operator to wear a safety harness while operating it. The lifting mechanism of the LLOP is not itself used to pick product, rather it assists to move product to an ergonomic height.

[89] Mr Holden was shown photographs of each type of MHE in cross-examination. In relation to the counterbalance forklift, Mr Holden accepted that this is a forklift<sup>50</sup> and agreed that the counterbalance forklift has an engine,<sup>51</sup> is driven by warehouse operators,<sup>52</sup> and the controls do not move up and down.<sup>53</sup> The tines of the forklift, controlled by the warehouse operators, do move up and down and from left to right.<sup>54</sup> The forklifts are used to move pallets of Dulux product around the warehouse.<sup>55</sup> Mr Holden accepted that ordinarily, the counterbalance forklift would be moved or driven around the warehouse with the load at as low a level possible, although it can be operated while the load is at both a low and high level.<sup>56</sup> A licence is required to operate a counterbalance forklift.<sup>57</sup>

[90] Next, Mr Holden was taken to the reach truck. After some pressing, Mr Holden accepted that a reach truck can be classified as a forklift.<sup>58</sup> Reach trucks have an engine,<sup>59</sup> the controls themselves don't move up and down,<sup>60</sup> and the operator uses the controls to move the tines up and down and left to right.<sup>61</sup> The reach truck is used to move pallets of Dulux products around the warehouse.<sup>62</sup> A warehouse operator uses foot controls to drive the reach truck.<sup>63</sup> A licence is required to operate a reach truck.<sup>64</sup>

[91] Finally, Mr Holden was taken to the LLOP. Mr Holden accepted that the LLOP has an engine/electric motor used to generate power.<sup>65</sup> The controls do not go up and down.<sup>66</sup> The warehouse operators use controls to move the tines up and down but unlike the reach truck and counterbalance forklifts the tines cannot move side to side.<sup>67</sup> The LLOP is driven using hand controls.<sup>68</sup> When driving the LLOP, the tines are generally kept at the lowest level possible.<sup>69</sup> Mr Holden accepted that the LLOP has been modified by Dulux to keep the tines at less than 900 millimetres and that<sup>70</sup> unmodified, the tines of the LLOP can be raised above 900 millimetres.<sup>71</sup>

[92] Mr Holden also accepted that his view that the LLOP is not a forklift is based on the fact that a license is not required to operate the LLOP and that should Dulux wish to do so, it could remove the modification.<sup>72</sup> Mr Holden conceded that if the modification was removed warehouse operators would require a licence to operate the LLOP,<sup>73</sup> and, in this circumstance, the LLOP would be a forklift for the purposes of the legislation.<sup>74</sup> Mr Holden also accepted that if the regulations were changed such that the 900mm restriction became, for example, a 700mm restriction, the LLOP would then be a forklift<sup>75</sup> and that this change would not require “*any change to the fundamental nature of the*” LLOP itself.<sup>76</sup>

### **Work performed by Warehouse Operators**

[93] Mr Lambert's evidence about the work he performs can be summarised as follows. Mr Lambert has around 30 years' experience in the warehousing industry. Based on that experience, Mr Lambert's view is that the job of a Warehouse Operator at the Dulux Rocklea Site could just as easily be described as “*Forklift Driver*”. Mr Lambert has seen this kind of job advertised as a Forklift Driver in other warehouses.

[94] Mr Lambert is a member and delegate of the CFMMEU. Mr Lambert was previously a member and delegate of the UWU. Including Mr Lambert there are 36 Warehouse Operators employed at the Rocklea site. There are also Team Leaders, Leading Hands, Stock Returners and labour hire employees. Mr Lambert accepts that Leading Hands and Stock Returners are employed as Warehouse Operators but considers that Team Leaders are not employed as Warehouse Operators.<sup>77</sup>

[95] Work is divided into a day shift and an afternoon shift. Afternoon shift is between 2pm and 10:30pm. Mr Lambert has almost continuously worked the day shift. A day shift is technically between 5:45am and 2:36pm but most workers start work at 5.00am and finish at 1:56pm. Mr Lambert's evidence is that supervisors allocate work according to the following categories: Office, Replenishment, Powders Interstate, Parchem, Front and Put Away, Transport>Returns, Export, Picking and Damaged Stock. To support his evidence about the types of work performed by Warehouse Operators and how that work is allocated, Mr Lambert tendered daily worksheets prepared by Team Leaders at the Rocklea site. Mr Lambert annexed to his evidence a number of these daily worksheets.<sup>78</sup> They appear to cover the period 13 July 2020 to 5 February 2021. Mr Lambert states that the worksheets are prepared each day by the Team Leader and are usually prepared in the afternoon for the following day's work.

[96] According to Mr Lambert, the daily worksheets are "*common knowledge*" and read out each day. The documents are kept in a folder on the desk of the main office. In obtaining the documents for use in these proceedings, Mr Lambert states that asked for permission from the acting Team Leader who was working on the day he obtained them.<sup>79</sup> Mr Lambert disclosed to the acting team leader that the purpose of his obtaining the worksheets was to use them in the present proceedings.<sup>80</sup> Mr Lambert photocopied the documents.<sup>81</sup>

[97] Mr Lambert accepted that he acquired the documents on or around 6 February 2021,<sup>82</sup> prior to completing his second statement in these proceedings.<sup>83</sup> Mr Lambert accepts that these worksheets do not show the amount of time actually spent driving a counterbalance forklift,<sup>84</sup> reach truck,<sup>85</sup> or LLOP<sup>86</sup> on the respective days.<sup>87</sup>

[98] Mr Lambert said that in any week, Warehouse Operators may perform any of the groups of specified in the work sheets. Tasks are assigned each morning at a tool-box meeting. Mr Lambert states that the order picking work is typically assigned to labour hire workers. Dulux employees spend the majority of their time operating the Truck and Reach Truck Forklifts and are generally not required to do order picking for more than one day a week.

[99] Mr Lambert strongly disagrees that picking work forms the majority of work undertaken by Warehouse Operators for two reasons. Firstly, Mr Lambert states that in day-to-day usage on site, a reference to "*picking*" is a reference to picking of stock using the LLOP only. This work involves fulfilling orders in accordance with information about quantities of stock required. This information is given by way of the RF gun. LLOPs are used for this work. This work is often assigned to labour hire employees.

[100] According to Mr Lambert, Dulux's evidence seems to refer to "*picking*" in a broader sense to include stock picking where reach forklifts are used. This is not consistent with practice. On average, Mr Lambert is assigned to "*picking*" using the LLOP once a week. For the period of 1 December 2020 to 22 January 2021, Mr Lambert worked 22 days. On 6 of those days Mr Lambert completed picking using an LLOP. Mr Lambert accepted that, because of an error in his statement about being on an RDO on November 18, he was assigned to picking using an LLOP on 7 out of the 22 working days rather than 6.<sup>88</sup> Mr Lambert also states that Warehouse Operators may "*occasionally*" be assigned the task of order picking.

[101] Mr Lambert's evidence about the types of work performed by Warehouse Operators was set out in three witness statements and can be summarised as follows. Mr Lambert states

that each morning two B-double semi-trailers are waiting at the gates at 5:00am ready to be unloaded by warehouse staff. Mr Lambert said:

“In short, Warehouse Operators use forklifts to move product throughout the day. A procession of trucks arrive and depart from the site throughout the day from 5am onward for the purposes of delivering materials and dispatching stock. To get a sense of how much stock is typically loaded onto trucks by forklifts for the purposes of dispatch, 158,000 litres of paint was dispatched from the site on 3 December 2020.”<sup>89</sup>

**[102]** Mr Lambert states that these trucks are unloaded by Warehouse Operators using Truck Forklifts. The materials are then moved to areas designated for inbound freight, also by Warehouse Operators. The material is moved using Truck Forklifts. This work is called “*out the front*” work. A majority of deliveries are picked up and dropped off by trucks during the day shift.

**[103]** Warehouse Operators move material from the inbound areas using Reach Truck Forklifts. The goods are moved to the appropriate location within the warehouse where they are placed on pallet racks. The Reach Truck Forklifts allow the material to be raised up to eight meters in the air. This work is described as “*put-away*”. Each person may perform out the front work and put-away work on any given day. Warehouse Operators may also replenish stock to ensure sufficient supply for order pickers to fulfil orders received from inventory control. This work is called “*replenishment*” and is performed using the Reach Truck Forklifts.

**[104]** Once the orders are picked and stock collected, it is transported to the outbound area for dispatch. Stock going to interstate Dulux sites and trade centres is moved to a specific area near the manufacturing plant. Once there, Warehouse Operators, who Mr Lambert calls “*forklift drivers*”, load the goods onto trucks using a reach forklift. The operators usually undertake this work all day when it is assigned to them. Generally, two or three Warehouse Operators are assigned to this work on any given day. This work is described “*interstate*” work.

**[105]** In his second witness statement Mr Lambert gave detailed evidence in relation to “*interstate*” work described in the worksheets as “*Powders/Interstate*” although the work no longer includes powders. Mr Lambert described the interstate work and said that he uses an RF gun to select the interstate queue and then selects an order. The RF gun directs Mr Lambert to a series of locations in the warehouse to collect stock to make up the order. Once the order is collected Mr Lambert takes it to a staging area where it is assembled onto a pallet which is wrapped by a machine. While this is occurring Mr Lambert finalises the order in the RF gun and produces a label for the stock to affix to the pallet. The order is then posted in the RF gun and a delivery docket is generated in the office. Mr Lambert undertakes this task during the day unless “*parchem*” orders come through which then take priority. That work involves products for construction products such as cement, building fixtures and hardware which Dulux supplies to construction companies. For the entire day that he undertakes interstate and parchem work, Mr Lambert operates a forklift. If he completes parchem and interstate work on that day, Mr Lambert may do some replenishment or bin to bin work.

**[106]** In relation to replenishment work, Mr Lambert said that he logs on to the RF gun and puts himself into a queue which contains a list of jobs based on priority. Mr Lambert works through that list and undertakes replenishment until he receives a replenishment request from an order picker to replenish stock. These requests are made when an order picker attends a location in the warehouse to retrieve stock for an order and there is insufficient stock available. On receiving a replenishment request, Mr Lambert manually types what needs to be replenished

into the RF gun which identifies a location for the stock. Mr Lambert then retrieves the stock by taking it down using his forklift and then delivering it to the required location identified by the order picker and then completes the job transaction in the RF gun. When this has been completed, Mr Lambert returns to the automatic queue in the RF gun. Mr Lambert said that apart from meal breaks, he is operating a forklift for the duration of the days that he is assigned to this task.<sup>90</sup>

**[107]** Mr Lambert also disputes the Mr Holden's evidence concerning "*export*" work. Mr Lambert does not agree that export work is a part of order picking work. Warehouse Operators assigned to export work use a Reach Forklift to perform the work and are assigned to the work for the entirety of the day.

**[108]** Mr Lambert states that all tasks require the use of a Truck Forklift, High Reach Truck Forklift or LLOP. These machines are used for the vast majority of the day. There are days when Mr Lambert would not use a reach truck or a counterbalance forklift.<sup>91</sup> Warehouse Operators briefly cease the operation of a forklift to take lunch and attend meetings and when performing the following tasks:

"a. stock enquiries, which will typically occur when someone is assigned to the task of "put-away". Workers performing "put-away" operate a handheld radio frequency gun that is used for the purpose of scanning pallet barcodes and locating the specific location within the warehouse that the pallet needs to be stored. The worker will then transport the pallet to the identified location, using either a High Reach Truck Forklift or [LLOP]. In the event that the space is already occupied, the worker will need to initiate an enquiry with inventory control and then they return to the task shortly thereafter;

b. investigating any stock discrepancies that become apparent when performing the tasks described above;

c. enquiring as to stock quantities with a Team Leader for the purposes of fulfilling interstate orders; and

d. when performing order picking, using an automatic pallet wrapper in preparation of stock being dispatched."<sup>92</sup>

**[109]** Mr Lambert accepts that when using the LLOP, the Warehouse Operator physically picks the stock off the shelf to put onto a pallet.<sup>93</sup> Sometimes the LLOP will be used to pick up a whole pallet. Sometimes additional stock is physically put onto or taken off the pallet that has been picked up using the LLOP.<sup>94</sup> When getting off the LLOP to move stock onto or off the pallet, Mr Lambert does not log off the machine and remains logged on the whole time.<sup>95</sup>

**[110]** Mr Lambert also states:

"The tasks described above are very much secondary to the primary duty of almost all Warehouse Operators which is to operate a forklift. It is more common than not for me to spend my working day operating a forklift without interruption."<sup>96</sup>

**[111]** Mr Lambert annexed to his first statement handwritten notes made over a number of working days. Mr Lambert accepted that they were not his notes<sup>97</sup> and said that any reference to him making those notes was a mistake.<sup>98</sup> Mr Lambert's explanation was that he asked a few other workers to make notes about what work they were performing because he knew that Dulux's position was that Warehouse Operators were not forklift drivers. Mr Lambert gave those other employees a notebook of the same type as he used to make notes and did not notice

that he had attached the notes of another worker to his witness statement. Mr Lambert accepted that he was not with the person who made the notes at the time they were made.<sup>99</sup> Mr Lambert did not receive the notes each day but probably after all the entries were completed<sup>100</sup> and does not know when the notes were taken.<sup>101</sup>

[112] At the hearing Mr Lambert produced his own notes which were called for by Dulux and provided by Mr Lambert.<sup>102</sup> Mr Lambert was not cross-examined in relation to those notes and they were tendered into evidence.<sup>103</sup> The notes cover 19, 20, 23, 24 and 25 November 2020 and indicate that on those dates, Mr Lambert spent much of his working shift on the reach truck or the high reach truck.

[113] Mr Lambert also tendered a job advertisement placed by a recruitment company for its client “*a global leader in the manufacture of paint products*” seeking the services of two forklift operators for work at Rocklea. The advertisement states that the successful candidate will have a forklift ticket and two years of experience operating a forklift and experience in working at a manufacturing facility as a process worker.<sup>104</sup>

[114] Generally, Mr Lambert disagrees with the evidence of Mr Holden. Mr Lambert considers that the evidence of Mr Holden overstates the amount of time Warehouse Operators spend order picking. In Mr Lambert’s view, this overstatement arises for several reasons but primarily because the view is based on the premise that an LLOP is not a forklift.

[115] It is also Mr Lambert’s view that the SAP data from RF guns relied upon by Dulux in forming its view is unreliable. According to Mr Lambert, RF guns are not used by Warehouse Operators when performing some tasks, for example, office work. As a further example, 4 or 5 Warehouse Operators will ordinarily perform “*out the front*” work and while undertaking this work only one of those 4 or 5 Warehouse Operators uses an RF gun to receive goods. The remaining Warehouse Operators load and unload the trucks using a gas counterbalance forklift.

[116] Further, Mr Lambert states that the SAP data includes data from labour hire employees. Mr Lambert’s evidence is that generally labour hire workers are “*only ever assigned to the task of order picking*”. In his third statement, Mr Lambert states that he does not understand the data relied upon by Mr Holden in his second statement (dealt with below) and replies to Mr Holden’s evidence as follows:

- “a. on 17 November 2020 – I was assigned to “Picking”. I would have been operating a low level order picker through the day to do this work;
- b. on 18 November 2020 – I was on a rostered day off;
- c. on 19 November 2020 – I was assigned to “Replenishment”. I would have been operating a reach truck throughout the day to do this work;
- d. on 24 November 2020 – I was assigned to “Powders/Interstate”. I would have been operating a reach truck throughout the day to do this work; and
- e. on 25 November 2020 – I was assigned to “Replenishment”. I would have been operating a reach truck throughout the day to do this work.

At paragraph 39 of Holden's Second Statement he refers to me spending 62% of my time undertaking picking tasks in the period from 17-19 and 24-25 November 2020. I do not understand this because I was only allocated to do "Picking" tasks (which is the only task that required the use of a low level order picker) on one of those days. It may be that Mr Holden is referring to work that is part of interstate which does involve picking stock, but it is picking stock using a reach truck forklift.

At paragraph 40 of Holden's Second Statement he says that most picking tasks are completed using the low level order picker instead of a counterbalance forklift or reach truck. Again, Mr Holden is overlooking the fact that a lot of picking work is done on reach truck forklifts. Other than interstate, reach truck forklifts are used to pick Parchem products (where the products are collected and put in a staging area ready to be put on a truck), to assemble orders for interstate (where the products are put on pallets, wrapped, and taken out the back for collections), and to do export work."<sup>105</sup>

[117] In cross-examination, Mr Lambert accepted that the description of his work given by Mr Holden is an accurate reflection of the work he actually performed on those days<sup>106</sup> but maintained that forklifts are essential part of his work and daily tasks.<sup>107</sup> Mr Lambert also accepted in cross-examination that, based on the machine usage data, he was not in fact on an RDO on the 18<sup>th</sup> of November but was at work.<sup>108</sup> Further, Mr Lambert conceded that in his evidence he has not provided the amount of time he actually spends on a reach truck or a counter balance forklift.<sup>109</sup>

[118] Mr Lambert agreed that prior to using any of the relevant MHE or the RF gun he must sign on<sup>110</sup> using an individual login and password.<sup>111</sup> Mr Lambert would never (and has never) used another person's login information.<sup>112</sup> Mr Lambert also agreed that a machine will log the driver off after 5 minutes of inactivity.<sup>113</sup> Mr Lambert accepts that if he is picking orders, getting on and off the LLOP or other machine, as long as the time spent off the machine is less than 5 minutes the machine will record a continuous log in.<sup>114</sup> This means that the login times shown in the relevant data does not necessarily represent continuous operation of the vehicle.

[119] Mr Menon's evidence indicates that he became involved in recruiting members at the Rocklea Site in late October 2020, when was approached by two employees of Dulux. In his discussions, Mr Menon asked about the organisation of work at the Rocklea Site and the work performed by employees. Mr Menon said that it was clear that the work was typical of many manufacturing facilities that also included a warehousing and distribution operation. The employees explained to Mr Menon that materials are received by truck and then distributed throughout the site by forklift. The materials are then picked and moved to an outbound area of the site, which is done by forklift. The goods are then loaded onto trucks for dispatch, which also is done by forklift. It was confirmed to Mr Menon that for many employees at the Rocklea site, their primary duty was to operate forklifts.

[120] Mr Menon accepted that prior to his discussion with employees in October 2020, he had not observed Mr Lambert perform any work.<sup>115</sup> In subsequent inspections Mr Menon cannot recall observing Mr Lambert operate a forklift.<sup>116</sup> In reaching the view that Mr Lambert was eligible for membership of the CFMMEU, Mr Menon accepted that he relied upon what he has been told by Mr Lambert.<sup>117</sup> Sixty-two Dulux employees joined the CFMMEU in late October. Mr Menon has not spoken to, or observed, all of them in relation to the work they perform.<sup>118</sup>

[121] Prior to accepting the Dulux employees as members, Mr Menon says that he looked at the CFMMEU's Rules.<sup>119</sup> Mr Menon was taken to Mr Lambert's CFMMEU membership card. The card refers to "*MIXED INDUSTRIES/PLANT OP*". The reference to "*mixed industries*" refers to non-construction sectors of CFMMEU membership.<sup>120</sup> "*Plant op*" stands for plant operator and refers to a member that drives machinery or plant, typically a forklift.<sup>121</sup> Mr Menon was not able to point to where in the relevant rule it provided for coverage of plant operators. However, Mr Menon stated that the pieces of machinery in Rule (2)(E) are "*plant*" and maintained that a forklift is a piece of plant.<sup>122</sup>

[122] Mr Holden is the Site Manager for the Rocklea Site having worked for Dulux since 1990 and has been the Site Manager at Rocklea for approximately 12 years. The Site Manager is responsible for the day-to-day management of the site. Deliveries to the Site vary from day to day. Mr Holden does not agree that each day two B-double semi-trailers deliver stock to the Rocklea Site.

[123] Mr Holden said that contrary to Mr Lambert's evidence, there are 40 Warehouse Operators employed at the Rocklea Site. 24 operators work the day shift and 16 work the afternoon shift. On average there are 8 labour hire casual workers each day. All employees, including team leaders, leading hands and stock returners, are employed as Warehouse Operators. Each undertakes the tasks of a Warehouse Operator, including picking tasks.

[124] The operations at the Rocklea Site run based on what Mr Holden calls a "*multi-skilled generalist classification and task system*".<sup>123</sup> Between the two facilities employees are engaged as either Warehouse Operators or Production Operators. The two facilities that make up the Rocklea site are broken into different work areas, with each work area consisting of different "*multi-skilled tasks*". In the warehouse, Mr Holden says there are three tasks/areas with all employees rotating through the three areas on a daily basis.

[125] Mr Holden states that the purpose of the Warehouse Operator position is to fulfil customer orders for product produced in the manufacturing facility at Rocklea and other manufacturing facilities across the country.<sup>124</sup> In fulfilling this purpose employees utilise various skills including information technology skills and materials handling skills.

[126] Customer orders for Dulux products are called a sales orders. Each sales order is entered in a system referred to as SAP. When entered into the SAP system each sales order is converted into a delivery order. A delivery order may contain multiple sales orders. Each delivery order is broken up into one or more transfer orders. The transfer order includes the individual tasks that are given to a Warehouse Operator.

[127] On commencing a shift, a warehouse operator uses a radio frequency (RF) gun to receive tasks within the transfer orders. The RF gun gives information on the tasks required and allows the warehouse operator to record when the task is complete. Each warehouse operator has an individual username for use with the RF guns. Labour hire workers share common usernames for the RF guns.

[128] Tasks are sorted into headings and subheadings within the RF gun system. Tasks are also sorted into queues set up to ensure that tasks are completed in sequence ready for despatch when trucks arrive to collect the orders. Warehouse operators generally work from a queue. The RF gun will deliver instructions to the Warehouse Operator from the queue. A summary screen will be shown of how to undertake the task and guides the warehouse operator through

the transfer order in sequence. Warehouse Operators may deviate from the sequence to ensure that the picked pallet is safe and stable.

**[129]** Mr Holden describes the various tasks of warehouse operators as:

- a. Loading: Operators unload delivery trucks that arrive at site, or load delivery trucks with customer deliveries. The operator checks that the paperwork matches the delivery. For incoming deliveries, the operator moves the product to the put-away area and books a location for the product in the warehouse;
- b. Picking: The operators use a Low level order picker and RF Gun to prepare an order on a pallet, and put it on a conveyor to get wrapped;
- c. Put-away: Operators use a reach truck to move stock that has been taken off a truck and needs to be moved to a specific location nominated by the RF Gun;
- d. Replenishment: Operators replenish stock from higher levels to lower levels of the warehouse to assist the operators undertaking the picking tasks;
- e. Bin to Bin: Where manual replenishment is needed if a replenishment task has not arisen, or where stock needs to be moved out of one location to clear that location;
- f. Office (including goods receipt and returns): Operators arrange for paperwork to be completed to coordinate customer deliveries and returns, deal with customer queries, check stock to ensure it aligns with the order, allocate locations in the warehouse for that stock, and update DuluxGroup's systems."<sup>125</sup>

**[130]** Mr Holden considers that the “*export*” and “*interstate*” work referred to by Mr Lambert are types of picking tasks. They are tasks that assist in compiling orders for shipping and are recorded by SAP as picking. Mr Holden accepted that warehouse operators use a reach truck to complete this work and that “*fundamentally*” what they are doing is using materials handling equipment to move paint around the warehouse<sup>126</sup> or taking paint off trucks to a “*put away area*” using a counterbalance forklift and then taking paint from that area and storing it in the warehouse using a reach truck.<sup>127</sup> In relation to replenishment, Mr Holden agreed that this involves taking paint that is stored at higher levels in the warehouse and moving it to lower levels using a reach truck, so that it can be picked. Bin replenishment involves moving paint from one location to another using either a LLOP or a reach truck. “*Office*” describes clerical tasks where an RF gun is not used and there is no recording of such tasks in SAP data.<sup>128</sup>

**[131]** Mr Holden said that Warehouse Operators at the Rocklea Site are less frequently required to pick export or interstate orders than they are to prepare local customer orders. The daily worksheets attached to Mr Lambert's evidence support this view. Mr Holden describes a picking task as follows:

- a. the warehouse operator will firstly scan the licence plate to tell the system that they are going to undertake the picking task;
- b. the RF Gun will tell them where their first location is within the warehouse that they need to collect product from;
- c. once they arrive at that location, they will scan the product and confirm the number of items of the product on the RF Gun;

d. once those details match the task in the system, the RF Gun will provide them with the next task. If the details don't match the task in the system, they will receive a reminder on the RF Gun;

e. once all the transfer orders are completed, the warehouse operators have completed the picking order and the next step is to wrap the pallet and label it for transport (e.g. dangerous goods labels in Class 2 (aerosols) or Class 3 (flammables)). Once the pallets are wrapped and labels are put on, the warehouse operator hits "F1 post" and that records the transfer order as completed in the system and a time is recorded to the completion."<sup>129</sup>

**[132]** The use of manual handling equipment for the various tasks is described by Mr Holden as:

"a. Loading: A gas counterbalance forklift is used to load and unload delivery trucks, and move pallets;

b. Picking: Low level order pickers are generally used for this work as most product is on lower levels, but a reach truck may be needed in some circumstances, such as:

i. interstate shuffles where pallets need to move from the warehouse to an interstate warehouse;

ii. orders in the export queue as they usually involve full pallets; or

iii. Parchem orders because of the size of the order.

c. Replenishment, put-away, and bin to bin activity: A reach truck is used to replenish stock that is moved from higher levels of the warehouse to lower levels, and is also used for stock put-away;

d. Office: A low level order picker or a reach truck are used depending on what the order is and where it is located."<sup>130</sup>

**[133]** Mr Holden requested that another Site Manager within Dulux prepare reports from the SAP system showing time spent by warehouse operators on various tasks. Mr Holden tendered the reports for September, October, November, and December 2020, and for the period 1 January to 20 January 2021. Mr Holden's evidence about calculations relating to the percentage of time that Warehouse Operators spent performing loading, picking, put-away, replenishment, bin to bin and office work was not pressed on the basis that underpinning calculations were not provided.

**[134]** In response to Mr Lambert's evidence<sup>131</sup>, Mr Holden said that deliveries at the Rocklea Site vary from day to day and that it is incorrect that each day two B Double semi-trailers deliver stock to the site. Mr Lambert's evidence that 158,000 litres of paint was dispatched from the Rocklea Site on 3 December 2020 is incorrect and 113,000 litres was picked for dispatch on that date. Mr Holden also said that contrary to Mr Lambert's evidence, trade centre orders are dispatched from the Rocklea Site Warehouse and not the interstate dispatch area near the manufacturing facility. Mr Holden also said that all Warehouse Operators complete picking tasks.

[135] Mr Holden provided the SAP data for the RF gun used by Mr Lambert for the periods 17–19 and 24–25 November 2020.<sup>132</sup> Mr Holden stated that he had asked Mr White, DuluxGroup Distribution Manager (Australia and NZ) and Padstow Site Manager, to calculate the percentage of working hours Mr Lambert spent on RF gun tasks and Office tasks. On the basis of the material in the SAP data it has been calculated that in the periods mentioned, Mr Lambert spent 31% of his time on Office tasks and 69% on RF gun tasks. Of that 69%, Mr Lambert spent 62% of the time on picking tasks, 2% undertaking bin-to-bin tasks, and 36% of the time on replenishment tasks. Mr Holden states:

“The only tasks set out above that require any use of reach trucks and counterbalance forklifts are Picking, Put-away and Replenishment. Most Picking tasks, however, are completed using the LLOP instead of a counterbalance forklift or reach truck.”<sup>133</sup>

[136] At Hearing, Mr Holden accepted that there were errors in the calculation of the figures referred to above. Whilst highlighting the errors, Mr Holden did not specify the correction to those figures that should occur as a result.<sup>134</sup> Mr Holden only identified the error in the weekend prior to the hearing.<sup>135</sup> In cross-examination, Mr Holden was taken to the SAP data included at PH-13 of his evidence in these proceedings. On that spreadsheet is a column for “*time error*”. The following exchange occurred:

“Okay. If we can go back to page 35, let's have a look at that. Just out of curiosity, how did Mr White account for the time error entries in his calculations? You seem to have paused for some time, Mr Holden, can I get you to look at page 35, just focus on that for a moment?---Yes. So depending on how the user exited the gun, if there's a time error it doesn't give the exact time of the transaction, but you've got the date. So any of those time error ones, he ran the report for September only, so anything with a time error is part of September. It doesn't give you the exact date.

So there's a page of entries where you just don't know how long the task actually took?---No. You know how long the task actually took, you don't have a date stamp on the - you don't know what day.

Are you seriously suggesting that it took no time at all, for example in line 3, to move 1000 items?---Yes, I can't explain that.

And you don't know how Mr White accounted for those errors, do you? If you don't know just say so?---Mr White included them into the September calculations.

You accept that almost all of the first page is taken up with time error entries? Well, you don't have to accept it, you can see what I'm saying here?---Yes.

And you see that, indeed, Samuel A, who you discussed earlier, one of his entries is a time error, about two-thirds of the way down the page?---Mm hm.

Just a yes or no, for the record, I'm sorry?---Yes.

I'll just get you to keep, on page 35, rather than flicking through the documents for the moment, we will move through. These are all picking tasks, for the time error?---Those ones on that page are, yes.

So this spreadsheet underestimates the amount of time spent on tasks?---It would. For these picking tasks it would, yes.”<sup>136</sup>

[137] Mr Holden has also produced the MHE activity reports (discussed further below) for Mr Lambert for the same periods.<sup>137</sup> Using the data in annexures PH-13 and PH-17 to his evidence, Mr Holden also asked the other Site Manager to calculate the amount of time Mr Lambert spent on Office and RF gun tasks from 1 September to 31 December 2020. Mr Holden reports the results of that inquiry as follows:

- “a. 35% of his total working hours on Office tasks (i.e. 189 hours out of a total of 539 working hours in that period); and
- b. 65% of his total working hours on RF Gun Tasks (i.e. 351 hours out of a total of 539 working hours in that period).”<sup>138</sup>

[138] Of the hours spent on RF gun tasks, the time is further broken down as follows:

- “a. 71% undertaking Picking (i.e. 250 hours out of a total of 351 RF working hours in that period);
- b. 5% undertaking Put-away (i.e. 16 hours out of a total of 351 RF working hours in that period);
- c. 1% undertaking Bin to Bin (i.e. 5 hours out of a total of 351 RF working hours in that period); and
- d. 23% undertaking Replenishment (i.e. 80 hours out of a total of 351 RF working hours in that period).”<sup>139</sup>

[139] Each piece of MHE at the Rocklea site uses IVM systems to track times a warehouse operator spends operating the equipment. There are two systems: I-Site on the gas counterbalance and reach truck forklifts and Shockwatch on the diesel counterbalance forklifts.

[140] The I-Site system can report on the utilisation of the equipment by comparing the operating hours (which match the shift duration) against the total time the machine is in run mode. Utilisation is expressed as a percentage of time the machine is in use. Warehouse operators have an access code to use MHE. The code is linked to the employee’s swipe card. The swipe card is used to access the equipment after having completed the pre-start checklist. The time between swiping on and swiping off, or the machine timing out after 5 minutes, is measured by I-Site as utilisation time. While a Warehouse Operator is swiped onto a piece of MHE that Operator is the only person allowed to drive that piece of equipment<sup>140</sup> and is responsible for it until he or she logs out again.<sup>141</sup>

[141] Mr Holden requested the Production and Engineering Manager of the Rocklea site to prepare reports from I-Site. Mr Holden produced to the Commission an “*Activity Report*” and “*Machine Report*” for the months of December 2020 and January 2021.<sup>142</sup> The Activity Report shows every individual use of a machine by an operator over a certain period of time. The Machine Report shows the utilisation time of each machine as a percentage of the overall operating hours at the Rocklea site.

[142] There are four diesel counterbalance forklifts in use at the Rocklea site. The use of this equipment is recorded through Shockwatch which does not have the same recording capacity as I-Site. Data is collected regarding these machines by Toyota Material Handling Australia when it services the MHEs. Those records for two of the four diesel counterbalance forklifts are annexed to Mr Holden’s evidence in these proceedings.<sup>143</sup> Mr Holden accepted under cross-

examination that Mr Lambert has a forklift licence and is required to operate all three pieces of manual handling equipment.

[143] In his supplementary witness statement<sup>144</sup> Mr Holden responded to the evidence of Mr Lambert in relation to the job advertisement placed by a labour hire company for a role at Dulux's Rocklea Site. Mr Holden said that he was not previously aware of the advertisement but maintains that it does not describe the work of warehouse operators at the Rocklea site. Mr Holden also said that he was not responsible for advertisements placed by labour hire companies and that Dulux did not direct them in this regard. Further, Mr Holden said that labour hire employees at the Rocklea Site perform a discrete set of tasks and do not perform the full range of tasks performed by Dulux's Warehouse Operators. Mr Holden maintained that he has never required that persons engaged by the labour hire contractor to perform work at the Rocklea Site have a forklift licence.<sup>145</sup> Labour hire employees engaged by the agency are characterised by the agency as "*process workers*" and not "*forklift operators*".

[144] Mr Holden tendered a job advertisement placed by Dulux for an open Warehouse Operator position in support of his assertions about labour hire employees. Under cross-examination Mr Holden changed his evidence and stated that this advertisement was for operations team members in manufacturing and distribution.<sup>146</sup> Mr Holden was also shown a document that appears to be a job advertisement for an "*Operations Team Member*" with the DuluxGroup header<sup>147</sup>. The two advertisements appear to have the same job number. The second advertisement includes a tag of "*Forklift Operator*". Mr Holden was surprised that this was the case<sup>148</sup> and said that he was not involved in the production of this job advertisement, as it was dealt with by the Dulux recruitment centre in conjunction with the production manager and warehouse lead.<sup>149</sup>

[145] In cross-examination, Mr Holden accepted that Dulux's position concerning the ability of the CFMMEU to represent the industrial interests of Warehouse Operators was based on three propositions; the LLOP is not a forklift,<sup>150</sup> warehouse operators don't use forklifts to a substantial degree,<sup>151</sup> and primary purpose of their position is to pick customer orders to allow Dulux to sell paint.<sup>152</sup> Mr Holden accepted that he is not familiar with the history of the CFMMEU's rules or what was classified as a forklift in 1947.<sup>153</sup>

## **Submissions**

### **CFMMEU**

[146] In its submissions, the CFMMEU contends that the issue for determination is a discrete question: is the CFMMEU entitled to represent the industrial interests of a single employee, Mr Lambert. If this question is answered in the affirmative, then the Union is a bargaining representative for the purposes of s.172(b) of the FW Act and is entitled to bring this application. The broader matters raised in the Respondent's submissions are not for determination.

[147] The CFMMEU submits that the FEDFA was an occupational union and that the FEDFA rule permits the CFMMEU to represent the industrial interests of "*forklift drivers*". The task before the Commission is, in part, one of construction. The principles of construction applicable to union rules disclose a liberal and purposive approach. Purpose, in this context, includes the purpose of allowing people to join trade unions. However, rules are not to be given an indefinite

scope of operation or promote exorbitant claims to coverage. Rules are interpreted with a view to the relevant union's legitimate sphere of operation.

[148] Terms used in union rules are not stuck in time. What the words connote is fixed but the denotation of the words can change over time. The current meaning of the words has a role to play in the interpretation exercise. The CFMMEU referred to the 1947 Decision of the Industrial Registrar which resulted in the insertion of the term "*forklift driver*" into the then FEDFA rules. The CFMMEU submits that the decision shows that a forklift is:

"fundamentally a device that generates power to lift and move, in the context of moving goods around a warehouse that a traverser crane would, in the forties, be used for."<sup>154</sup>

[149] Importantly, as the phrase originated, it did not relate to licensing requirements and the rule should not be interpreted so narrowly. While the FEDFA was an occupational union it was not a trade-based occupational union. There is not a "*trade*" of forklift driver. The traditional concept of a forklift driver was, to some extent, tied to industry considerations. However, since the High Court decision in *Re Coldham*<sup>155</sup> there has been a shift to the concept of a forklift driver operating the piece of equipment without a tie to the industry in which it is operated, as was the case with the FEDFA rule originally.

[150] The evidence establishes that all three pieces of MHE used at the Dulux site generate power in the sense used in the FEDFA rule. Each has tines that lift, operated by controls. Each is capable of being driven. Each piece of MHE looks like a forklift and each is sold as a forklift. In its unaltered state, the LLOPs could operate in a manner that attracts forklift licencing requirements. Even though the LLOPs are modified, that modification can be undone. The licencing requirements do not change the inherent nature of the LLOPs as a forklift.

[151] The application of the principal purpose test is not an abstract one. The test looks to the task that the employee is engaged to perform, in reality. Limiting the inquiry to simply the purpose of filling orders and delivering paint to customers is too narrow. In private enterprise it might be said that the purpose of all positions is the generating of profit. In the CFMMEU's submission the focus is on what the employee actually does and what tasks are they required to perform.

[152] The CFMMEU submits that Mr Lambert's evidence describes his work. In short, Mr Lambert moves paint around using one of three pieces of materials handling equipment. The focus of the Respondent on what work Mr Lambert did on particular days and the precise time he did that work is not to the point. The issue for determination is, based on the evidence, what Mr Lambert actually does and is engaged to do.

[153] According to the CFMMEU, the evidence establishes that Mr Lambert, almost uniformly, is allocated tasks using a run sheet that is not particularly sophisticated, and spends his days driving manual handling equipment to move paint. Mr Lambert cannot complete his range of tasks without operating a forklift. It is identical to work Mr Lambert has had in the past where he was employed as a forklift driver. Mr Menon's evidence, and the evidence of the Chandler McLeod and Dulux job advertisements is consistent with this.

[154] In the period December 2019 to January 2021, on the CFMMEU's analysis of the data, using the key time, supplied by Dulux, Mr Lambert is in control of a forklift 95.4% of his working time. If "*picking*" data, operating the LLOP, is excluded, that total reduced to 66.3%

of the time. Regardless of how it is viewed, the time spent by Mr Lambert operating manual handling equipment is overwhelming. In relation to this data, it was submitted that key time for the materials handling equipment should be considered rather than operating time. This is because if the forklift is idle or parked for more than 5 minutes, it logs the operator out automatically. Accordingly, where the forklift is not logged out, Mr Lambert must have been doing something with the forklift so as to continue to be logged in. When this is considered, the time that Mr Lambert spends operating the forklift is overwhelming.

[155] The CFMMEU accepts that Mr Lambert is employed to pick orders but submits that most forklift drivers are employed to do something – and are not just employed to drive forklifts around. The important factor is that Mr Lambert cannot pick orders without operating a forklift. In support of this submission, the CFMMEU points to the fact that no task that Mr Lambert does, with the possible exception of bin to bin, can be substantially performed without using a forklift. Dulux’s contention that the primary function is preparing and co-ordinating the delivery or return of customer orders, overstates Mr Lambert’s role in accepting tasks from the RF gun and completing them. According to the CFMMEU’s submission, that function is performed by an organisational layer above Mr Lambert. Secondly, how Mr Lambert achieves that purpose is by the use of a forklift.

[156] In conclusion the CFMMEU referred to the Decision of Commissioner Booth in *CFMEU v Rapid Metal Developments Pty Ltd (Rapid Metal)*.<sup>156</sup> In that case, Commissioner Booth considered *Re Coldham* and the first instance Decision of McKerracher J in *CSBP v CFMEU*.<sup>157</sup> The Commissioner noted the analysis of McKerracher J to the effect that in *Re Coldham* the High Court had held that the CFMEU eligibility rule was not ambiguous with respect to the expression “*crane driver*” and the court was not required to consider the ambit of the second part of the rule dealing with the production or utilization of power. In *Rapid Metal*, the Commissioner went on to find that the employees in dispute fell within the eligibility rule of the CFMMEU on the basis that:

- The substance of their role was predominantly to move goods using a forklift;
- Relevant employees operated forklifts for the majority of the day;
- Forklift driving was the substantive and predominant function of employees;
- Forklift was the preferred way for product to be moved; and
- For some of the product a forklift was the only way to move it safely and efficiently.<sup>158</sup>

[157] The CFMMEU submits that the facts in the present case are not relevantly distinguishable from those in *Rapid Metal* and that the outcome should be the same.

### Dulux

[158] In written closing submissions Dulux maintained that the CFMMEU had advanced its case at the outset by claiming the right to represent manufacturing and warehouse employees. Mr Menon’s evidence was that the CFMMEU had signed up a number of Dulux employees and sought to represent those employees. Dulux also submitted that the CFMMEU has not provided any evidence regarding the work performed by any other employee of the Respondent, including any Production Operator who the union claims to be a member. As such, the union has failed to “*demonstrate that its status is not merely asserted but open to demonstration as a fact*” regarding those members in respect of which it has adduced no evidence.<sup>159</sup>

[159] Citing the Full Court decision in *CPBS*, Dulux submitted that a person who operates a forklift as an incidental function of their employment as something else, is not a forklift driver within the meaning of the CFMMEU's eligibility rule and that this is determined according to the primary purpose test. This test is not undertaken by simply quantifying the amount of time spent on various elements of work performed and the equality of the relevant work is also a relevant consideration. Dulux submitted that "driving" is as defined by Commissioner Hartigan *Enco Precast Pty Ltd v CFMMEU (Enco)*<sup>160</sup> and involves "the exercise of control by the operator to put the crane in motion to travel along the tracks at varying speeds and stopping the crane can be described as driving the crane within the meaning of the relevant authorities".<sup>161</sup> Dulux accepted that the Eligibility Rule will cover Mr Lambert if he is engaged for the primary or principal purpose of controlling the movement of the operation of a forklift.

[160] Dulux submits that the primary or principal purpose of the employment of Warehouse Operators at its Rocklea Site is to work in the warehouse to fill customer orders and coordinate their delivery and return. While this may involve use of a forklift, Warehouse Operators are not engaged primarily to perform that particular skill or task but are instead engaged to perform tasks using a range of skills, for the purpose of preparing customer orders and coordinating their delivery or return.

[161] Dulux also submitted that the purpose of an LLOP is to act as a means of moving pallets containing completed or in progress customer orders. Reference was made to Mr Lambert's evidence that Warehouse Operators do pick stock off pallets and shelving and stack it manually on pallets which are transported by the LLOP and that the LLOP can also be used to pick up a whole pallet.<sup>162</sup> Reference was also made to Mr Lambert's concession under cross-examination that picking stock off shelves and placing it on a pallet is a manual task and that when he reverses the LLOP to a pallet he is required to physically add or remove product from the pallet.<sup>163</sup> Mr Lambert also accepted that while undertaking these tasks he got off and on to the LLOP and that he would have remained logged on if the manual aspect of the work took more than five minutes.

[162] After traversing the evidence of Mr Holden, and noting that Mr Menon had not examined the LLOP, Dulux submitted that it is not a forklift within the Eligibility Rule of the CFMMEU and that if a Warehouse Operator was operating the LLOP for the entirety of their employment (which is not the case) that employee would still not be a forklift driver within the meaning of the CFMMEU's Eligibility Rule. In this regard, reference was made to Mr Holden's evidence of the definition of a "forklift truck" in the *Workplace Health and Safety Regulations 2011* which excludes the LLOP. Reference was also made to the Decision of Commissioner Frawley in *3M v Federated Rubber and Allied Workers Union (3M v FRAWU)*<sup>164</sup> in which it was decided that the introduction of LLOP did not result in employees who had previously used hand trucks, from exercising higher skill levels and being entitled to be reclassified. It was submitted that the LLOPs used at the Rocklea site fulfil the same function as those considered in *3M v FRAWU* and on the basis that they do not require a higher level of skill than a hand truck or non-powered lifting equipment and are not forklifts.

[163] In relation to the hand-written notes and the worksheets tendered by Mr Lambert, Dulux submits that these documents are not probative regarding the tasks Mr Lambert performs or the time spent on MHE. Dulux also submitted that Mr Holden's evidence that changes in allocation of tasks may be made at any given point in a shift should also be considered. Further, Dulux submitted that Mr Menon's evidence was not relevant as he had not directly observed Mr Lambert or other CFMMEU members working at Dulux and was basing his views on what he

had been told by Mr Lambert. Reference was also made to Mr Holden's evidence that from 1 September to 31 December 2021, Mr Lambert spent 35% of his total working hours on Office tasks, 65% of his total working time on RF gun tasks and that of the 65% of time spent on RF gun tasks, 71% involved picking, 5% involved put-away, 1% involved bin to bin and 23% involved replenishment.

**[164]** In relation to Mr Lambert's driver data, Dulux provided further calculations set out in tables in its final submissions, based on data appended to Mr Holden's second witness statement. The calculations in table 1 are for 19, 20, 25 and 25 November 2020. The first table shows that on those dates, Mr Lambert spent 21.85% of his working time operating a reach truck. Table two concerns the period from 1–17 December 2020 and shows that Mr Holden spent 18.57% of his time on the reach truck and counterbalance forklift. From 11 January to 22 January 2021, Mr Lambert spent 24.32% of his time operating the reach truck and counterbalance forklift. Dulux also states that the percentages show that Mr Lambert has not operated a reach truck or counterbalance forklift for more than 38% of a 7.6 hour working day which is submitted to further support its submission that Mr Lambert is not a forklift driver under the CFMMEU's eligibility rule.

**[165]** In relation to key time, Dulux submits that this is not an accurate measure of the time that Mr Lambert is operating MHE because key time is not driving time. Dulux submits that the CFMMEU has failed to prove, on the balance of probabilities, that Mr Lambert, or any Warehouse Operator, is employed for the principal or primary purpose to be forklift drivers within the CFMMEU's Eligibility Rule. Dulux also submitted that the CFMMEU could have addressed its objections to the data provided by Dulux by making an application for James White (Dulux Group Distribution Manager) and/or Mark Hansen (Production and Engineering Manager at the Rocklea Site) to attend the Commission to give evidence.

**[166]** While conceding that the operation of a forklift is integral to the operations of the warehouse at the Rocklea Site, this does not mean that it is a major and substantial part of the employment of Warehouse Operators.<sup>165</sup> Even if Warehouse Operators spent the majority of their time operating forklifts, this would not change the primary/principal function of their employment or the employer's primary/principal purpose in directing them to undertake tasks. In this regard, reference was made to the comments of Isaac DP in *Transport Workers' Union of Australia and Cliffs Robe River Iron Associates and others*<sup>166</sup> who found that underground mine workers who spent as much as 40% of their time driving trucks, were not truck drivers on the basis that the employer's purpose in sending them underground was to "move" ore out of the ground, which required them to dislodge the ore. It was the dislodging of ore or the mining operation that was their primary task.

**[167]** Similarly, Dulux contends that the primary purpose of the Company in directing the Warehouse Operators to work in the warehouse, is to fill customer orders and co-ordinate their delivery or return. Whilst that may often involve moving items using a forklift, Warehouse Operators are not engaged primarily to perform that particular skill or task. Warehouse Operators are instead engaged to perform a range of tasks using a range of skills for the purpose of preparing customer orders and co-ordinating their return requiring:

- Competent written and verbal communication skills;
- Understanding of and competency in utilising computer management systems;
- Understanding and implementation of workplace health and safety management systems;

- Competent logistics and management skills; and
- Strong physical conditioning.

[168] In conclusion, Dulux submitted that it has provided cogent and empirical data supporting its evidence on the characterisation of the work and to the extent relevant, the minimal amount of time spent driving a forklift. Dulux also submitted that the evidenced called by the CFMMEU does not establish its claim that Warehouse Operators at Dulux are eligible for membership of the CFMMEU.

[169] In oral submissions, Dulux conceded that for the purposes of the present proceedings, the CFMMEU only needs to establish an entitlement to represent the industrial interests of Mr Lambert.<sup>167</sup> The primary purpose test is a holistic assessment of the employee’s role in the context of the business in which the employer operates. This holistic assessment includes a consideration of the tasks undertaken, time spent performing those tasks, the totality of the employee’s role, and the context of the employer’s business. Dulux accepts that the time taken to perform tasks is relevant, but not determinative of the primary purpose test.

[170] A person who operates a forklift as an incidental function of their employment is not a forklift driver within the meaning of the FEDFA rule. Forklift driver, where it appears in the rule, is used in its current industrial usage. In that context it is relevant that warehouse operators are not required to hold a licence to operate the LLOP. An LLOP is not a forklift for the purposes of the rule. Dulux cited *CFMEU v CSBP Ltd*<sup>168</sup> and the cases cited by the Court and asserted that in the present matter, Mr Lambert’s operation of a forklift is incidental or ancillary to his job as an order picker. He is not employed to drive a forklift in the sense that his employment is not for the primary purpose of putting forklifts into motion.

## Consideration

### The CFMMEU’s rules

[171] I have earlier considered the case law relating to the construction of union rules and in particular, rule 2(E)(a) of the CFMMEU’s rules. The following observations can be made about these cases. The decision of the High Court in *Re Coldham* concerned the question of whether the former FEDFA could generate an industrial dispute with respect to crane driving in the civil construction industry. In finding that the FEDFA could generate such a dispute, the High Court held that the scope of the Union’s activity in respect of the group of employees now described in rule 2(E)(a) of the CFMMEU’s Eligibility Rule as “*all classes of engine drivers, firemen, crane drivers, mobile crane drivers, forklift drivers, tow motor drivers, excavator drivers, pump attendants, pile drivers...*” is not limited by other classes of employees in other parts of the rule or to employees who engaged in the generation, production, distribution or utilisation of power either in the power generation industry or power undertakings or divisions or departments which generate power within undertakings performing wider industrial functions, as described in the industry rule.

[172] The High Court did not have recourse to the FEDFA’s industry rule on the basis that it considered there was no ambiguity in the part of the rule concerning what it described as “*enumerated drivers*”. This is unsurprising given that the drivers being considered were crane drivers and the issue for determination concerned the civil construction industry. To state the obvious, a crane is a specific piece of equipment used for a particular purpose. It was not necessary in that case to apply the principal or primary purpose test given that there was no

question that the cranes were driven by persons principally or primarily employed as crane drivers.

[173] In contrast, in *CSBP*, the Full Court of the Federal Court was considering the part of the CFMMEU's Eligibility Rule dealing with significantly wider and generic descriptors – engines, boilers and machinery – and the question for determination was whether persons operating engines etc. were principally or primarily employed to do so. It was also the case in *CSBP* the Full Court of the Federal Court was of the view that if the construction of the rule contended for by the Union was adopted, it would be difficult to see how any worker who turned on an electric switch in the course of his or her employment, would not be within the Eligibility Rule. However, despite considering the Industry Rule, the Full Court did so to inform the application of the principal or primary purpose test, on the basis that rule 2(E)(a) is an occupationally based rule.

[174] When forklift driving was included in the FEDFA Eligibility Rule, and at the time *Re Coldham* was decided, awards typically provided for narrow classification descriptions based on tasks required to be performed by employees rather than broader skill-based classifications.

[175] As previously noted *Re Coldham* concerned whether the former FEDFA could cover crane drivers in the civil construction industry. It is difficult to conceive of what tasks a mobile crane driver in the civil construction industry undertakes other than driving a crane for the purpose of moving items which are too heavy to be handled manually or which it is safer to move using a crane, from one part of a workplace to another. Similarly, it is unlikely that when forklift driving was introduced into the FEDFA Eligibility Rule in 1947, that drivers of traverser cranes (which forklifts partly replaced) were principally employed to do anything other than move items around factories or other heavy industrial establishments for the use of other employees such as production workers.

[176] As indicated in the exclusions in its rules the FEDFA did not cover transport or waterside workers and it also did not cover persons principally or primarily employed as storepersons or production workers. While the issue of other unions which may have coverage of particular work is not determinative of the proper construction of the CFMMEU's rules in the present case, the occupational focus of rule (2)(E) of the CFMMEU's rules means that eligibility does not extend, and has never extended, to persons who are not principally or primarily employed to drive the equipment enumerated in the first part of the rule.

[177] *Re Coldham* is not authority for the proposition that the FEDFA (and now the CFMMEU) is entitled to represent the industrial interests of an employee simply because in the course of employment, an employee drives the equipment set out in that part of the rule. The occupational basis of the rule means that eligibility is based on the primary or principal purpose of employment.

[178] The occupation which is the subject of the present case is forklift driver. Forklifts are designed to move goods and materials from one location to another. The occupation of forklift driver describes a person principally or primarily employed to drive a forklift. It is a narrow occupation notwithstanding the breadth of industries in which persons principally or primarily engaged to undertake this job are employed.

[179] Union rules are not construed by taking a narrow or static approach based on circumstances as they existed when the rule was established. This means that for the purposes

of eligibility under union rules, changes to the equipment used to carry out an occupation will not necessarily result in a change to the principal purpose for which an employee in that occupation was employed. Accordingly, a person principally engaged as a forklift driver, will not cease to be within the eligibility rule of the CFMMEU if the forklift is replaced by a different lifting device, which for all intents and purposes is a forklift, and is used by that person to undertake the same tasks.

**[180]** Further, where the occupation of forklift driving – or driving other equipment covered by the first part of rule 2(E)(a) – extends into an industry in which it was not originally found, a person principally or primarily engaged as a driver of such equipment is within the eligibility rule of the CFMMEU, subject to the specific exclusions in the rule, on the basis that the rule is occupational.

**[181]** However, the principle that union rules are not construed in a narrow or static manner, does not extend the operation of an occupationally based rule which covers persons principally employed as drivers of specified equipment, to persons who drive such equipment for the purpose doing something else which they are principally or primarily employed to do. That principle does not require that union eligibility with respect persons principally employed in narrow occupational based roles, is extended to persons principally employed to undertake broader skill-based roles, simply because a task which was the principal task undertaken by a person in the narrower role, is now undertaken as one of a number of tasks, by a person in a broader role.

**[182]** An employee principally or primarily employed to undertake a broad range of warehousing tasks for the purpose of fulfilling customer orders – such as locating specified items in a warehouse, picking those specified items from a range of locations, combining them into an order, packing those items, transporting the items to a location, loading them on a particular vehicle, unloading incoming stock and replenishing stock to enable the work of fulfilling customer orders to be undertaken by others – is not principally engaged to operate a forklift. This is so, notwithstanding that the work is primarily undertaken using a forklift and cannot be done without the use of a forklift. In such circumstances, the forklift is simply the device the employee uses to move around the warehouse, pick up and put down items in specified combinations or locations, hold items that have been selected to make up an order while other items are selected, move those items to locations where they may be packaged or wrapped and load them onto transport.

**[183]** It may be the case that a warehousing operation is divided so that some employees are principally employed to pick and pack orders using a forklift as an aid, while other employees are principally engaged to drive a forklift to transport orders that have been picked and packed by others, or to load orders picked and packed by others or to unload vehicles and transport goods to a central area to be dealt with by warehouse employees. In these circumstances some of the persons driving forklifts may be found to be principally employed in this role.

**[184]** The approach to deciding what a person is principally or primarily employed to do, requires a holistic examination of the major, substantial or principal aspect of the work performed including what the person is employed to do, the tasks undertaken, the amount of time spent undertaking particular tasks, the circumstances of the employment and the manner in which work is organised by the employer.<sup>169</sup> While the time spent undertaking tasks is a relevant consideration, it is not determinative of an employee's primary or principal purpose, and the test does not involve the application of a mathematical formulation. The primary or

principal purpose for which a person is employed must be determined by looking at what the person does in the context of the employer's organisation of work.

[185] Applying this approach in the present case, if Mr Lambert is found to be principally employed as a forklift driver within rule (2)(E) of the CFMMEU Rules, he will not be so employed simply because he spends a significant amount, or most of his working time, driving a forklift. The question is whether Mr Lambert is employed to drive a forklift or whether he is employed to do something else. If Mr Lambert is employed to do something else, he is not a forklift driver because he drives a forklift to do what he is employed to do. Further, the primary purpose for which Mr Lambert is employed must be determined by looking at what he does in the context of Dulux's organisation of work.

### **Time spent on forklift driving**

[186] In determining whether the primary or principal purpose of Mr Lambert's employment is as a forklift driver, it is relevant to consider the time he spends in a working day driving a forklift. Despite the submissions for Dulux citing numerous cases in support of the proposition that the time spent undertaking a particular task is not determinative of the principal purpose of employment, a considerable part of the case was focused on this question. It is convenient to deal with this matter first.

[187] In order to determine the time spent by Mr Lambert driving a forklift, it is first necessary to determine whether the LLOP is a forklift for the purposes of rule (2)(E) of the CFMMEU's rules. In my view the LLOP is a forklift for the purposes of that rule for the following reasons. To accept the argument advanced by Dulux that the LLOP is not a forklift for this purpose, would be contrary to well established principles in relation to the construction of union rules.

[188] It is well established that union rules are to be construed in a liberal manner. The use of an expression in the context of the eligibility clause of a union's rules is intended to have a wide meaning and should be interpreted and applied in accordance with its ordinary and popular denotation rather than a narrow or formal construction.<sup>170</sup> The relevant part of rule (2)(E) is preceded by the phrase "*without limiting the generality of the foregoing and without being limited by thereby the following are eligible to be members of the Union.*" The Rule goes on to include "*An unlimited number of all classes*" of enumerated drivers including forklift drivers. These are words of inclusion and breadth rather than confining classes of drivers by virtue of regulatory requirements such as licencing.

[189] The LLOP is described by its manufacturer Toyota as a forklift. The fact that it is modified so that the tines cannot be lifted above a certain height, does not alter the fact that the LLOP is a forklift. The only effect for the modification is that a driver of an LLOP does not require a forklift licence under current Queensland regulation. Further, the removal of the limiting block on the mechanism of the forklift would mean that a licence is required to operate the LLOP without any further change to the machine. Conversely, if current regulations were amended so that a licence was required to operate a LLOP in circumstances where the tines could be raised to 700 mm rather than 900 mm, the LLOPs by employees at Dulux would be forklifts for the purposes of the regulation without any change to their specifications.

[190] The fact that a licence is required to operate plant or equipment is a regulatory or technical matter and does not change the nature of the plant or equipment. To find otherwise would result in a situation where the rights of unions to represent employees could be arbitrarily

impacted by changes to licencing or other regulation without any change to the nature of the work that relevant employees are principally engaged to undertake. Industrial usage and understanding of the term forklift includes a load shifting device, which is by design a forklift, notwithstanding that it has been modified with respect to the height that tines can be raised to.

[191] Similar circumstances were considered by Commissioner Martin of the West Australian Industrial Relations Commission in *Hamersley Iron Pty Ltd and Others*<sup>171</sup> (a case cited by Dulux in support of another aspect of its submission) who said in relation to coverage of employees driving vehicles with cranes mounted upon them:

“The answer to the general questions posed is not to be found in whether a worker must possess a certificate of competency as a crane driver, any more than the possession of a licence to drive a motor vehicle indicates that such a person is employed in the capacity of a truck driver. It is to be found in the overall work done and in the case of an individual worker, by reference to the work upon which he is usually and regularly engaged for the major and substantial portion of his ordinary working time.

Thus, for example in the case of a worker employed in the capacity of a motor vehicle driver of a vehicle with a loader mounted thereon as an aid to the loading and unloading of that vehicle and the major and substantial part of that workers ordinary time is usually and regularly spent upon the loading and unloading of the truck and the transportation of goods and materials from place to place, that worker is not employed in the capacity of a crane driver and is not eligible for membership of the applicant union.

In a case where a worker is usually and regularly employed for the major and substantial portion of his time in operating a truck mounted loader for the lifting and positioning of plant or machinery or materials and is in effect using that vehicle and its loading device as if it was a mobile crane, such a worker would be employed in the capacity of a crane driver and eligible for membership of the applicant union”.<sup>172</sup>

[192] If the holding of a licence does not change the nature of a piece of equipment described in the rules of a Union, neither does the fact that a licence is not required. In addition to the observation of Commissioner Martin in relation to the weight to be placed on whether the use of a device is usual and regular, another relevant consideration is whether a device is being used by an employee for the same purpose as a device listed in a union’s eligibility rule and is a device which meets the description of a device in the eligibility rule. This question is also to be answered by giving an expression in a union’s eligibility rule a wide meaning and applying the expression in accordance with its ordinary and popular denotation, rather than with some narrow or formal construction. In short, my view is that the LLOP is being used as a forklift regardless of the height to which it can lift items. Accordingly, on this basis, the LLOP is a forklift for the purposes of the CFMMEU’s eligibility rule.

[193] Finally, to find that the LLOP is not a forklift would also be inconsistent with the well-established principle that the meaning of terms used in eligibility rules is not static and that the search for meaning should not be confined to the point at which a term was introduced. When coverage of forklift drivers and mobile crane drivers was introduced into the eligibility rule of the FEDFA, the context (as evidenced by the 1947 Decision of the Industrial Registrar) was that those lifting devices were replacing traverser cranes as a means of moving items in industrial settings. The Registrar observed it was common to the mobile crane and forklift that “*the unit generates its propelling power and power which it utilizes, for the purpose of raising, lowering and transporting goods*” and that their use was an increasing feature of industry. The focus was to enable the FEDFA to represent the industrial interests of a group or class of

employees driving such equipment and the issue of whether a licence was required was not determinative of the operation of the rule.

[194] The Decision of Commissioner Whelan (as she then was) in *Textile, Clothing and Footwear Union of Australia and Bruck Textiles Pty Limited*,<sup>173</sup> does not assist the argument advanced by Dulux about the LLOP requiring lower skill levels than those required to operate a forklift, based on licensing requirements. That case concerned a hand operated pallet truck being replaced with a LLOP in circumstances where neither piece of equipment required a licence. It is not unusual for an industrial instrument, to provide for employees operating load shifting devices which require a licence to be classified at a higher level than employees operating devices which do not require a licence. Such an issue is not relevant to the eligibility of the CFMMEU to cover such employees pursuant to rule (2)(E).

[195] Accordingly, the time spent by Mr Lambert operating the LLOP is a relevant consideration in the overall determination of whether he is principally engaged as a forklift driver within the meaning of the CFMMEU Eligibility Rule.

[196] I also accept that the proper measure of time spent by Mr Lambert on operating forklifts (including the LLOP) is “*key to key*”. The evidence establishes that this measure reflects the time that Mr Lambert logs on to a machine until the time he logs off and that if he does not operate the machine after a period of five minutes, he will automatically be logged off. While Mr Lambert is logged on to a forklift, he is responsible for its operation, regardless of whether he is physically driving it at the relevant time. While logged on to the forklift, and at times where he is off the forklift performing other duties, Mr Lambert is responsible for parking it in a position where it does not create a hazard. Indeed, it is arguable that if Mr Lambert is logged off the forklift automatically because he is undertaking picking or other tasks, he remains responsible for the forklift unless and until another operator logs on to it and assumes control. In my view, the contention that a person who is principally engaged to perform the work of a forklift driver, is only so engaged while actually driving the forklift, is contrary to the realities of workplaces in which forklifts are operated.

[197] A person who is principally engaged to drive a forklift does not cease to be responsible for the forklift or to be in control of the forklift, during periods where the forklift is parked while items are loaded or unloaded. The decision of Commissioner Hartigan in *Enco*<sup>174</sup> is not authority for the proposition that a driver of a piece of equipment for the purposes of coming within rule (2)(E) of the CFMMEU’s rules is only “*driving*” while the equipment is in motion. In that case, Commissioner Hartigan was considering whether the CFMMEU was entitled to represent certain employees in relation to right of entry concerning a workplace health and safety matter. One of the arguments advanced against the CFMMEU was that employees in the workplace in question were “*operating*” gantry cranes rather than “*driving*” them in circumstances where they were using a remote control to perform lifting as well as to execute the travel of the crane along tracks. It was therefore contended that employees “*operating*” gantry cranes were not crane drivers within rule (2)(E) of the CFMMEU’s eligibility rule

[198] The Commissioner’s conclusion that the operator is in control of the crane when “*inter alia*” it is moving along the tracks, is not a finding that the only time an employee is driving the equipment is when it is moving. Neither is that conclusion determinative of whether an employee is principally employed as a driver of a piece of equipment. Arguably, Commissioner Hartigan’s decision reinforces that control of a piece of equipment is synonymous with driving it. In the present case, an employee who is logged in to a forklift, is in control of the forklift

notwithstanding that some of the tasks being performed by employee are carried out from a position where the employee is not seated or on the forklift at the relevant time.

[199] Accordingly, I accept the calculations advanced by the CFMMEU to the effect that Mr Lambert is in control of a forklift for 95.4% of his working time. I also note that if my conclusion in relation to the LLOP is wrong, that Mr Lambert is in control of a forklift for 66.3% of his total working time. It follows that for the major and substantial portion of his working day, Mr Lambert is driving a forklift. This is a relevant consideration in determining whether Mr Lambert is employed as a forklift driver. As previously noted, this weighs in favour of a finding that Mr Lambert is principally employed as a forklift driver but is not determinative.

### **Industrial instruments**

[200] The manner in which industrial instruments which prescribe classifications and terms and conditions of employment for employees is relevant to determining the principal or primary purpose for which they are employed. The 2016 Agreement applies to employees employed in or in connection with *inter alia* handling or storage of materials or products used in connection with decorative or technical surface coatings or coverings and associated products and covered by the classifications in the Agreement.

[201] The classification structure in the 2016 Agreement is broad and skills-based and includes skills relevant to both Production and Warehouse Operators. Employees progress through the structure based on the demonstration of competency at each level. The Trainee to Grade 1.6 level includes order picking, loading trucks, unloading trucks and FS/RM replenishment. The “*skill*” of forklift driving is included at all levels of the classification structure and there is no specific level or classification of forklift driver. Mr Lambert is classified at level 1.6 of the classification structure.

[202] The classification structure in the Agreement is consistent with the classification structure in the *Manufacturing and Associated Industries and Occupations Award 2020* (the Manufacturing Award), which covers employees of Dulux and would apply to them but for the operation of the 2016 Agreement. The Manufacturing Award does not contain a specific classification for a forklift driver but rather includes this work as an indicative task in various classification levels.

[203] The 2016 Agreement and the Manufacturing Award which would otherwise apply, do not provide for a classification of forklift driver but rather incorporate this skill at multiple classification levels. This indicates that Dulux has organised its operations so that employees are not employed in narrow task-based roles, but rather are employed in broad skills-based roles and can be deployed flexibly throughout its operations. In the context of the warehouse where Mr Lambert is employed, the 2016 Agreement reflects Mr Holden’s evidence that Warehouse Operators are employed to fulfil customer orders and to co-ordinate their delivery and return. The classification structure in the 2016 Agreement also indicates that in his employment as a warehouse Operator, Mr Lambert is not principally employed as a forklift driver.

### **Position description**

[204] The position description tendered by Lambert contains references to forklift driving. However, there are other references to tasks including: receipting of incoming goods and stock returns using the RF gun; picking and packing and dispatch of orders involving collecting stock

onto a pallet prior to wrapping and assembling outgoing orders using the RF gun; and computer skills to manage inbound and outbound stock on a SAP computer program.

[205] The description of the work environment in the statement tendered by Mr Lambert also indicates that the work involves manual tasks associated with picking and packing of a variety of paint, building maintenance and horticultural products for Dulux, Cabots, Selleys, Yates and associated brands to be sent out to various locations. The description of the work environment also states that: “*Reach trucks are used in the aisles...motorised pallet movers are used during picking and packing and forklifts are used in the yard for the loading and unloading of delivery trucks*”. The job description tendered by Mr Lambert further states that: “*Experienced forklift and Warehouse Operators are required for this role.*”

[206] Similarly, the position description tendered by Mr Holden refers to: receiving, storing, picking and dispatching of goods; receipt and inbound goods; putaway of product; replenishment of stock; picking and packing customer orders; dispatching of customer orders onto various transport units; and working collaboratively with different site teams, vendors, managers and contractors. The position description tendered by Mr Holden also includes: “*Operation of Low Level Order pickers and Counter Balance and Reach forklifts and a range of warehouse machinery.*” Further, references are made to the requirement for competent use of technologies supposed to perform all tasks and an example of RF devices is included.

[207] Regardless of whether the position description tendered by Mr Lambert or Mr Holden is accurate, it is clear that the job described in either version is not that of a person principally or primarily engaged to drive a forklift. Rather the position descriptions evidence that forklift driving is a means by which the various tasks which make up the Warehouse Operator’s role, are undertaken. This is so regardless of the version of the position description that is accepted.

[208] It is also not determinative that a labour hire company which supplies employees to Dulux to work as Warehouse Operators advertises roles at Dulux for experienced forklift drivers. The fact that forklift driving experience is required is not determinative of whether the employees in this role are principally employed as forklift drivers, even in circumstances where high levels of skill in this area are required. What is determinative is the primary or principal purpose for which Warehouse Operators, including Mr Lambert, are employed. In the present case, this is determined by considering what Mr Lambert is employed to do and what he actually does. I turn now to consider the evidence in relation to these matters.

### **Mr Lambert’s duties**

[209] In examining the primary or principal purpose of work performed by an employee the question is one of fact to be determined by reference to the duties actually attaching to the position, rather than its title.<sup>175</sup> By extension, a position description or a classification definition in an enterprise agreement will not be determinative of this question in circumstances where the actual duties performed by an employee are not accurately described in those documents.

[210] The CFMMEU submits that Dulux is overstating the complexity of Mr Lambert’s role and that essentially, he is operating a forklift to move paint around a warehouse in accordance with instructions provided by the RF gun. Mr Lambert’s evidence was focused on the time he spent driving forklifts rather than other tasks he undertook while driving or in connection with driving forklifts. Mr Lambert was not pressed during cross-examination about what tasks he performed while driving forklifts or in connection with driving forklifts. Mr Lambert

maintained that all tasks require the use of a forklift or LLOP and that the tasks that he undertakes using this equipment are secondary to the to the primary duty of warehouse operators which is to operate a forklift.

[211] Generally, the evidence of Mr Holden about Mr Lambert's duties was somewhat deficient. Other than listing the various tasks Mr Lambert undertakes, there was little in the way of detail about training and the amount of time that is required for a Warehouse Operator to be competent in the various systems and processes that Dulux operates with respect to materials handling. As previously noted, despite citing numerous cases in support of the proposition that the time spent driving a forklift was not determinative, a significant amount of Mr Holden's evidence was devoted to this matter and as the case developed that evidence had little probative value. It would have assisted the case conducted by Dulux if more detailed evidence had been given about what other tasks Mr Lambert was undertaking while he was logged or keyed into a forklift or LLOP. I also note Mr Holden's concession under cross-examination that primarily Mr Lambert does move paint using a forklift.

[212] Notwithstanding the deficiencies in Mr Holden's evidence and Mr Lambert's insistence that the use of the forklift is secondary to other tasks he undertakes, I am satisfied on the basis of the evidence of both Mr Lambert and Mr Holden, that the actual duties performed by Mr Lambert do not bring him within rule (2)(E) of the CFMMEU rules and that Mr Lambert is not principally or primarily employed as a forklift driver.

[213] The evidence establishes that Warehouse Operators operate flexibly to undertake a range of tasks involving the receiving and dispatch of products. Regardless of how the tasks are allocated, I am satisfied that during his normal work Mr Lambert is required at some point to perform all tasks associated with the duties of Warehouse Operators, including at least some of the tasks classed as "*office*". Even if Mr Lambert's evidence that picking tasks are usually allocated to labour hire employees is accepted, Mr Lambert acknowledged that Warehouse Operators may be required to perform any of the tasks described in his evidence and that he does so as required, notwithstanding that he spends more time undertaking some tasks than others. Further, Mr Lambert performs what he accepts is picking one day each week. I am also satisfied that despite the fact that Mr Lambert spends a significant majority of time each day driving forklifts, this is incidental to his work as a Warehouse Operator.

[214] None of the tasks undertaken by Mr Lambert can properly be described as simply using a forklift to move paint. Regardless of whether he is guided by an RF gun or some other device or system for managing materials, Mr Lambert is required to drive the forklift to various specified areas in the warehouse as directed by the instructions he obtains by using the RF gun to place paint and other products in specified locations, or to move paint and other products from specified locations, which change depending on the task being undertaken. None of the tasks described by Mr Lambert involve him being principally or primarily engaged as a forklift driver to move paint or other products to a location so that Warehouse Operators can then store those items. Rather, the movement and the storage or despatch of the items are integrated.

[215] Mr Lambert classifies the task of "*picking*" as work undertaken using the LLOP when stock is picked off shelves in the warehouse and placed on a pallet or where an entire pallet is picked. Mr Lambert and other Warehouse Operators designate this work as picking because the term LLOP (which is the materials handling equipment used to undertake this task) is an abbreviation for Low Level Order Picker. Mr Lambert asserts that this work is generally assigned to labour hire employees rather than Dulux employees. Work which Mr Lambert

categorises as “*out the front work*”, “*interstate work*” and “*export work*” is categorised by Mr Holden as “*picking*”.

[216] The terms used by Mr Lambert and Mr Holden to describe these tasks are consistent with their respective views about whether the tasks performed by Warehouse Operators generally, and Mr Lambert in particular, result in the principal or primary purpose of the employment of Warehouse Operators being to drive a forklift or whether the primary purpose of that job is to fulfil customer orders for paint and other products manufactured by Dulux at Rocklea and its other manufacturing facilities. In my view, regardless of whether the range of tasks performed by Mr Lambert are described as “*picking*” or by some other term, and regardless of the fact that different types of forklift are used to undertake those tasks, the tasks involve more than forklift driving and Mr Lambert’s employment to undertake those tasks does not result in him being principally or primarily employed as a forklift driver.

[217] On Mr Lambert’s evidence, the work that he describes as “*out the front work*” entails multiple tasks associated with unloading a significant amount of freight from trucks and moving it to areas in the workplace designated for inbound freight. This is done by using Truck forklifts. Mr Holden termed this work “*loading*” and said that the Warehouse Operators undertaking this work are required to check that the paperwork matches the delivery. This evidence was not disputed by Mr Lambert. In my view, even if only one operator performing this work uses the RF gun it does not follow that operators who are not using the RF gun are principally employed as forklift drivers when the role of Warehouse Operators and all the tasks performed by them is considered holistically.

[218] The warehouse Operators move the product that has been unloaded to the put away area and book a location in the warehouse for the product. Mr Lambert said that this work which is also called “*putaway*” involves moving goods to an appropriate location within the warehouse and placing the goods on pallet racks. Mr Holden confirmed that the location for this stock is nominated by the RF gun. Mr Lambert also gave evidence about tasks associated with “*putaway*” which requires the use of the RF gun to scan barcodes to identify where stock is to be stored in the warehouse and initiating a stock inquiry with inventory control if the designated space is already occupied. While the pallet holding the relevant stock is transported on a forklift or LLOP, these tasks do not principally or primarily involve forklift driving despite the fact that they cannot be undertaken without the use of a forklift.

[219] The interstate work described by Mr Lambert involves him undertaking a significant number of tasks necessary to locate stock in the warehouse to fill orders, move that stock to a staging location, wrap and label the stock and recording his actions in the Company’s materials handling system. While it is necessary to drive a forklift in order to undertake the work, and the work could not be undertaken without the forklift, the forklift is incidental to the work and is simply a device by which the work is carried out. Similarly, on Mr Lambert’s evidence, the forklift is incidental to replenishment work and is simply the device used to carry out the work. Replenishment work is focused on replenishing stock either from a queue on the RF gun or at the request of order pickers. The task does not principally involve forklift driving. It is also the case that without the direction provided by the RF gun in relation to locating various items in a very large warehouse, there would be no purpose to driving the forklift

[220] When all of the tasks Warehouse Operators are required to undertake are considered holistically and in the context of the warehouse environment in which they are undertaken, Mr Lambert’s assertion that these tasks are secondary to the operation of the forklift, cannot be

sustained. I do not accept that Dulux has overstated the skills involved in the work of Warehouse Operators. Mr Lambert's evidence clearly establishes that Warehouse Operators have skills that are additional to forklift driving and that they are required to use those skills to undertake the Warehouse Operator role.

[221] The reality is that Mr Lambert is principally employed to undertake the role of a Warehouse Operator, and in that role, one of the tasks he is required to undertake is forklift driving. The time spent by Mr Lambert driving forklifts is a matter to which I have had regard in determining the principal or primary purpose of Mr Lambert's employment. In all of the circumstances the fact that he spends a significant amount of time operating forklifts, does not result in Mr Lambert being principally or primarily employed as a forklift driver.

[222] I do not accept that the facts in the present case are analogous with those *CFMMEU v Rapid Metals Developments (Australia) Pty Ltd* or that the outcome in both cases should be the same. That case involved employees who were moving large plant and equipment in the employer's yard for the purpose of locating it in various positions. It appears that the plant and equipment in question had been hired to other companies. There was very little evidence of the relevant employees undertaking other work and they were generally referred to by the employer as forklift drivers. There was no enterprise agreement classifying the employees on any other basis.

## Conclusion

[223] Ms Saunders presented the case for the CFMMEU skilfully. I accept that there is evidence that establishes that Mr Lambert drives forklifts for a significant majority of his working time and that Mr Lambert could not do his job without driving a forklift. However, for the reasons set out above, I am unable to accept that the primary or principal purpose of Mr Lambert's employment is to drive a forklift.

[224] Accordingly, the CFMMEU is not entitled to represent the industrial interests of Mr Lambert pursuant to rule (2)(E) of its eligibility rule. As a result, the CFMMEU does not have standing by virtue of Mr Lambert being a member, to make an application for a bargaining order under s. 229 of the FW Act.



DEPUTY PRESIDENT

*Appearances:*

Ms L Saunders of Counsel for the Applicant with Ms L Weber, Senior National Legal Officer for the CFMMEU.

Mr T Spence of Counsel for the Respondent with Ms W Fauvel and Mr C Scott of Herbert Smith Freehills.

*Hearing details:*

8 and 17 March.

2021.

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<sup>1</sup> Exhibits A1, A2, A3 and A4.

<sup>2</sup> Exhibits A5 and A6.

<sup>3</sup> Exhibits A7 and A8.

<sup>4</sup> Exhibits R1, R2 and R3.

<sup>5</sup> *ResMed Limited v “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU)* [2014] FWCFB 2418 at [10]; *“Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU) v ResMed Limited* [2014] FWCFB 3501 at [7].

<sup>6</sup> [2014] FWCFB 5595.

<sup>7</sup> Exhibit R1 paragraphs 82, 93 and 94 excluded. Exhibit R2, paragraphs 4 – 7, 43 – 44, 57 – 61 excluded. Exhibit R3 paragraphs 34 and 36 excluded. Transcript of proceedings 8 March 2021 PN672 – 907, PN910 – PN929, PN935 – 1052, PN1057 – 1079, PN1183 – 1100. Transcript references relating to paragraphs in Mr Holden’s statement not relied on PN 930 – 934, PN1057 – 1079.

<sup>8</sup> *Fair Work Act 2009* (Cth) s.229(1).

<sup>9</sup> *Ibid* s.12.

<sup>10</sup> *ResMed Limited v “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU)* [2014] FWCFB 2418 at [10]; *“Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU) v ResMed Limited* [2014] FWCFB 3501 at [7].

<sup>11</sup> CFMMEU Outline of Submissions at [4] to [5]; Respondent’s Outline of Submissions at [58] to [62]; CFMMEU Submissions in Reply at [3]; the issue is not directly addressed by the Respondent’s Outline of Submissions in Reply but it is implicit in the submissions; PN1878.

<sup>12</sup> *Regional Express Holdings Limited v Australian Federation of Air Pilots* (2017) 262 CLR 456 at 461; *ResMed Limited v “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU)* [2014] FWCFB 2418 at [10]; *“Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU) v ResMed Limited* [2014] FWCFB 3501 at [8].

<sup>13</sup> [2014] FWCFB 3501.

<sup>14</sup> *Ibid* at [34].

<sup>15</sup> [1984] HCA 62.

<sup>16</sup> *Federated Engine Drivers’ and Firemens Association of Australasia and Master Builders’ Association of Western Australia & Ors; The Federated Engine Drivers’ and Firemens Association of Australasia and Quest Mining and Exploration Limited & Ors* (1983) 291 CAR 530 at 531.

<sup>17</sup> *Ibid* at 531 – 532.

<sup>18</sup> *Ibid* at 532.

<sup>19</sup> (1913) CAR 132 at 136.

<sup>20</sup> *Ibid* at 532.

- <sup>21</sup> (1940) 42 CAR 588 at 601.
- <sup>22</sup> *Ibid* at 534.
- <sup>23</sup> [2012] FCAFC 48.
- <sup>24</sup> *CSBP Limited v Construction, Forestry, Mining and Energy Union* [2011] FCA 917.
- <sup>25</sup> *Ibid* at [186].
- <sup>26</sup> [2012] FCAFC 48.
- <sup>27</sup> *Ibid* at [39].
- <sup>28</sup> (1977) 57 WAIG 794.
- <sup>29</sup> *Ibid* at 794.
- <sup>30</sup> *Ibid* at 795.
- <sup>31</sup> (1990) 26 FCR 261.
- <sup>32</sup> *Ibid* at at 269.
- <sup>33</sup> *Ibid* at [47] to [52].
- <sup>34</sup> *Foulsham v JJ Corbett Plumbing and Gasfitting Pty Ltd* [2015] FCCA 1290 per Jones J.
- <sup>35</sup> *Ware v O'Donnell Griffin Television Services Pty Ltd* (1971) AR (NSW) 18.
- <sup>36</sup> (1990) 26 FCR 261.
- <sup>37</sup> *Ibid* at 272.
- <sup>38</sup> CFMMEU Outline of Submissions at [10] citing *Construction, Forestry, Mining and Energy Union v CSBP* (2012) 212 IR 206 at 44; Respondent's Outline of Submissions at [72].
- <sup>39</sup> CFMMEU Outline of Submissions at [10], citing *Construction, Forestry, Mining and Energy Union v CSBP* (2012) 212 IR 206 at 44. Respondent's Outline of Submissions at [73] to [76]; and see for example PN1354.
- <sup>40</sup> Exhibit A1 at WL-1.
- <sup>41</sup> Exhibit R1 Annexure 12.
- <sup>42</sup> Exhibit A1 at paras 15 to 17; see also PN580 to PN605.
- <sup>43</sup> PN594 to PN600.
- <sup>44</sup> PN604.
- <sup>45</sup> PN711.
- <sup>46</sup> PN443 to PN444.
- <sup>47</sup> PN797.
- <sup>48</sup> PN803.
- <sup>49</sup> PN1500 to PN1501.
- <sup>50</sup> PN1438.
- <sup>51</sup> PN1444.
- <sup>52</sup> PN1445.
- <sup>53</sup> PN1446.
- <sup>54</sup> PN1447 to PN1448.
- <sup>55</sup> PN1451.
- <sup>56</sup> PN1452 to PN1455.
- <sup>57</sup> PN1456.
- <sup>58</sup> PN1466.
- <sup>59</sup> PN1473.
- <sup>60</sup> PN1474.
- <sup>61</sup> PN1475.
- <sup>62</sup> PN1477.
- <sup>63</sup> PN1476.
- <sup>64</sup> PN1478.
- <sup>65</sup> PN1483 to PN1484.
- <sup>66</sup> PN1485.

<sup>67</sup> PN1486 to PN1488.

<sup>68</sup> PN1489.

<sup>69</sup> PN1490.

<sup>70</sup> PN1492; PN1494.

<sup>71</sup> PN1493.

<sup>72</sup> PN1499.

<sup>73</sup> PN1502 to PN1503.

<sup>74</sup> PN1516.

<sup>75</sup> PN1521.

<sup>76</sup> PN1522.

<sup>77</sup> Exhibit A3 at para 9.

<sup>78</sup> Exhibit A3 at WL-12.

<sup>79</sup> PN315; PN322.

<sup>80</sup> PN324.

<sup>81</sup> PN323.

<sup>82</sup> PN334.

<sup>83</sup> PN337.

<sup>84</sup> PN417.

<sup>85</sup> PN420.

<sup>86</sup> PN421.

<sup>87</sup> PN422.

<sup>88</sup> PN624 to PN628.

<sup>89</sup> Exhibit A1 at para 13.

<sup>90</sup> Exhibit A2 para 19.

<sup>91</sup> PN668 to PN671.

<sup>92</sup> Exhibit A1 at para 25.

<sup>93</sup> PN629.

<sup>94</sup> PN630 to PN635.

<sup>95</sup> PN639 to PN640.

<sup>96</sup> Exhibit 1 at para 26.

<sup>97</sup> Exhibit A3 paras 2 to 4; see also PN347 to PN382.

<sup>98</sup> Ibid.

<sup>99</sup> PN385 to PN386; PN400.

<sup>100</sup> PN392 to PN393.

<sup>101</sup> PN395 to PN397.

<sup>102</sup> Exhibit A4; PN351 to PN362.

<sup>103</sup> Exhibit A4.

<sup>104</sup> Exhibit A2 Annexure WL-8.

<sup>105</sup> Exhibit A3 at paras 21 to 23.

<sup>106</sup> PN416.

<sup>107</sup> PN700.

<sup>108</sup> PN459 to PN463; PN575 to PN576.

<sup>109</sup> PN673 to PN684.

<sup>110</sup> PN423.

<sup>111</sup> PN424, PN439.

<sup>112</sup> PN428 to PN438; PN440 to PN442.

<sup>113</sup> PN641.

<sup>114</sup> PN636 to PN665.

- <sup>115</sup> PN751.  
<sup>116</sup> PN752.  
<sup>117</sup> PN753.  
<sup>118</sup> PN755 to PN756.  
<sup>119</sup> PN761.  
<sup>120</sup> PN770.  
<sup>121</sup> PN773 to PN774.  
<sup>122</sup> PN784 to PN792.  
<sup>123</sup> Exhibit R1 at para 28.  
<sup>124</sup> PN1405 to PN1407.  
<sup>125</sup> Exhibit R1 at para 72.  
<sup>126</sup> PN1414 – PN1415.  
<sup>127</sup> PN1417 – 1424.  
<sup>128</sup> PN1427 – 1434.  
<sup>129</sup> Exhibit R1 at para 73.  
<sup>130</sup> Exhibit R1 at para 75.  
<sup>131</sup> Exhibit R2 Further Witness Statement of Peter Holden.  
<sup>132</sup> Exhibit R2 at PH-25.  
<sup>133</sup> Exhibit R2 at para 40.  
<sup>134</sup> PN914 to PN919.  
<sup>135</sup> PN1104.  
<sup>136</sup> PN1113 to PN1121.  
<sup>137</sup> Exhibit R2 at PH-26.  
<sup>138</sup> Exhibit R2 at para 51.  
<sup>139</sup> Exhibit R2 at para 53.  
<sup>140</sup> PN1546.  
<sup>141</sup> PN1547 to PN1548.  
<sup>142</sup> Exhibit R1 at PH-18.  
<sup>143</sup> Exhibit R1 at PH-20.  
<sup>144</sup> Exhibit R3.  
<sup>145</sup> PN1532.  
<sup>146</sup> PN1565 to PN1568.  
<sup>147</sup> Exhibit A10.  
<sup>148</sup> PN1592.  
<sup>149</sup> PN1598 to PN1601.  
<sup>150</sup> PN1400.  
<sup>151</sup> PN1402.  
<sup>152</sup> PN1403 to PN1407.  
<sup>153</sup> PN1524 to PN1527.  
<sup>154</sup> PN1629, referring to the Registrar’s decision at pg 5.  
<sup>155</sup> *Re Coldham; Ex parte Australian Workers’ Union* [1984] HCA 62; (1984) 56 ALR 149.  
<sup>156</sup> [2012] FWA 2790.  
<sup>157</sup> [2011] FCA 917.  
<sup>158</sup> [2012] FWA 2790 at [59] – [60].  
<sup>159</sup> *CFMEU v Ostwald Brothers Pty Ltd* [2012] FWC 2484 at [96].  
<sup>160</sup> [2020] QIRC 188.  
<sup>161</sup> *Ibid* at [260].  
<sup>162</sup> Exhibit A3.

<sup>163</sup> PN629 – 635.

<sup>164</sup> 207/83 SD Print 2577.

<sup>165</sup> *Textile, Clothing and Footwear Union of Australia v Bruck Textiles Pty Limited* [PR953474](#) [2004] AIRC 1151 at [57] – [59].

<sup>166</sup> (1984) 294 CAR 563.

<sup>167</sup> PN823; PN831; PN1731.

<sup>168</sup> (2012) 212 IR 206.

<sup>169</sup> *Foulsham v JJ Corbett Plumbing and Gasfitting Pty Ltd* [2015] FCCA 1290 per Jones J.

<sup>170</sup> *R v Cohen; Ex parte Motor Accidents Insurance Board* (1979) 141 CLR 577 at 587 per Mason J.

<sup>171</sup> (1979) 60 WAIG 148.

<sup>172</sup> *Federated Engine Drivers and Firemen's Union of Workers of Western Australia v Hamersley Iron Pty Limited and Others* 23 January 1980 WAIG 148 at 151 – 152.

<sup>173</sup> [PR953474](#) 19 November 2004.

<sup>174</sup> [2020] QIRC 188.

<sup>175</sup> *Foulsham v JJ Corbett Plumbing & Gasfitting Pty Ltd* [2015] FCCA 1290.