



DECISION

Fair Work Act 2009
s.185—Enterprise agreement

Spark NEL DC Workforce Pty Ltd
(AG2023/1621)

SPARK NEL DC WORKFORCE PTY LIMITED (TUNNELLING) GREENFIELDS AGREEMENT 2023

Building, metal and civil construction industries

DEPUTY PRESIDENT MILLHOUSE

MELBOURNE, 6 JULY 2023

Application for approval of the Spark NEL DC Workforce Pty Limited (Tunnelling) Greenfields Agreement 2023

[1] Spark NEL DC Workforce Pty Ltd (Spark Workforce) has applied pursuant to s 185 of the *Fair Work Act 2009* (Cth) for approval of an enterprise agreement known as the *Spark NEL DC Workforce Pty Limited (Tunnelling) Greenfields Agreement 2023* (Proposed Agreement). The Proposed Agreement has been made between Spark Workforce and the Australian Workers Union (AWU). The Proposed Agreement is said to relate to a “genuine new enterprise” that Spark Workforce was establishing or proposed to establish for the supply of “blue collar” labour to perform certain tunnelling works on the North East Link Project.

[2] The AWU supports the application for approval of the Proposed Agreement.

[3] On 30 May 2023, the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) requested to be heard in relation to the application. The request was made on the basis that the Proposed Agreement does not appear to relate to a genuine new enterprise that Spark Workforce is establishing or proposing to establish. On 8 June 2023, following receipt of submissions from the parties, I determined to inform myself pursuant to s 590(1) of the Act and granted the CFMMEU an opportunity to be heard.

[4] The matter proceeded to a hearing before me on 20 June 2023.

[5] The evidence establishes, on the balance of probabilities, that (a) the Proposed Agreement relates to a genuine new enterprise that Spark Workforce is establishing, (b) Spark Workforce has not employed any of the persons who will be necessary for the normal conduct of that enterprise and will be covered by the Proposed Agreement, and (c) it is in the public interest to approve the Proposed Agreement.

Context

[6] The North East Link Project (Project) is a large civil infrastructure project in Victoria. It involves completing a “missing link” in Melbourne’s orbital freeway between an upgraded Eastern Freeway and the M80 Ring Road. It comprises of five sub-projects: an early works package, the primary package, two secondary packages and a tolling service package.

[7] A special purpose vehicle, Spark North East Link Pty Ltd (Project Co) entered into a project deed with the State of Victoria and the North East Link State Tolling Corporation, under which Project Co agreed to part-finance and undertake the design and construction of the primary package, and then provide operations and maintenance services for a 25 year term.¹

[8] In December 2021, by way of a design and construction contract arrangement with Project Co, Spark Consortium Joint Venture (Spark CJV) was appointed as the design and construction contractor for the primary package. The primary package of works comprises of, in summary, tunnelling and associated civil and surface construction works. Spark CJV is not required to finance, or operate and maintain, the primary package.² For the purposes of this decision “Primary Package” is a reference to the work to be carried out by Spark CJV pursuant to the design and construction contract with Project Co.

[9] Spark CJV is an unincorporated joint venture comprising Webuild S.p.A, CPB Contractors Pty Ltd, China Construction Oceania Pty Ltd and GS Engineering and Construction Australia Pty Ltd.³

[10] Spark Workforce was established by Spark CJV for the supply of “blue collar” labour to perform certain tunnelling works in relation to the Primary Package. Spark Workforce was registered as a corporation with effect from 15 June 2022.⁴

[11] Article 2.1 of the Spark Workforce Constitution states that its purpose is to “provide labour for the construction of the North East Link tunnel as part of the North East Link Primary Package in Melbourne, Victoria, and known as the ‘North East Link Program’...”⁵

[12] The Proposed Agreement was made on 29 May 2023.⁶ The application for approval of the Proposed Agreement was filed in the Commission on the same day.

[13] By its Form F20 declaration in support of the application, Spark Workforce states that it is a genuine new enterprise that was incorporated for the purpose of supplying labour to Spark CJV to perform work on the Project.⁷ It states that it has not employed any persons who will be necessary for the normal conduct of the new enterprise and who will be covered by the Proposed Agreement.⁸ It is declared that approval of the Proposed Agreement is in the public interest because it will provide fairness and certainty with respect to the industrial arrangements for relevant employees who will perform work on a major infrastructure project, assisting in the delivery of the project in a productive, economic and timely fashion. It is also said that the Proposed Agreement provides for significantly better terms and conditions of employment for employees than those offered by the underpinning *Building and Construction General On-Site Award 2020*.⁹

[14] The AWU filed a Form F21 declaration in which it states that it is entitled to represent the industrial interests of a majority of the employees who will be covered by the Proposed

Agreement in relation to the work to be performed under it.¹⁰ The AWU's position is that approval of the Proposed Agreement is in the public interest.

The statutory framework

[15] Section 172 of the Act provides for the making of greenfields agreements with employers that are single interest employers and one or more employee organisations. Section 172(2) relevantly provides as follows:

Single enterprise agreements

- (2) An employer, or 2 or more employers that are single interest employers, may make an enterprise agreement (a single-enterprise agreement):
- ...
- (b) with one or more relevant employee organisations if:
- (i) the agreement relates to a genuine new enterprise that the employer or employers are establishing or propose to establish; and
 - (ii) the employer or employers have not employed any of the persons who will be necessary for the normal conduct of that enterprise and will be covered by the agreement.

Note: The expression genuine new enterprise includes a genuine new business, activity, project or undertaking (see the definition of enterprise in section 12).

...

Greenfields agreements

- (4) A single enterprise agreement made as referred to in paragraph (2)(b)...is a greenfields agreement.

[16] Having regard to s 172(2)(b), a greenfields agreement must satisfy two jurisdictional pre-requisites: first, that it *relates* to a *genuine new enterprise* that the employer (or single interest employers) is establishing or proposing to establish; and second, that the employer(s) has not employed any of the persons who would be necessary for the normal conduct of that enterprise and would be covered by the agreement.¹¹ Where jurisdiction depends on particular facts or a particular state of affairs, those facts must be established on the balance of probabilities, in light of the evidence advanced in the proceeding.¹²

[17] The Full Court in *Australian Rail, Tram and Bus Industry Union v Busways Northern Beaches Pty Ltd (No 2) (Busways)*¹³ recently considered the phrase “genuine new enterprise.” Bromberg and Snaden JJ provided separate reasons and reached the same conclusion. Wheelahan J agreed with the conclusion “substantially for the reasons given by Bromberg J.”

[18] There is no divergence between the judgments that the word “enterprise” is defined, for the purpose of s 172(2)(b)(i), in s 12 of the Act to mean “a business, activity, project or undertaking,” and that each of the words “genuine” and “new” has distinct work to do.¹⁴ The proposed enterprise agreement must be “new” from a general perspective or in a holistic sense, and not new from the perspective of the employer party to the agreement.¹⁵

[19] Bromberg J considered the word “genuine” in s 172(2)(b)(i) to qualify the word “new,” such that the enterprise being established or proposed to be established when the agreement is made must be genuinely new, or, in other words, truly authentic or really new.¹⁶ The word genuine “directs attention to substance rather than form.”¹⁷ His Honour proposes a three-step test for identifying a genuine new enterprise:¹⁸

- “(1) First, what is the character of the existing enterprise by reference to the essential characteristics which define it?
- (2) Second, what is the character of the proposed enterprise by reference to the essential characteristics which define it?
- (3) Third, compare the two.

If the existing enterprise and the proposed enterprise substantially bear the same character, then it will usually be the case that the proposed enterprise is not a “genuinely new enterprise.”

[20] The essential characteristics of an enterprise in question will depend on the nature of the enterprise. They may ordinarily include the kind of goods or services produced or provided, the kind of plant and equipment utilised to produce those goods or services, and the kind of workforce utilised to produce the goods and services in question including the nature and mix of the skills and occupations involved.¹⁹ The characterisation exercise will typically require that all relevant features or factors be considered in combination and then assessed on an overall basis.²⁰

[21] Snaden J provides that a “[t]he phrase “genuine new enterprise” denotes a business, activity, project or undertaking upon which an employer purposes to commence otherwise than as a successor to an existing operator.” In applying that interpretation, “analysis will turn upon the proper characterisation of the enterprise of an old or existing operator and an assessment as to whether it bears, in substance, the same character as the enterprise of the “new” or “incoming” operator.”²¹

[22] Further, the agreement must “relate” to a genuine new enterprise that is being established or proposed to be established. This requires a determination as to whether there is a direct, relevant, sufficient or material connection or relationship, rather than one that is merely a causal, indirect or incidental connection or relationship.²² The manner in which the requisite connection is to be ascertained is through the agreement’s scope and coverage.²³

[23] In relation to an application for approval of an enterprise agreement pursuant to s 185, the Commission must be satisfied that the requirements in ss 186 and 187 are met. These matters are not set out here, suffice to note that in relation to a greenfields agreement, the Commission must be satisfied of the matters in s 187(5):

Requirements relating to greenfields agreements

- (5) If the agreement is a greenfields agreement, the FWC must be satisfied that:
 - (a) the relevant employee organisations that will be covered by the agreement are (taken as a group) entitled to represent the industrial

interests of a majority of the employees who will be covered by the agreement, in relation to work to be performed under the agreement; and

- (b) it is in the public interest to approve the agreement.

The evidence advanced by Spark Workforce

[24] Spark Workforce relies upon the witness statement of Mr Mark Harrington,²⁴ who is a Procurement Director for Spark CJV. Mr Harrington is also employed by CPB Contractors Pty Limited, one of the joint venture partners of Spark CJV.

[25] Mr Harrington's evidence is that delivering the Primary Package will require Spark CJV to deliver the following, in summary: designing and planning the works; site establishment including preparatory work for the tunnels, excavation of the tunnelling sites and associated preparatory work for the commencement of tunnelling operations including construction of the tunnel boring machine launch site; construction to complete 6.7 kilometres of tunnel; supply and installation of mechanical, electrical and related equipment; construction of ventilation structures and related matters; surface work; and large scale urban and community works including landscaping.

[26] Spark Workforce was incorporated in June 2022.

[27] Between October 2021 and August 2022, Spark CJV conducted a design phase in respect of the Primary Package. No substantive construction work was undertaken on the Primary Package during this phase, the work being predominantly office-based design work the preparation of geotechnical reports and site investigations.

[28] In August 2022, Spark CJV commenced preparatory construction work involving the removal of trees and topsoil from construction sites. From September 2022, above-ground earthworks and drainage operations were performed as well as the construction of site sheds. Such work was undertaken by subcontractors and labour hire workers engaged by Spark CJV.

[29] Mr Harrington's evidence is that tunnelling operations have not commenced and says that it is not anticipated that tunnelling operations will commence until May 2024. As will become apparent (see [57] below), this issue is in contest. The CFMMEU's position is that tunnelling works commenced in August 2022, being the date that Spark CJV first "broke ground" on the Primary Package.

[30] Mr Harrington says that the work to date in respect of the Primary Package has been performed by specialist subcontractors engaged by Spark CJV. These specialist subcontractors have provided both the equipment required to perform the contracted work together with the labour necessary to operate that equipment. Additional labour to support the specialist contractors has been procured from five labour hire providers which do not operate exclusively with Spark CJV, the Primary Package or the Project.

[31] The work performed on the Primary Package by the specialist subcontractors thus far is said to be different to what will occur when tunnelling operations begin and Spark CJV procures labour from Spark Workforce. Mr Harrington explains that the labour supplied by Spark Workforce will operate specialist tunnelling machinery such as road headers, concrete rigs and tunnel boring machines. This equipment will be hired by Spark CJV and supplied without the

labour to operate them. This tunnelling equipment is different to the equipment supplied and used by the specialist subcontractors and labour hire workers performing the work to date.

[32] By comparison, the labour procured by Spark CJV from the labour hire providers referred to at [30] above is said to be generalist in nature and includes gate management, general unskilled labour and general plant and equipment operations. Mr Harrington says that those employees were engaged only to provide support to the specialist subcontractors, and they do not possess the specialist skills required to complete tunnelling work.

[33] Mr Harrington's evidence is that Spark CJV does not intend to procure labour from Spark Workforce to complete the same kind of work that is currently being, or has previously been, completed by specialist subcontractors or labour procured from the labour hire providers referred to at [30] above.

[34] On 24 January 2023, Spark CJV entered into a Services Contract with Spark Workforce for the supply of labour. The Services Contract sets out the terms under which Spark CJV will procure labour from Spark Workforce. Spark Workforce is required to provide labour to Spark CJV in accordance with individual service orders made by Spark CJV. The types of services to be delivered by Spark Workforce to Spark CJV under the Services Contract are "as set out in the Project EBA" being a reference to the Proposed Agreement. Spark CJV has not yet issued any service orders to Spark Workforce. Accordingly, Spark Workforce has not commenced carrying out any services under the Services Contract.

[35] Aside from entering into the Services Contract with Spark CJV, and making the Proposed Agreement, Spark Workforce has undertaken various regulatory compliance steps (such as obtaining relevant licenses, registrations and insurances) but it has not commenced performing any specific business activities. Spark Workforce has not commenced the recruitment process to source tunnelling workers or any other workers that it may need to place on the Primary Package. It intends to begin advertising expressions of interest for tunnelling roles covered by the Proposed Agreement following the date the Proposed Agreement commences operation, if it is approved.

The Proposed Agreement

[36] By clause 3.1, the Proposed Agreement will apply to employees of Spark Workforce who fall within the classification structure in the Proposed Agreement who are placed by Spark Workforce "on the Project" to carry out tunnelling work in accordance with the Services Contract.

[37] The "Project" is defined at clause 6 of the Proposed Agreement. It states:

"Project means the building and construction works performed on a site or combination of sites for the North East Link Primary Package, being a part of the North East Link Project."

[38] Clause 6 defines the North East Link Primary Package in the following way:

"North East Link Primary Package means the design and construction of all works required under the Project including all relevant designs and construction works."

[39] The term “site” is defined in clause 6 as follows:

“Site means a construction site within the Project.”

[40] Clause 6 of the Proposed Agreement defines “tunnelling work” by reference to clause 5. Clause 5.1 provides that the agreement will “apply to construction works that fall within the scope of tunnelling, including but not limited” to excavation operations using tunnel boring machines and road headers, excavation of shafts and cross passages, installation and operation of tunnel lining and services such as power, water, lighting, ventilation and other support systems, and surface support works for the tunnel site.

[41] The classification descriptions are contained within Appendix 3. The type of duties to be performed by tunnelling workers is summarised as follows:

- (a) *TW1 – New Entrant*: An employee with less than 12 months experience in tunnelling, engaged to perform general labouring, chainman, concrete gang, store person and/or hoist driver.
- (b) *TW2 – Tunneller Class 2*: An employee engaged underground assisting Tunneller Class 1, car spotter, brakeman, operators of dump trucks, members of a bullgang, or an employee carrying out general excavation operations. It includes employees engaged to perform concrete finishing, steel fixing, scaffolding, dogman, nipper and/or dumper driver.
- (c) *TW3 – Tunneller Class 1*: An employee engaged to carry out work in the excavation, lining and support works of the tunnel, working with specialised equipment. It includes employees engaged as service vehicle operators.
- (d) *TW4*: Employees engaged to perform shotcreting and/or rockbolting and/or shot firing and/or ringbuilding and/or jumbo operator.
- (e) *TW5 – Operator: Road Header or Tunnel Boring Machine*: An employee engaged specifically to operate a road header or tunnel boring machine.
- (f) *TW6 – Tunnelling Mechanical or Electrical Tradesperson*: An employee engaged specifically to perform work associated with tunnel or shaft excavation and/or installation of tunnel supports and lining and/or tunnel excavation and ancillary duties on the Project.

The respective contentions

[42] The CFMMEU submits that the Proposed Agreement does not relate to a genuine new enterprise within the meaning of s 172(2)(b)(i) of the Act. It contends that the business, activity, project or undertaking is not itself genuinely new. Its position is that there can be no doubt that the Proposed Agreement relates to a “project” and points to various features of the Proposed Agreement which demonstrate that it is geared around the content of the defined word, “Project.” These include:

- (a) The subject matter of the Proposed Agreement is identified as labour services for the design, construction, operation and maintenance of the North East Link Primary Package, which forms part of the North East Link Project.
- (b) The definition of “Project” in the Proposed Agreement (see [37] above), which refers to the “North East Link Project.”
- (c) The definition of “North East Link Project” (see [38] above), which includes all relevant design and construction works.
- (d) These phrases are imported into other concepts used in the Proposed Agreement such as “Critical Works” and “Emergency Work;” a “Tunnelling Worker” performs work “in and around the Tunnel Zone” and this zone relates to designated areas of the “Project.”

[43] The CFMMEU submits that the Form F20 declared by Spark Workforce demonstrates that the work to be covered by the Proposed Agreement relates to employees who will be placed to perform work on the “Project,” inclusive of the Primary Package.

[44] Against this background, the CFMMEU contends that the enterprise exists now and has been underway since 2020. The CFMMEU relies upon the witness statement of David Anthony Hepworth Vroland²⁵ in support of its position, including the following matters:

- (a) Mr Vroland deposes to information from the Senior Vice President of the CFMMEU’s Construction and General Victoria/Tasmania Branch, Mr Joe Myles, that the Project has been underway since 2020.²⁶
- (b) An October 2021 project update for the “North East Link Program” describes the tunnelling works that will be undertaken and the proposed timeline.²⁷
- (c) A community update dated March 2022 states that “Tunnel construction starts this year.” Under the heading “We’re hiring,” recruitment is said to be underway in respect of the planning, design and construction of the project.²⁸
- (d) A February 2023 project update advises of Spark’s appointment and provides a statement of key dates as to the progress of the Project.²⁹

[45] The CFMMEU says that the fact Spark Workforce may not yet have employed employees to perform the work that the Proposed Agreement contemplates is of no moment for the purposes of s 172(2)(b)(ii).

[46] In this respect, the CFMMEU contends that the Proposed Agreement does not relate to a genuine new business, activity, project or undertaking that this employer is establishing having regard to the circumstances of Spark Workforce and the terms of the Proposed Agreement. It is said that while Spark Workforce is identified as the employer party to the Proposed Agreement, the evidence demonstrates that the entity is owned and controlled by members of the consortia who had already been engaged to undertake, and is undertaking, the design and construction works of the Project.

[47] The CFMMEU refers to various terms of the Proposed Agreement in support of its position, including the following:

- (a) Clause 6 defines the word “Employer” to mean “Spark,” and the same clause defines “Spark” as follows:

Spark means the consortium engaged to design, construct, operate and maintain the North East Link Primary Package comprised of Webuild, CPB Contractors, China Construction Oceania, GS Engineering and Construction, Ventia, Capella Capital, John Laing Investments, DIF and Pacific Partnerships.

- (b) An objective of the Proposed Agreement pursuant to clause 9.1 is as follows:

The parties to this agreement recognise that Spark aims to achieve real and sustained performance improvements on the Project to meet its goals and objectives. The parties to this agreement aim to support Spark to achieve those goals.

- (c) Although “Spark” is not a party to the Proposed Agreement, the parties have committed, at clause 9.3(c), to the following:

Employees perform work as requested by the Employer or Spark, provided it is within their range of skills, competence, classification and authorisation.

- (d) A “Manager(s) or Senior Manager(s) or Supervisors” is defined by clause 6 to mean “senior Employees appointed by the Employer or Spark to whom Employees covered by this agreement report.”

- (e) Clauses 13.1 and 13.2 require employees to adhere to the Employer and Spark’s general code of conduct, work methods, procedures, guidelines, standards as well as any policies and procedures that the Employer or Spark may implement as a lawful direction.

- (f) Clause 13.6 requires employees to be ready, willing and available to perform work as required by the employer to best meet the needs of the Project.

- (g) Clause 15.1(a) requires employees to work at any location where the agreement is in operation, and clauses 15.1(b) and (f) require employees to observe all lawful directions including from Spark, and ensure compliance with site rules put in place by the Employer or Spark.

[48] The CFMMEU submits that the Proposed Agreement would authorise consortium members to interpose in the employment rights between employees and Spark Workforce by exercising rights of control and direction of and over those employees. In these circumstances, the CFMMEU contends that it is plain that Spark Workforce is a corporate vehicle for those with responsibility for the Project to carry out one or another aspect of what they have already commenced.

[49] Spark Workforce contends that the CFMMEU’s focus on the enterprise of Spark CJV embarks from a wrong starting point as s 172(2)(b)(i) is concerned with a genuine new enterprise that the *employer* is proposing to establish. It says that the Spark Workforce

Constitution identifies its express purpose, which is to provide labour for the construction of the North East Link tunnel as part of the Primary Package and “to perform the relevant construction works, including anything ancillary or incidental to that purpose.”³⁰

[50] Spark Workforce draws attention to a Service Agreement it has entered into with the Spark CJV parties which establishes its enterprise to be a labour hire business.

[51] Spark Workforce also identifies various terms of the Proposed Agreement which it says demonstrate that the relevant enterprise is that of Spark Workforce. This includes the title; clauses 3.1(a) and 6 which identify it as the employer; clause 3.1(c) which describes the employees to be covered by the Proposed Agreement as employees “who are placed on the Project to carry out tunnelling work” in accordance with the Service Agreement with Spark CJV; and clause 9.1 which draws a distinction between Spark CJV’s Project goals against the aims of the parties to the Proposed Agreement to support Spark CJV to achieve those goals.

[52] Spark Workforce contends that there is a direct, relevant, sufficient or material connection or relationship between the identified new enterprise and the Proposed Agreement.³¹ It says that any connection to the broader Project is, at best, indirect. While Spark Workforce may supply services to the Spark CJV, that does not collapse its enterprise into that of the “head contractor.”

[53] Spark Workforce submits that if the CFMMEU’s position is correct, greenfields agreements would be available only to the principal contractor on any building and construction project, as the supply of labour by any labour hire provider to the relevant project could not amount to a relevant “enterprise.”

[54] Further, Spark Workforce contends that the CFMMEU’s objection cannot logically be made out without establishing its second argument that the corporate veil should be lifted. In relation to this matter, Spark Workforce contends, *inter alia*, that the Services Contract is a legitimate commercial labour hire agreement and the fact that it is made between related entities is of no moment. Spark Workforce refers to the rejection of a similar argument at first instance and on appeal in *SC Hydro*.³²

[55] In reply, the CFMMEU’s contends that the essential characteristics of the enterprise relevant here are the construction aspects of the Project. It says that the subject matter of the Project is the construction of tunnels. The Spark Workforce labour will carry out construction work for the Project including by operating machinery that Spark CJV will procure. The recipient of the services is Spark CJV.

[56] The CFMMEU says that a genuine new enterprise takes its essential character from what it will do, rather than the means by which it will do it. It submits that it is not to the point that the purpose of Spark Workforce is to provide labour to Spark CJV because this omits from the inquiry the reason for the labour. The CFMMEU submits that the Form F20 filed by Spark Workforce identifies the reason, being to provide labour to the Spark CJV, which is responsible for the design and construction of the Primary Package, being part of the Project.

[57] The CFMMEU contends that Mr Harrington’s evidence demonstrates that tunnelling surface works at tunnelling sites have been underway since August 2022.³³ Accordingly, the CFMMEU’s position is that the construction work underway to deliver the Project, and the construction work of Spark Workforce, are directed to the same Project specific end.

[58] The CFMMEU points to the degree of control exercisable by Spark CJV. It notes that it is relevant to “genuineness” that the entities that established Spark Workforce are themselves part of the joint venture.

[59] The AWU’s position is that the Proposed Agreement provides for terms and conditions of employment well in excess of the statutory minimums, providing Spark Workforce and future employees with certainty. Further, the AWU declares by its Form F21 that the Proposed Agreement ensures productivity by removing the prospect of protected industrial action prior to its nominal expiry date. The AWU therefore contends that approval of the Proposed Agreement is in the public interest. The AWU relies upon the witness statement of Joel Archer³⁴ in support of its position that the AWU had no reason to question Spark Workforce’s view that a greenfields agreement could be negotiated in these circumstances.

Does the Proposed Agreement relate to a genuine new enterprise being established or proposed to be established?

[60] Spark Workforce submits that this case is on all fours with the first instance decision in *SC Hydro* and, as the decision was upheld on appeal, I am bound to apply it.³⁵ The CFMMEU contends that *SC Hydro* adopts a narrower focus than the characterisation test posited by Bromberg J in *Busways*, and the Full Court supplants the Full Bench decision in *SC Hydro*. The CFMMEU’s contentions broadly focus upon the application of Bromberg J’s judgment in *Busways* in support of its approach to characterising the enterprise being established by Spark Workforce.

[61] Having regard to the judgment of Bromberg J in *Busways*, to be “new” an enterprise must be new to “persons generally,” not just to the proponent or establishing entity.³⁶ Further, the word “genuine” directs attention to substance rather than form.³⁷ However, *Busways* concerned an employer purporting to establish a new enterprise in connection with the acquisition of an existing enterprise. The objection raised by the CFMMEU here arises in a different context; being the arrangement by an existing enterprise, Spark CJV, for the incorporation of a new entity – Spark Workforce – for the supply of labour to perform tunnelling works for Spark CJV on the Primary Package. The objection is made on the basis that the purported genuine new enterprise is another aspect of an existing enterprise.³⁸ The essence of the dispute concerns the objective character and identity of the “enterprise” to which the Proposed Agreement relates, and its novelty in relation to the “enterprise” in existence, which on the CFMMEU’s view is the Project, being the construction works for the Primary Package which Spark Workforce is an extension of.

[62] Against this background, I turn now to characterise the enterprise Spark Workforce is establishing and to which the Proposed Agreement relates, before considering whether it is an aspect of a broader project as contended by the CFMMEU.

[63] As earlier stated, a characterisation exercise “typically requires that all relevant features or factors be considered in combination and then assessed standing back from the detail in order to gain an overall impression.” It has been said that the “object of the exercise is to paint a picture from the accumulation of detail” and that limited assistance will be found upon a consideration of the facts of other cases.³⁹ It is therefore appropriate to undertake the characterisation exercise on the evidence before me, and not to simply apply the decision in *SC Hydro*.

[64] Having regard to all of the evidence, I consider there to be four documents that provide a sufficiently detailed picture of the enterprise being established by Spark Workforce. They are the Spark Workforce Constitution, the Services Contract between Spark Workforce and Spark CJV, the Proposed Agreement and the licence to provide labour hire services. These are considered in turn.

[65] Clause 2 of the Spark Workforce Constitution is titled “Purpose.” It states as follows:

The purpose of the Company is to provide labour for the construction of the North East Link tunnel as part of the North East Link Primary Package in Melbourne, Victoria, known as the “North East Link Program” (Project), to perform relevant construction works, including anything ancillary or incidental to that purpose. This article does not limit the powers of the company.

(Emphasis omitted)

[66] Clause 2.3 expresses the intention that Spark Workforce will be wound up “if labour is no longer required to be provided to the Project, including when the Project is completed...”

[67] While there is nothing in its Constitution limiting Spark Workforce from conducting some other type of service, the purpose of the company is plainly to provide labour to perform construction works, primarily comprising tunnelling works and any ancillary or incidental works, to support Spark CJV in delivering the Primary Package.

[68] The Services Contract sets out the terms by which Spark CJV will procure labour from Spark Workforce. The types of services to be delivered by Spark Workforce to Spark CJV under the Services Contract are “as set out in the Project EBA” being a reference to the Proposed Agreement. It is not contended that Spark Workforce has entered into, or has the intention of entering into, any other major commercial contract.

[69] The recitals of the Services Contract are, in full as follows, where the Principal is Project Co and Spark Workforce is the Contractor:⁴⁰

- (1) Spark CJV has entered into the Main Contract with the Principal with respect to the Project.
- (2) The Contractor Services are part of the Work under the Main Contract.
- (3) The Contractor conducts a business that provides its Personnel for labour purpose (Business).
- (4) Spark CJV notes that the Contractor intends to make an industrial agreement to cover its Personnel to be engaged for the Project (“Project EBA”) and requires the services of the Contractor for the recruitment, employment and management of such Personnel and for fulfilling all associated legislative and contractual obligations and other general activities associated with the employment of Personnel for the Project.
- (5) The parties represents to each other that they have the requisite skill, experience, ability and available resources, and meets all requirements at law to perform certain Services in accordance with the Contract.
- (6) In reliance on the Contractor’s representations in Recital (5), during the Term, Spark CJV may wish to engage the Contractor to perform certain Services in

- accordance with the Contract by issuing one or more Services Orders to the Contractor.
- (7) Upon issue of a Services Order by Spark CJV to the Contractor, the Contractor must carry out the relevant Services in accordance with the relevant Services Order and the Contract.
 - (8) For the purposes of conducting the Business and performing the Work under the Main Contract:
 - (a) the parties wish to agree general terms and conditions that will apply to the provision of the Services, including as specified in more detail in any Services Orders;
 - (b) the Contractor has agreed to provide the Contractor Services to Spark CJV and provide Personnel for the Project on the terms and conditions set out in the Contract and as directed by Spark CJV, at its absolute discretion; and
 - (c) Spark CJV has agreed to provide the Spark CJV Services to the Contractor in accordance with the Contract.

[70] Consistent with the recitals, clause 9.2(1) of the Services Contract provides that Spark CJV must pay Spark Workforce any Contract Sum for the provision of labour to it, as described in the Services Order. Spark CJV will not pay any employees directly. Rather, employees are to be engaged by Spark Workforce and paid in accordance with the Proposed Agreement.

[71] It appears that Spark Workforce is not conducted with a view to profit and will be paid at cost in relation to the labour it provides to Spark CJV, or an amount of \$10.⁴¹ The CFMMEU's position is that this demonstrates that Spark Workforce is not a "business" either in the ordinary meaning or the particular meaning of that word as it appears in the s 12 definition of "enterprise." I do not accept this contention. A "business" can be a not-for-profit business, and such businesses can make greenfields agreements.⁴² In any event, Spark Workforce is undeniably an entity with its own interests separate from any other entity. It will have directors responsible for pursuing those interests and is capable of transacting on its own behalf in that pursuit.

[72] Consistent with the Services Agreement and the Spark Workforce Constitution, clause 3.1 of the Proposed Agreement provides that the parties to the Proposed Agreement are (a) Spark Workforce, (b) the AWU, and (c) employees of Spark Workforce "who fall within the classification structure contained within this Agreement who are placed on the Project to carry out tunnelling work (as defined at clause 6) in accordance with the Employer's labour hire agreement with Spark."

[73] Clause 6 defines "Tunnelling Work" by reference to clause 5. Clause 5.1 provides that the Proposed Agreement shall apply to work that falls within the scope of "tunnelling," and provides a non-exhaustive list of nine prescriptive examples of the types of work that are intended to fall within the Proposed Agreement's scope. As set out above at [41], Appendix 3 to the Proposed Agreement provides a list of classifications which are consistent with the non-exhaustive list of tunnelling work described in clause 5.1. Clause 5.2 importantly limits the scope and application of the Proposed Agreement with respect to the following groups:

- "a) Personnel carrying out work not covered by classifications contained in this Agreement such as: Administrative, other supervisory (including forepersons)

- or managerial personnel, engineers, technicians, surveyors, security, paramedics, nursing, or medical support personnel.
- b) Persons engaged in the transportation or delivery of material and/or equipment to and/or from the Project.
 - c) Personnel employed by any subcontractor, specialist contractor and/or supplier.
 - d) Personnel engaged in off-site infrastructure, manufacturing or fabrication of goods, materials or equipment including but not limited to off-site batch plants, pre-cast yards and concrete works, whether associated with the project or not.
 - e) Warranty, defects liability, repair and/or maintenance work performed by or on behalf of the subcontractor/supplier.”

[74] It follows that the scope of the Proposed Agreement includes employees who will perform the types of work contemplated by the Spark Workforce Constitution and the Services Contract, and excludes employees who will not perform the types of work contemplated by these instruments.

[75] It is apparent from the materials, and I am satisfied, that the scope of the Proposed Agreement, and the employee classifications to whom it applies are wholly consistent with the purpose set out in the Spark Workforce Constitution and the contractual arrangements for the provision of labour in the Services Contract. The purpose of Spark Workforce is to provide labour to Spark CJV. It is appropriately licenced to do so, noting that Spark Workforce holds a non-transferable licence to provide labour hire services, issued pursuant to s 24 of the *Labour Hire Licensing Act 2018* (Vic).⁴³ Spark Workforce will not use the Proposed Agreement to carry out its own works on the Primary Package. Nor will Spark Workforce, on the evidence before me, carry out any activity Spark CJV carries out in fulfilling its contractual obligations with respect to delivering the Primary Package.

[76] Accordingly, while the Primary Package may or may not be capable of being characterised as a “project” for the purposes of s 12 of the Act, the enterprise being established by Spark Workforce is separate from that project. The enterprise carries on the supply of labour to Spark CJV. It is observed, in this respect, that the CFMMEU does not explain why the “project” should be limited to the construction work on the Primary Package,⁴⁴ or the design and construction work on the Primary Package,⁴⁵ or indeed the primary package as a whole as detailed above at [7], or all of the five sub-projects, or “packages,” identified above at [6].

[77] Instead, the CFMMEU seeks to characterise the enterprise Spark Workforce is establishing by reference to the reason for the labour, being the work that will be carried out under the Proposed Agreement. I accept that the work to be performed under a greenfields agreement, and how that work is to be carried out (e.g., plant and equipment), may be relevant in the characterisation exercise and in determining the enterprise to which the Proposed Agreement relates. However, I do not consider that the purpose of Spark Workforce as an entity to provide labour can be dismissed in the manner contended by the CFMMEU.⁴⁶ The provision of labour is unique. It is in the transaction whereby labour is provided to a third party that the activity occurs, and where a labour hire enterprise embodies its essential character. That is what arises in the case of the enterprise being established by Spark Workforce.

[78] While there is an intention for Spark Workforce to be wound up once Spark CJV no longer has a need to continue procuring labour from it, it is not an enterprise which takes its form from the completion of the Primary Package. Rather, the enterprise takes its form from

the provision of labour and associated matters to Spark CJV for its works on the Primary Package. It is the carrying on of that activity that is the essential characteristic of the enterprise.

[79] The provision of labour by Spark Workforce is, on the facts, a discrete enterprise. Significantly, no contention was made that Spark CJV itself operates as a labour hire enterprise. Further, Spark CJV does not directly employ persons to perform the construction work on the Primary Package that the employees who will be covered by the Proposed Agreement will perform. Accordingly, I consider there to be no basis to suggest that the enterprise being established by Spark Workforce is simply a part of an existing enterprise conducted by Spark CJV. Nor is it the case that any of the labour hire enterprises or contractors previously engaged by Spark CJV represent the “enterprise” Spark Workforce is establishing. Spark Workforce will exist as a labour hire enterprise, and Spark CJV will retain a discretion to engage the services of Spark Workforce or any other labour hire enterprise or contractor.

[80] The CFMMEU’s objection proceeds on the basis that a number of different enterprises collectively carry out work on what might be capable of description as a “project” for the purposes of s 12 of the Act. However, the labour hire enterprises, and contractors, and Spark CJV are not one and the same. They are discrete enterprises with respect to the definition in s 12 of the Act. Had these activities been bundled together by Spark CJV, it may be the case that the new enterprise substantially bears the same character as the existing enterprise.⁴⁷ It did not.

[81] Similarly, contrary to the CFMMEU’s submissions, the genuineness or authenticity of the enterprise being established is not undermined by the fact that Spark Workforce was incorporated by Spark CJV, and Spark CJV retains a large degree of control over (a) Spark Workforce, and (b) the employees who will be covered by the Proposed Agreement. This is not a case where Spark CJV is attempting to “rebadge” a component of its existing enterprise. Rather, Spark CJV has created an entity which is establishing a discrete enterprise.⁴⁸ Such a corporate structure is uncontroversial.⁴⁹

[82] In support, the CFMMEU draws attention to a number of clauses in the Proposed Agreement which provide Spark CJV with a right to control employees to whom the Proposed Agreement applies.⁵⁰ However, Spark CJV is not a party to the Proposed Agreement. The provisions to which the CFMMEU refers provide detail as to the nature of the labour hire arrangement for employees of Spark Workforce performing work for Spark CJV on the Primary Package. A distinction may be readily drawn between the goals and objectives of Spark CJV and the aims of the parties to the Proposed Agreement to support Spark CJV to achieve those goals. To this end, clause 9.2 of the Proposed Agreement provides a list of goals which the Proposed Agreement is intended to create a framework to achieve. Insofar as employees of Spark Workforce are required to follow the directions and policies of Spark CJV, such obligations are commonplace in labour hire arrangements. In my view, this further supports the conclusion that the enterprise is appropriately characterised as a labour hire enterprise.

[83] Accordingly, while it may be the case that Spark CJV holds a large degree of control over Spark Workforce, that does not prevent the enterprise Spark Workforce is establishing from being a genuine new enterprise.

[84] Finally, the tunnelling operations cannot commence until all the preparatory civil works and erection of the tunnel support systems are complete. It is anticipated that these tasks will be completed in April 2024 and that tunnelling operations will commence in May 2024. The work to be undertaken by the labour to be supplied by Spark Workforce depends upon the

completion of that preparatory work. In *HP Distribution*, the Federal Court held that a holding company may complete significant preparatory work directed to establishing or proposing to establish a genuine new enterprise that it intends will be conducted by a subsidiary that will be incorporated shortly before the subsidiary enters into a greenfields agreement with a relevant employee organisation.⁵¹ Contrary to the CFMMEU's contention, I do not consider the completion of that preparatory work to bear upon whether the enterprise is genuine and new, in circumstances where (a) the relevance of the enterprise being established depends upon the completion of that preparatory work, and (b) the preparatory work is not of the kind the enterprise will carry out.

[85] The characterisation exercise demonstrates that the "enterprise" Spark Workforce is establishing, and to which the Proposed Agreement relates, is an enterprise that provides labour to Spark CJV for its tunnelling works on the Primary Package. That enterprise is a genuine new enterprise for the purposes of s 172(2)(b)(i) of the Act.

[86] For the purposes of s 172(2)(b)(ii), it is not in contest and I find that Spark Workforce has not employed any of the persons who will be necessary for the normal conduct of that enterprise and who will be covered by the Proposed Agreement.

[87] Accordingly, the relevant jurisdictional facts under s 172(2)(b) are established.

Is approval of the Proposed Agreement in the public interest?

[88] I am satisfied, for the reasons that follow, that it is in the public interest to approve the Proposed Agreement. The Proposed Agreement relates to a major project which forms a critical component of Victoria's road infrastructure. It is anticipated that 5,000 new jobs will be created for the Project, and Spark Workforce's proposed workforce engaged under the Proposed Agreement will constitute a number of these employees.

[89] The terms and conditions of employment in the Proposed Agreement compare favourably to the terms of the *Building and Construction General On-Site Award 2020* and will no doubt benefit the employees to be engaged. I also accept that the Proposed Agreement contains market competitive conditions for skilled labour on a major infrastructure project, which is reflected in the support of the AWU for the Proposed Agreement, being the union with the majority coverage rights in respect of the classifications under the Proposed Agreement.

[90] I accept that approving the Proposed Agreement will provide certainty to Spark Workforce to meet its obligations to Spark CJV pursuant to the Services Contract, as well as to the future employees with respect to the transparency, consistency and enforceability of their terms and conditions of employment. These matters will assist Spark CJV to deliver on the Primary Package in a productive, economic and timely manner.

[91] Each of these matters support a conclusion that it is in the public interest to approve the Proposed Agreement, and I so find.

Other approval considerations

[92] For the reasons stated, the *Spark NEL DC Workforce Pty Limited (Tunnelling) Greenfields Agreement 2023* is a greenfields agreement that meets the requirements of s

172(2)(b) of the Act. I am satisfied that each of the requirements of ss 186 and 187 of the Act as are relevant to this application for approval have been met.

[93] In accordance with s 187(5)(a) of the Act, I am satisfied that the AWU is entitled to represent the industrial interests of a majority of employees who will be covered by the *Spark NEL DC Workforce Pty Limited (Tunnelling) Greenfields Agreement 2023* in relation to work that is to be performed under it. I am also satisfied, for the reasons given, that it is in the public interest to approve the *Spark NEL DC Workforce Pty Limited (Tunnelling) Greenfields Agreement 2023*.

[94] Pursuant to s 53(2)(b) of the Act, I note the *Spark NEL DC Workforce Pty Limited (Tunnelling) Greenfields Agreement 2023* was made with the AWU and covers this organisation.

[95] The *Spark NEL DC Workforce Pty Limited (Tunnelling) Greenfields Agreement 2023* is approved and, in accordance with s 54 of the Act, will operate from 13 July 2023. The nominal expiry date of the *Spark NEL DC Workforce Pty Limited (Tunnelling) Greenfields Agreement 2023* is 7 June 2027.



DEPUTY PRESIDENT

Appearances:

Mr R. Dalton KC, with *Mr A. Pollock*, of Counsel, instructed by Corrs Chambers Westgarth, for the applicant

Mr S. Miller, on behalf of the Australian Workers' Union

Mr M. Harding SC, on behalf of the Construction, Forestry, Maritime, Mining and Energy Union

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Melbourne:

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¹ Exhibit 1 at [15]; CB 119

² Exhibit 1 at [16] and [19]; CB 119-120

³ Exhibit 1 at [3]; CB 117

⁴ Exhibit 1 at [44]; CB 125

⁵ Exhibit 1 at [45]; Annexure MH-6 to Exhibit 1; CB 150-191

⁶ *Form F20 declaration in support of an application for approval of greenfields agreement dated 29 May 2023* (Form F20) at [2.1]; CB 79

⁷ Form F20 at [1.5] and [1.4]; CB 78

⁸ Form F20 at [1.7]; CB 79

⁹ Form F20 at [2.5]; CB 80-81

¹⁰ *Form F21 declaration of an employee organisation in relation to an application for approval of a greenfields agreement dated 26 May 2023* at [4]; CB 101

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- ¹¹ *Fair Work Act*, ss 172(2)(b)(i) and (ii); *National Union of Workers (NSW) v HP Distribution Pty Ltd* [2013] FCA 139, 210 FCR 250, 231 IR 263 (*HP Distribution*) at [29] and [41]; *Construction, Forestry, Maritime, Mining and Energy Union v CPB Contractors Pty Ltd and the Australian Workers' Union* [2018] FWCFB 3702, 280 IR 293 at [7]
- ¹² *HP Distribution* at [27]
- ¹³ [2022] FCAFC 55
- ¹⁴ *Busways* at [4]-[5] per Bromberg J; [63]-[76] per Snaden J
- ¹⁵ *Busways* at [4] per Bromberg J; [71] per Snaden J
- ¹⁶ *Busways* at [3]-[5] per Bromberg J
- ¹⁷ *Busways* at [5]
- ¹⁸ *Busways* at [7]
- ¹⁹ *Busways* at [8]
- ²⁰ *Busways* at [9]
- ²¹ *Busways* at [76]
- ²² *The Australian Workers' Union v Construction, Forestry, Maritime, Mining and Energy Union & Watpac Construction Pty Ltd* [2022] FWCFB 85 (*Watpac*) at [42]
- ²³ *Ibid* at [43]
- ²⁴ Exhibit 1; CB 117-128
- ²⁵ Exhibit 3
- ²⁶ Exhibit 3 at [7]; CB 323
- ²⁷ Annexure 4 to Exhibit 3; CB 388-392
- ²⁸ Annexure 5 to Exhibit 3; CB 393-397
- ²⁹ Annexure 6 to Exhibit 3; CB 398-402
- ³⁰ Annexure MH-6 to Exhibit 1; CB 150-191
- ³¹ *Watpac* at [42]
- ³² *S C Hydro Pty Ltd* [2021] FWC 5110; *Australian Manufacturing Workers' Union v S C Hydro Pty Ltd* [2021] FWCFB 6024
- ³³ Exhibit 1 at [23]; CB 121
- ³⁴ Exhibit 2; CB 310-311
- ³⁵ Transcript of proceedings dated 20 June 2023 at [97]
- ³⁶ *Busways* at [4] per Bromberg J
- ³⁷ *Busways* at [5] per Bromberg J
- ³⁸ See, eg *Construction, Forestry, Maritime, Mining and Energy Union v CPB Contractors Pty Ltd* [2018] FWCFB 3702
- ³⁹ *Hall (Inspector of Taxes) v Lorimer* [1992] 1 WLR 939 cited in *Attorney General (NSW) v Ohlsen* [2022] FCAFC 38 at [11] (and *Busways* at [9])
- ⁴⁰ Annexure MH-7 to Exhibit 1; CB 193-300
- ⁴¹ Exhibit 1 at [54]-[55]; CB 127-128
- ⁴² *S C Hydro* at [40]; *Australian Manufacturing Workers' Union v S C Hydro Pty Ltd* [2021] FWCFB 6024 at [22]
- ⁴³ Annexure MH-9 to Exhibit 1; CB 302
- ⁴⁴ Construction, Forestry, Maritime, Mining and Energy Union reply submissions dated 20 June 2023 at [8]-[10]
- ⁴⁵ Construction, Forestry, Maritime, Mining and Energy Union submissions dated 13 June 2023 at [34]
- ⁴⁶ Construction, Forestry, Maritime, Mining and Energy Union reply submissions dated 20 June 2023 at [12]
- ⁴⁷ *Busways* at [23] per Bromberg J
- ⁴⁸ *HP Distribution* at [34]
- ⁴⁹ *SC Hydro* at [40]
- ⁵⁰ Proposed Agreement, cl 6, 9.1, 9.3(c), 13.1, 13.2, 13.6 and 15.1(a)-(b) and (f)
- ⁵¹ *HP Distribution* at [36]