DECISION

Fair Work Act 2009
s.604—Appeal of decision

Appeal by The Australian Workers' Union
(C2023/3473)

JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT ASBURY
DEPUTY PRESIDENT GRAYSON

SYDNEY, 6 SEPTEMBER 2023

Appeal against decision [2022] FWCA 3757 of Deputy President Gostencnik at Melbourne on 26 October 2022 in matter number AG2022/4202.

Introduction and background

[1] The Australian Workers' Union (AWU) has, pursuant to s 604 of the *Fair Work Act 2009* (Cth) (FW Act), appealed the decision[1] of Deputy President Gostencnik on 26 October 2022 to approve, with undertakings, the *Workforce Logistics Pty Ltd Enterprise Agreement 2022*[2] (Agreement). Permission is required for the appeal. The appeal was lodged on 19 June 2023, approximately eight months after the approval decision was published on 26 October 2022. Rule 56(2) of the *Fair Work Commission Rules 2013* (FWC Rules) provides that a notice of appeal under s 604 of the FW Act must be filed within 21 calendar days after the date of the decision the subject of the appeal, or within such further time as may be allowed by the Commission on application by the appellant. Accordingly, the AWU requires the grant of an extension of time for its appeal.

[2] In the proceedings before the Deputy President concerning the application for the approval of the Agreement, no party opposed the application. No union had been appointed as an employee bargaining representative and none was covered by the proposed agreement. In those circumstances, the application was dealt with on the papers and, in the decision under appeal, the Deputy President only found it necessary to make very limited findings as to the undertakings provided by Workforce Logistics Pty Ltd (Workforce Logistics), the applicant for approval of the Agreement and the employer covered by the Agreement, and his satisfaction that the Agreement met the requirements of the FW Act.

Application for approval of the Agreement

[3] Workforce Logistics was registered on 19 August 2022.[3] Mr Blake Read was the Director, Secretary and sole shareholder of Workforce Logistics from 19 August 2022 until 20 December 2022.[4] The registered address of Workforce Logistics during this period was Unit 2, 1 Aitken Way, Kewdale, Western Australia (Aitken Way premises).

[4] On 5 October 2022, Workforce Logistics applied[5] for approval of the Agreement. The Form F16 application for approval identified that Mr Vincent Ruffino was an employee bargaining representative for the Agreement. The Form F17 employer's declaration accompanying the application was made by Mr Read. Mr Read's declaration disclosed that the notice of employee representational rights (NERR) for the proposed agreement had been physically provided to employees on 31 August 2022, that a vote to approve the Agreement took place on 23 September 2022, and that all six employees who were covered by the Agreement cast valid votes and voted in favour of approval. The Agreement was signed on 4 October 2022 by Mr Read on behalf of Workforce Logistics, and Mr Vincent Ruffino as the Employee Representative. We will return to Mr Read and Mr Ruffino's relationship later on in this decision.

[5] The application identified that Workforce Logistics, as the employer covered by the Agreement, is in the building, metal and civil construction industries. In his Form F17 statutory declaration made on 5 October 2022, Mr Read made statements to the following effect:

- the primary activity of Workforce Logistics is construction and maintenance;
- the Agreement did not cover all employees of Workforce Logistics because it did not cover white-collar administrative or management roles;
- the Agreement would operate in every State and Territory of Australia;
- no current collective agreement applied to employees to be covered by the Agreement;
- the nine classifications in the Agreement corresponded to the CW/ECW1d to CW/ECW7 classifications of the *Building and Construction General On-site Award 2020* (Building and Construction Award) and the C12 to C7 classifications of the *Manufacturing and Associated Industries and Occupations Award 2020* (Manufacturing Award) respectively;
- clauses 6 and 7 contained more beneficial terms than the equivalent terms and conditions in the Building and Construction Award or the Manufacturing Award as a result of rates of pay that were significantly higher, annual pay increases and higher allowances;
- the Agreement contained unspecified terms or conditions of employment that were less beneficial than equivalent terms and conditions in the Building and Construction Award or the Manufacturing Award because they were less detailed;
- the Agreement omitted entitlements in clauses 14, 15, 16, 19, 23, 28 and 47-57 of the Manufacturing Award and clauses 42 and 43 of the Building and Construction Award, but these did not affect employees of Workforce Logistics;
- he thought that the Agreement passed the better off overall test (BOOT);

- Workforce Logistics 'physically handed a copy' of the NERR to each employee who would be covered by the Agreement pursuant to s 173 of the FW Act on 31 August 2022 when the employer agreed to bargain. The NERR gave notice to employees that Workforce Logistics was bargaining in relation to an enterprise agreement that was 'proposed to cover employees that are engaged in any work involving or in association with maintenance, modification, repair, fabrication, commissioning, decommissioning, construction, metal and engineering construction, on site building, civil construction, and any related or associated works when employed in the classifications in this Agreement anywhere within [the] Commonwealth of Australia';

- on 14 October 2022 (sic – presumably September), employees were provided with a copy of the proposed agreement;

- on 14 September 2022, Workforce Logistics emailed employees outlining the date, the place, the time and the method of voting on the proposed agreement;

- Workforce Logistics conducted a meeting and information sessions with employees about the proposed agreement on 15, 19 and 21 September 2022 where Mr Read personally answered employees' questions with reference to the relevant Awards and their understanding of the operations of Workforce Logistics; and

- the vote occurred on 23 September 2022, at which time there were six employees covered by the proposed agreement, all of whom cast a valid vote and voted to approve the Agreement.

[6] Mr Read did not provide with his declaration any supporting documents regarding the meeting and information sessions that he conducted with employees or the voting process to approve the Agreement, nor did he subsequently supply any such documents to the Commission prior to approval of the Agreement.

[7] In accordance with the Commission's usual process, the Agreement was sent to the Commission's Agreements Team to assess its compliance with the statutory approval requirements in the FW Act. The Agreements Team produced a 'checklist' analysis on 12 October 2022.[6] The same day, the application was allocated for determination to the Deputy President.

[8] The checklist identified a number of deficiencies in entitlements under the Agreement as compared to the Building and Construction Award and the Manufacturing Award, and the overall conclusion of the checklist was that employees covered by these awards might not be better off given these issues. The Deputy President's chambers subsequently sent correspondence to Workforce Logistics requesting further information about the identified deficiencies and any proposed undertakings to rectify them. In response to this, on 25 October 2022, Workforce Logistics provided a number of signed undertakings to the Deputy President's chambers, and a consolidated copy of the Agreement containing those undertakings was prepared on 26 October 2023. The Deputy President's chambers confirmed receipt of the undertakings and requested that Workforce Logistics confirm that an employee bargaining representative had been consulted about the undertakings, as well as the outcome of any such

consultation. Mr Read responded by email on the same day confirming that Mr Ruffino, as the nominated employee representative, had been consulted. It is significant to note, as we will subsequently explain, that at the time that Mr Read was corresponding with the Commission to this effect, he failed to disclose to the Commission that Mr Ruffino was no longer an employee of Workforce Logistics and that, in fact, Workforce Logistics did not have any employees at all.

Decision to approve the Agreement

[9] The same day, the Deputy President issued his decision approving the Agreement.[7] The decision, in its entirety, stated:

> [1] An application has been made for approval of an enterprise agreement known as the *Workforce Logistics Pty Ltd Enterprise Agreement 2022* (the Agreement). The application was made pursuant to s.185 of the Fair Work Act 2009 (the Act). It has been made by Workforce Logistics Pty Ltd. The Agreement is a single enterprise agreement.
>
> [2] The Employer has provided written undertakings. A copy of the undertakings is attached in Annexure A. I am satisfied that the undertakings will not cause financial detriment to any employee covered by the Agreement and that the undertakings will not result in substantial changes to the Agreement. The undertakings are taken to be a term of the agreement.
>
> [3] Subject to the undertakings referred to above, I am satisfied that each of the requirements of ss.186, 187, 188 and 190 as are relevant to this application for approval have been met.
>
> [4] The Agreement is approved and, in accordance with s.54 of the Act, will operate from 2 November 2022. The nominal expiry date of the Agreement is 26 October 2026.

Relevant provisions of the Agreement

[10] The provisions of the Agreement relevant to this appeal are as follows. Clause 3.1 provides that the Agreement has a nominal expiry date of four years from the date the Agreement is approved by the Commission.

[11] Clause 2 provides:

> **2. Application**
>
> This Agreement covers and applies to:
>
> (a) Workforce Logistics Pty Ltd (ACN 661 845 727) (**Company**); and
>
> (b) its Employees that are engaged to perform any work involving or in association with maintenance, modification, repair, fabrication, commissioning, decommissioning, construction, deconstruction, metal, and engineering construction, on site building, civil construction, and any related or associated works when employed in the classifications in this Agreement anywhere within the Commonwealth of Australia (**Employees**).
>
> Collectively referred to as (the **Parties**).

[12] Clause 4 provides:

4. Relationship to Awards, Legislation and Other Instruments

4.1 This Agreement operates to the exclusion of any award and/or agreement.

4.2 Where any legislation, award, policy, procedure or other document is referred to in this Agreement it is not incorporated into and does not form part of this Agreement. In particular, reference to entitlements provided for in the Fair Work Act 2009 (FW Act) and/or National Employment Standards (**NES**) and other legislation are:

(a) For information only and do not incorporate those entitlements into this Agreement; and

(b) Not intended as a substitute for the detailed provisions of the FW Act, the NES and other legislation.

4.3 For the avoidance of doubt, this Agreement will be read and interpreted in conjunction with the FW Act and/or the NES. Where there is any inconsistency between this Agreement and the FW Act and/or the NES, and the FW Act and/or the NES provides a greater benefit, the FW Act and/or the NES provision will apply to the extent of the inconsistency.

[13] The effect of clauses 2 and 4 taken together is that the Agreement applies to any employee of Workforce Logistics working anywhere in Australia who is engaged to perform the work described in clause 2(b) and who falls within the classifications provided for in the Agreement, and that the Agreement wholly displaces the provisions of all awards and agreements including but not limited to the Building and Construction Award and the Manufacturing Award.

[14] Clauses 6.1 and 6.2, together with Schedule A, set out nine classification levels and their rates of pay. Schedule A sets out descriptions of the classifications as follows:

SCHEDULE A – Classification Description

Level	**Classifications**
Level 1	• Labourer • Trades Assistant (less than 12 months experience)
Level 2	• Lagger, • Scaffolder (Basic) • Trades Assistant (less than 12 months experience)

Level	Classifications
Level 3	• Brush hand • Concrete worker • Dogperson • Electrical Trades Assistant • Forklift Operator • Insulator (qualifications and experience recognised by the Company and with less than 4 years' experience) • Non-destructive testing technical assistant Operator (Other) • Operator (Basic) • Polywelder • Refractory Assistant • Rigger (Basic or Intermediate) • Scaffolder (Intermediate) • Steel Fixer • Storeperson • Trades Assistant (24 months or more relevant experience) • Yardperson
Level 4	• Cryogenic Insulator (with qualifications and experience recognised by the Company and with less than 4 years' experience) • Painter/ Blaster -- Non-Trade Level • Rigger (Advanced) • Scaffolder •
Level 5	• Boilermaker • Carpenter • Crane Operator 0 - 20T • Cryogenic Insulator (qualifications /experience recognised by the Company and with 4 • years' experience or more) • Mechanical Fitter • Painter/ Blaster Trade Level • Pipe Fitter • Refractory Tradesperson • Sheet Metal Worker • Tradesperson (Other) • Welder
Level 6	• Crane Operator 21 - 100T • Electrical Fitter/ Instrumental Fitter
Level 7	• Crane Operator 101 - 140T • Electrician Special Class • Tradesperson Special Class • Welder Special Class including exotics
Level 8	• Electronics Tradesperson Instrumentation Tradesperson • Crane Operator 141 to 220T
Level 9	• Tower Crane Operator • Crane Operator in excess of 220T and above

*Employees in the role of supervisor and above are not included in these classifications.

[15] The ordinary time hourly rates for adult (non-apprentice) employees for which the Agreement provides are set out in clause 6.1 and for apprentices at clause 7. The rates are higher than the rates for the equivalent classifications in the Building and Construction Award and the Manufacturing Award as they were at the time the application for approval of the Agreement was filed. Clause 6.4 of the Agreement makes provision for annual wage increases while it remains in operation.

[16] Clause 8 of the Agreement deals with allowances for leading hands, meals, higher duties and fares and travel. The last of these is dealt with in clause 8.4 as follows:

> **8.4 Fares and Travel Allowance**
>
> (a) Where an Employee agrees to the Employer's request to use the Employee[']s own vehicle in the course of their employment to transfer from one site to another site during working hours the Employee will be paid an allowance per kilometre travelled of $0.91.
>
> (b) Where an Employee transfers from one site to another site during working hours and uses public transport the reasonable cost of fares for public transport between sites will be paid.
>
> (c) Where an Employee is required to transfer between sites 'in the course of their employment', the time spent transferring will be paid at base rates of pay.

[17] Clause 39 sets out the arrangements for 'fly in, fly out' employees as follows:

> **39. Fly in Fly Out (FIFO) Employees**
>
> 39.1 An Employee engaged to work on a FIFO basis will be returned to and from an agreed point of hire for R&R in accordance with their agreed FIFO roster.
>
> 39.2 The Company will cover the cost of an Employee's flights and/or other transport as required, to and from the agreed point of hire to the Company's or its client's work site. If an Employee misses a booked flight the Company reserves the right to deduct the full cost of the airfare from the Employees' next pay and take disciplinary action if required.
>
> 39.3 The Employee will not be paid for any shifts missed as a result of them missing a booked flight.
>
> 39.4 The Company will give consideration to an Employee's reason for missing the flight before any decision is made to deduct monies or pursue appropriate disciplinary action.
>
> 39.5 Payment for travel time will be dependent on the terms of the Client for those works.

[18] The Agreement also includes provisions regarding leave, project work, probation, payment of wages, fitness for work, distant work and accommodation, site security, mode of employment, notice of termination, stand down, absence from work/abandonment, rostered days off, public holidays, superannuation, redundancy, meal and rest breaks, overtime, breaks following overtime, recall to work, shift work, roster arrangements and work cycles for 'fly in, fly out' employees, individual flexibility arrangements, requests for changes in working arrangements, consultation, dispute resolution and a 'no extra' claims clause.

Appeal grounds, evidence and submissions

Appeal grounds

[19] The AWU's notice of appeal, as filed, contained three appeal grounds by which it contends that the Deputy President erred in his decision to approve the Agreement:

> (1) The Deputy President erred in concluding that the Commission was satisfied the *Workforce Logistics Pty Ltd Enterprise Agreement 2022* (Agreement) was genuinely agreed to by the relevant employees, in accordance with ss 186(2)(a) and 188 of the *Fair Work Act 2009* (FW Act).
>
> (2) The sole employee bargaining representative during any purported bargaining for the Agreement was not free from the control or improper influence of the employer, as required under reg 2.06 of the *Fair Work Regulations 2009*. This goes directly to the question of whether the Agreement was genuinely agreed to.
>
> (3) The [Deputy President] erred in concluding that the Agreement passed the better off overall test, in accordance with ss 186(2)(d) and 193 of the FW Act. The *Hydrocarbons Industry (Upstream) Award 2020* was not included as a comparator.

[20] The AWU contended that it was in the public interest for the Commission to grant permission for the appeal for the following reasons:

> (1) If any of the errors alleged by the Appellant are established, then the Commission did not have jurisdiction to approve the Agreement.
>
> (2) The Appellant intends to establish that the Agreement is the result of a process contrived by Workforce Logistics Pty Ltd to avoid collective bargaining with the Appellant and the Maritime [Union of Australia] Division of the Construction, Forestry, Maritime, Mining and Energy Union (Offshore Alliance).
>
> (3) The matter raises important considerations around the integrity of the framework for good faith bargaining and the making of enterprise agreements.

[21] We shall refer to the appeal grounds as they are numbered above, noting that appeal ground 2 is effectively an argument in support of appeal ground 1, rather than a separate ground of appeal.

New evidence on appeal

[22] The AWU sought to advance its case in the appeal, including for an extension of time to appeal and permission to appeal, on the basis of evidence it adduced in the appeal. This evidence consisted of:

> (1) A witness statement made by Mr Doug Heath, an AWU Organiser, on 11 July 2023.[8] This statement annexed a number of documents. Mr Heath was not

required for cross-examination and his statement was tendered without objection.

(2) Documents produced to the Commission by Workforce Logistics, Mr Read and Mr Ruffino pursuant to orders to produce issued at the AWU's request. The documents produced included emails regarding the process for the making of the Agreement, contracts of employment, Workforce Logistics plans and procedures, pay slips, tax file declarations and Australian Taxation Office (ATO) and bank statements.

(3) Documents relating to Altrad APTS Pty Ltd (APTS), the current holding company of Workforce Logistics.

(4) Oral evidence given at the appeal hearing by Mr Read, Mr Ruffino, Mr Shane Kimpton and Mr Paul Hudston pursuant to orders to attend and give evidence.

AWU submissions

[23] The AWU's submissions address five issues:

(1) whether the AWU had standing to bring the appeal;
(2) whether an extension of time should be granted to file its appeal;
(3) whether permission to appeal should be granted;
(4) whether new evidence should be admitted on appeal; and
(5) whether the appeal should be upheld on the grounds stated in the notice of appeal.

[24] In relation to the issue of whether it had standing to bring the appeal, the AWU submitted that, given its rules permit the enrolment of employees of Workforce Logistics who could become covered by the Agreement, the AWU is 'a person who is aggrieved by [the] decision' for the purpose of s 604(1) of the FW Act. Workforce Logistics did not dispute that the AWU has standing to appeal.

[25] In relation to the issue of an extension of time, the AWU submitted that the primary reason for its delay in filing the appeal was that it was not a party to the Agreement or the proceedings for its approval. The AWU submitted that the Agreement did not come to its attention because Workforce Logistics was a new entity otherwise unknown to the AWU, and the Form F16 and F17 documents nominated 'Building, metal and civil construction' and 'Construction and Maintenance' respectively as the industries in which Workforce Logistics operated or conducted its primary activities.

[26] The AWU submitted that it did not become aware of the existence of the Agreement until 31 May 2023 when Mr Kumeroa, an AWU Organiser, was informed about it by an employee of Workforce Logistics who was at that time working on a Chevron offshore gas platform. Mr Kumeroa notified Mr Heath, who then raised the matter with Mr Zachary Duncalfe, AWU Senior National Legal Officer. Mr Duncalfe contacted the Commission to request information concerning the Agreement, which was provided on 2 June 2023. The AWU filed its Notice of Appeal on 19 June 2023, the 19th calendar day after the AWU became aware of the Agreement.

[27] In relation to permission to appeal, the AWU contended that permission should be granted because:

- the AWU would establish that the Commission erred in being satisfied that the Agreement was genuinely agreed;
- the decision manifests an injustice because the Agreement, which nominally expires on 26 October 2026, will extend to employees engaged by Workforce Logistics to work on Chevron facilities, in a different industry, and in circumstances where such employees would otherwise have become entitled to more beneficial, industry standard, terms and conditions;
- the Agreement raises significant matters of public interest, including the manner and circumstances in which Workforce Logistics achieved approval of the Agreement;
- the circumstances of the approval of the making and approval of the Agreement demonstrate that it is a contrivance and a sham intended to avoid collective bargaining;
- the matter also raises important issues of general application around the integrity of the framework for good faith bargaining and the making of enterprise agreements, which are central to the FW Act, as indicated in its objects at ss 3 and 171;
- determining whether an enterprise agreement has been genuinely agreed to remains a central focus of both the old and new framework of the FW Act, following recent amendments and, accordingly, the broader public interest considerations raised by this matter remain relevant;
- the Commission fell into error in concluding that the Agreement passed the BOOT; and
- any prejudice to Workforce Logistics is significantly outweighed by public interest considerations around the integrity of the framework for good faith bargaining and the making of enterprise agreements.

[28] In relation to its reliance on new evidence, the AWU submitted that it was not in a position to intervene at first instance because it was unaware of the proceedings, the application for approval was dealt with on the papers and the Commission had to rely on the minimal material filed by Workforce Logistics. The AWU's application to rely on new evidence was not opposed by Workforce Logistics in the appeal.

[29] In relation to the first and second appeal grounds, the AWU submitted that the Commission could not be satisfied that the Agreement had been genuinely agreed to by employees covered by it, as required by ss 186(2)(a) and 188 of the FW Act, in circumstances where the pre-approval steps required by s 180(5) of the FW Act had not been complied with,

the Agreement was voted on by a cohort of employees who were not performing work that was covered by the Agreement, and the employees would not in future be covered by it, once approved, due to the four-week terms of their contracts. It was submitted that the Agreement was intended to subsequently cover a much larger workforce, including in a different industry (the hydrocarbons industry), and that the Agreement was a contrivance or sham intended to avoid the requirements of the FW Act in relation to the making of enterprise agreements. The AWU also submitted that another basis for determining that the Agreement had not been genuinely agreed was that the nominated bargaining representative, Mr Ruffino, was not free from control by the employee's employer or another bargaining representative or free from improper influence from the employee's employer or another bargaining representative (as required by reg 2.06 of the *Fair Work Regulations 2009* (FW Regulations)).

[30] In relation to the third appeal ground, the AWU submitted that the Deputy President had erred in concluding that the Agreement passed the BOOT, in accordance with ss 186(2)(d) and 193, as the material before the Commission did not permit the Commission to be satisfied that Workforce Logistics employees would be better off overall. This was because Workforce Logistics nominated the 'Building, metal and civil construction' or 'Construction and Maintenance' industries as the ones in which it operates, and it did not identify that the *Hydrocarbons Industry (Upstream) Award 2020* (Hydrocarbons Award) was a required comparator for the purpose of applying the BOOT. It was also argued that the Commission cannot be satisfied that each prospective award covered employee would be better off overall under the Agreement, compared to the Hydrocarbons Award, given the lesser payments for employees under the Agreement when travelling from a point of assembly to a worksite. The AWU submitted that this was demonstrated by Mr Heath's analysis concerning travel offshore to a worksite in the oil and gas sector, and the entitlements this would attract under the Agreement as compared to the Hydrocarbons Award.

Workforce Logistics

[31] Workforce Logistics did not oppose the AWU's applications for an extension of time and to adduce fresh evidence in the appeal. It relied upon a witness statement made by Mr Neil Sadler, the Chief Executive Officer of Altrad Asia Pacific, on 7 August 2023 in response to the witness statement of Mr Heath. It described its position in the appeal as 'somewhat unusual' since it had been acquired by Altrad Australia Pty Ltd (Altrad) some two months after the Agreement was made, and those persons who made the Agreement were no longer employed by Workforce Logistics. It was contended that Altrad had no knowledge of, or involvement in, Workforce Logistics or its bargaining for the Agreement prior to the purchase, and that the new owners had no knowledge of the matters the subject of the first appeal ground.

[32] Workforce Logistics' initial position was that permission to appeal should be refused because the appeal is inutile. It contended that Altrad has decided to wind up Workforce Logistics and offer its current employees employment with another Altrad subsidiary entity, APTS. On 28 August 2023, Workforce Logistics lodged an application for orders under s 318 of the FW Act that the Agreement would not apply to employees whose employment transferred from Workforce Logistics to APTS. Because of these matters, it was submitted, the Agreement could not have any future application and the appeal therefore served no purpose.

[33] However, by the time of closing submissions, Workforce Logistics had altered its position. In relation to appeal ground 1, Workforce Logistics ultimately accepted that the evidence adduced in the appeal was such as to permit the Commission to conclude that the employees who voted to approve the Agreement did not genuinely agree to it and had no relevant stake in it since the vote occurred on their last day of employment. On that basis, Workforce Logistics accepted that permission to appeal on this ground should be granted, the appeal should be upheld, the decision to approve the Agreement should be quashed and the application to approve the Agreement should be dismissed.

[34] In relation to appeal ground 3, Workforce Logistics accepted that the Deputy President erred in not taking the Hydrocarbons Award into account when assessing whether the Agreement passed the BOOT. However, Workforce Logistics submitted that there was no utility in granting permission to appeal in circumstances where the AWU had not adduced any cogent evidence to show that the Agreement would have failed the BOOT had it been assessed against the Hydrocarbons Award. In particular, Workforce Logistics did not accept Mr Heath's analysis concerning travel time entitlements under the Agreement as compared to the Hydrocarbons Award, submitting that this analysis exaggerated both the time that would be involved in traveling to a Chevron offshore gas platform and the consequent entitlement to payment which would arise under the Hydrocarbons Award.

Consideration

The statutory framework and the approach to the appeal generally

[35] It is not in dispute that the provisions of the FW Act concerning the approval of enterprise agreements as they were prior to 6 June 2023 were applicable at the time of the decision under appeal and remain applicable to the determination of this appeal. The relevant provisions of s 186 are as follows:

> **186 When the FWC must approve an enterprise agreement – general requirements**
>
> *Basic rule*
>
> (1) If an application for the approval of an enterprise agreement is made under subsection 182(4) or section 185, the FWC must approve the agreement under this section if the requirements set out in this section and section 187 are met.
>
> Note: The FWC may approve an enterprise agreement under this section with undertakings (see section 190).
>
> *Requirements relating to the safety net etc.*
>
> (2) The FWC must be satisfied that:
>
> (a) if the agreement is not a greenfields agreement--the agreement has been genuinely agreed to by the employees covered by the agreement; and
>
> . . .
>
> (d) the agreement passes the better off overall test.
>
> . . .

[36] In relation to the requirement in s 186(2)(a) for genuine agreement, s 188 of the FW Act as it was before 6 June 2023 provided:

> **188 When employees have genuinely agreed to an enterprise agreement**
>
> (1) An enterprise agreement has been ***genuinely agreed*** to by the employees covered by the agreement if the FWC is satisfied that:
>
> (a) the employer, or each of the employers, covered by the agreement complied with the following provisions in relation to the agreement:
>
> (i) subsections 180(2), (3) and (5) (which deal with pre-approval steps);
>
> (ii) subsection 181(2) (which requires that employees not be requested to approve an enterprise agreement until 21 days after the last notice of employee representational rights is given); and
>
> (b) the agreement was made in accordance with whichever of subsection 182(1) or (2) applies (those subsections deal with the making of different kinds of enterprise agreements by employee vote); and
>
> (c) there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees.
>
> (2) An enterprise agreement has also been ***genuinely agreed*** to by the employees covered by the agreement if the FWC is satisfied that:
>
> (a) the agreement would have been ***genuinely agreed*** to within the meaning of subsection (1) but for minor procedural or technical errors made in relation to the requirements mentioned in paragraph (1)(a) or (b), or the requirements of sections 173 and 174 relating to a notice of employee representational rights; and
>
> (b) the employees covered by the agreement were not likely to have been disadvantaged by the errors, in relation to the requirements mentioned in paragraph (1)(a) or (b) or the requirements of sections 173 and 174.

[37] In respect of the requirement in s 186(2)(b) for the agreement to pass the BOOT, s 193 as it was before 6 June 2023 relevantly provided:

> **193 Passing the better off overall test**
>
> *When a non-greenfields agreement passes the better off overall test*
>
> (1) An enterprise agreement that is not a greenfields agreement ***passes the better off overall test*** under this section if the FWC is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.

FWC must disregard individual flexibility arrangement

(2) If, under the flexibility term in the relevant modern award, an individual flexibility arrangement has been agreed to by an award covered employee and his or her employer, the FWC must disregard the individual flexibility arrangement for the purposes of determining whether the agreement passes the better off overall test.

…

Award covered employee

(4) An ***award covered employee*** for an enterprise agreement is an employee who:

(a) is covered by the agreement; and

(b) at the test time, is covered by a modern award (the ***relevant modern award***) that:

(i) is in operation; and

(ii) covers the employee in relation to the work that he or she is to perform under the agreement; and

(iii) covers his or her employer.

Prospective award covered employee

(5) A ***prospective award covered employee*** for an enterprise agreement is a person who, if he or she were an employee at the test time of an employer covered by the agreement:

(a) would be covered by the agreement; and

(b) would be covered by a modern award (the ***relevant modern award***) that:

(i) is in operation; and

(ii) would cover the person in relation to the work that he or she would perform under the agreement; and

(iii) covers the employer.

Test time

(6) The ***test time*** is the time the application for approval of the agreement by the FWC was made under subsection 182(4) or section 185.

FWC may assume employee better off overall in certain circumstances

(7) For the purposes of determining whether an enterprise agreement passes the better off overall test, if a class of employees to which a particular employee belongs would be better off if the agreement applied to that class than if the relevant modern award applied to that class, the FWC is entitled to assume, in the absence of evidence to the contrary, that the employee would be better off overall if the agreement applied to the employee.

[38] Whether the above approval requirements are met depends upon the *satisfaction* of the member of the Commission who hears and determines the application for approval of the relevant agreement. On appeal therefore, it is not sufficient that a Full Bench would form a different view as to the relevant approval requirement for an appeal to succeed. Rather, because the requirement for the member's satisfaction as to the approval criteria indicates that the statute allows a degree of latitude as to the choice of the decision to be made, the *House v The King* standard of appellate review applies on appeal.[9] This means in this case that the AWU must demonstrate, in order for its appeal to succeed, that the Deputy President acted upon a wrong principle, mistook the facts, took into account an irrelevant consideration or failed to take into account a material consideration, or made a decision which is plainly unreasonable or unjust.

[39] However, because a Full Bench of the Commission has a discretionary power to admit further evidence in dealing with a decision under appeal pursuant to s 607(2) of the Act, the appeal may be characterised as one which proceeds by way of rehearing. As explained by the High Court in *ALDI Foods Pty Ltd v Shop, Distributive & Allied Employees*,[10] the Full Bench is not constrained to consider only the evidence that was before the member at first instance and may find appealable error on the basis of new evidence admitted in the appeal:

> [99] Whether the Full Bench was satisfied that an employee was better off overall under the Agreement than under the award required an evaluative assessment after consideration of the provisions of the award and the Agreement that may have been more beneficial to employees and those that may have been less beneficial. This assessment is a matter of the kind which has been described in other contexts as:
>
> > "a question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds."
>
> [100] The appeal to the Full Bench for which the Act provides is an appeal by way of rehearing. Section 607(2) allows the Full Bench to admit further evidence on an appeal to it in order to determine the matter upon that rehearing. Using that further evidence, the Full Bench may find that the decision the subject of appeal was an incorrect decision even though, on the evidence before the Commission, its decision was not demonstrably erroneous. The Full Bench was wrong to approach its task as if it were enough to conclude that Bull DP had "properly considered the BOOT and reached a decision based on a sound analysis".

Evidence and issues of credibility

[40] Because, as explained earlier, the AWU's appeal relies upon the new evidence adduced in the appeal, it is necessary to assess that evidence and make findings of fact in order to determine the appeal (including to determine whether the requisite extension of time to appeal and permission to appeal should be granted). This requires an analysis of the documentary evidence and the oral evidence given by Mr Read, Mr Ruffino, Mr Paul Hudston and Mr Kimpton.

[41] Much in this matter turns on the credibility of the witnesses. It is necessary to state that we do not consider that Mr Read, Mr Ruffino or Mr Paul Hudston were credible witnesses, and we do not accept much of the evidence they gave.

[42] In relation to Mr Read, there were numerous inconsistencies, contradictions, omissions, improbabilities and evasions in his evidence. In examination by counsel for the AWU, and in response to questions from us, Mr Read was frequently vague, evasive, non-responsive and obfuscatory in his answers. His evidence was frequently contradicted by the evidence of Mr Ruffino and Mr Paul Hudston. For example:

(1) When questioned about what work Mr Ruffino did as an alleged employee of Workplace Logistics, Mr Read vaguely described Mr Ruffino's duties as including 'building teams'[11] and being a 'potential supervisor'.[12] When asked to explain what 'building teams' meant, Mr Read described it as 'more than just a recruitment process', and said that it involved combining the practical experience of an onsite employee with the interests of the business in the context of labour hire.[13] Mr Read at no time suggested that Mr Ruffino was engaged in any form of manual trades labour. However, when Mr Ruffino was asked about his duties for Workforce Logistics, he stated that he had done basic mechanical fitting work, working on chutes, that this was the only work that he did for Workforce Logistics and that this took the whole four weeks of his employment working 38 hours per week.[14] We will return to the evidence of Mr Ruffino in this respect shortly, but it plainly contradicted directly the evidence of Mr Read.

(2) Mr Read gave evidence that his brother, Mr Mark Read — another alleged employee of Workforce Logistics — had been performing paper-based work, recruitment work and also electrical work on equipment belonging to another business, Diablo Industrial Services Pty Ltd (Diablo), at the Aitken Way premises.[15] Mr Read gave evidence that Mr Mark Read had also been 'tapping into [Mr Mark Read's] network on some other electrical resources that we would take with us as an electrical project team should the opportunity be successful.'[16] Mr Read confirmed that the equipment that Mr Mark Read used to perform the work at the Aitken Way premises, being saws and compressors, was owned by Diablo.[17] This work was apparently without charge to Diablo,[18] and it was not explained by Mr Read how this work was connected with Workforce Logistics' alleged business. However, Mr Ruffino's evidence was simply that he did not work with Mark Read at the Aitken Way premises.[19] As we explain later, Mr Ruffino has at all relevant times been the managing director of Diablo. Mr Read's evidence cannot be reconciled with that of Mr Ruffino.

(3) Mr Read gave evidence that he had met with Mr Paul Hudston prior to establishing Workforce Logistics to discuss the arrangements for setting up the business and the availability of both Mr Paul Hudston and other staff members.[20] Mr Hudston denied any such meeting or discussion between himself and Mr Read.[21]

(4) Mr Read gave evidence that many of the employees did policy-writing work, and/or recruiting work and/or advising on safety procedures,[22] for the duration of their four-week employment.[23] Other than one 'Workforce Logistics Management Plan' and one 'Workers Compensation, Rehabilitation, and Return to Work Procedure' produced by Mr Read under an order for production,[24] no documents of the type the employees were allegedly working on were produced to the

Commission pursuant to the orders for production or tendered into evidence by the Workforce Logistics.[25] Mr Read confirmed that none of the six employees who voted on the Agreement worked on either of the only two relevant documents produced to the Commission.[26] Mr Paul Hudston also confirmed that he did not work on documents of the kind produced by Mr Read.[27] Accordingly, no document exists which supports Mr Read's evidence concerning the nature of the work said to have been performed by the employees.

(5) Mr Read said that his long-term acquaintance, Mr Mark Hudston (the brother of Paul Hudston) had explained the terms and effect of the Agreement to three of the six employees, including Mr Paul Hudston, who had not attended the Aitken Way premises for work purposes.[28] However, Mr Paul Hudston gave evidence that he had never attended any meetings to discuss the Agreement and had not met with Mr Mark Hudston to discuss the Agreement terms.[29] Indeed, Mr Paul Hudston's evidence was that he was working for Monadelphous, a different labour hire business, during the period when the alleged explanatory meeting(s) were held (15, 19 and 21 September 2022) and was working 70-80 hours a week for that Company at the relevant time.[30] Mr Read's evidence in this respect also contradicted what he said in his Form F17 declaration, in which he averred that he had personally explained the Agreement by reference to the relevant awards on 15 September 2022 and further, personally answered employees' questions about the Agreement on 19 and 21 September 2022. He made no mention of having allegedly subcontracted these tasks to Mr Mark Hudston.

(6) In his Form F17 declaration, Mr Read also stated that each employee who was to be covered by the Agreement and who was employed at the notification time was physically handed a copy of the NERR on 31 August 2022. He confirmed this in his oral evidence.[31] However, during the hearing of the appeal, Mr Read admitted that he never met one of the six employees, Mr Alex Hudston,[32] he only met Mr Biddle once offsite[33] and that Mr Biddle probably never came to the Aiken Way premises.[34] He then claimed in his oral evidence that Mark Hudston had assisted in physically handing the NERR to some of the employees, and gave the following evidence:[35]

> At page 48 of the bundle - this is still in your declaration - it says that each employee was physically handed a copy of a notice of employee representational rights; do you see that?---Yes, correct.
>
> Who did that?---Yes. So I had handed out those to the employees that were in the office that day, and Mark and I handed out the other ones, and then I - yes. So they were - I had confirmation, they were all handed out on that 31st and then - - -
>
> Did Mark go to their homes, did he?---I'm not sure whether he went to the – yes, well, whether he was at their homes or caught up with them somewhere in between. I know Paul had been out to the premises but I hadn't caught him that day. So, yes, I had confirmation back from him that they had been handed out, your Honour. I'd also emailed out post that, later on that evening, sent an electronic copy just to ensure that they had that on file as well.

[43] In none of the above examples can the evidence of Mr Read be accepted.

[44] Mr Read also gave evidence that was inherently improbable. Most significantly, Mr Read said that, upon establishing Workforce Logistics, he was conscious that the business needed to have sufficient resources to accept work quickly,[36] and that he was actively tendering for work including at BHP sites.[37] However:

- there was no documentary evidence that Workforce Logistics tendered for any work prior to the making and approval of the Agreement;
- all the employees who voted on the Agreement were, as we explain later, employed on short fixed-term contracts, and their employment ended upon the Agreement being made;[38]
- Mr Read admitted that he never registered Workforce Logistics for GST;[39]
- Mr Read admitted he did not check whether any of the six employees he engaged held White Cards[40] (a minimum safety qualification required for work in the construction industry in Western Australia); and,
- Mr Read admitted that, although he was familiar with the scheme, he did not register Workforce Logistics for MyLeave,[41] a mandatory Western Australian portable long leave scheme for the construction industry.

[45] These matters establish to our satisfaction that Mr Read never intended for Workforce Logistics, while under his control, to actually engage in its ostensible business of hiring labour to employers in the construction and mining industries. His evidence that he was genuinely trying to establish a new business venture cannot be accepted.

[46] At the appeal hearing, we granted leave for Mr Read to be legally represented and to make submissions concerning the credibility of his evidence. It was submitted on Mr Read's behalf that Mr Read was not a legal practitioner, did not hold himself out as having any experience in human resources or industrial relations, and did not have a sophisticated understanding of the FW Act and how to make an enterprise agreement. Mr Read's submissions reviewed the evidence in detail and contended that 'some of' the asserted inconsistencies were overstated and that '[f]or the most part, Mr Read's evidence was consistent with Mr Ruffino and Paul Hudston'. It was conceded that Mr Read's Form F17 contained answers that were 'not strictly accurate', but this was explicable having regard to his relative inexperience, inadvertence or lack of attention to detail.

[47] We do not accept these submissions. Even if the premise of the submissions concerning Mr Read's lack of relevant experience or knowledge is accepted (which is doubtful having regard to matters adverted to later in this decision), they do not adequately answer the matters we have identified above. For these reasons given, we do not accept any evidence given by Mr Read or any representation made by him in a document as truthful and accurate unless otherwise corroborated by reliable evidence.

[48] There were also numerous inconsistencies, contradictions and improbabilities in the evidence given by Mr Ruffino. Mr Ruffino also frequently appeared to be evasive when answering questions. It is sufficient to refer to one example of the unsatisfactory nature of his evidence. As earlier stated, Mr Ruffino gave evidence that the work he performed for Workforce Logistics whilst ostensibly employed by that company consisted entirely of him performing mechanical fitting work on chutes at the Aitken Way premises. He said that this took him 38 hours per week for the entire duration of his four-week period of employment with Workforce Logistics.[42] However, during the same period, Mr Ruffino was still employed as the Managing Director of Diablo[43] — a role which he said took 'all of his time'[44] — and the other evidence (not challenged by Workforce Logistics) suggested that he had not worked as a mechanical fitter since 1993.[45] When questioned about this work, Mr Ruffino gave the following evidence:[46]

> So where did you do that work?---At Kewdale, sir.
>
> And what equipment did you use?---Equipment that was there that was provided by our - well, provided by West Coast Site Services.
>
> How is that connected to Workforce Logistics?---They were also working out of the units.
>
> Yes, but you said you did mechanical fitting work, I thought, for Workforce Logistics. So how is this work for Workforce Logistics? I don't understand?---That was the work that we were doing.
>
> Did Mr Read tell you to do that work?---Yes.
>
> But how did that relate to the business of Workforce Logistics?---I suppose because of the trade qualifications of the - and that work. We were just working on it. Yes.
>
> Sorry. With the greatest respect, Mr Ruffino, this doesn't make any sense to me. What connection did working on that equipment have to do with Workforce Logistics? Workforce Logistics was going to be a labour hire company and had just started up. How did this equipment come into the equation?---The work was already there. So we were allowing West Coast Site Services to use the space in the back of our workshop. That equipment was there, and that was the equipment that we worked on.
>
> I understand you worked on it, and you did it for another entity, but what was the connection to Workforce Logistics? It wasn't the equipment, was it?---No. It was work that they were doing for their customers.
>
> Which customers?---Well, you mean West Coast Site Services customers?
>
> No. What is the connection between this work and Workforce Logistics?---Sir, I don't really know the answer to that question.
>
> You don't know the answer to that question. You were asked if you'd performed any work for Workforce Logistics while you were employed by Workforce Logistics. You remember that question?---Yes.
>
> How is this work work for Workforce Logistics as distinct from somebody else?---That was the work that was assigned.

> That was the work that was what?---Assigned.
>
> By Mr Read?---Yes.
>
> So was the company that owned this equipment his client?---Yes, I suppose it was.
>
> How did that come about?---Mr Read and I are shareholders in West Coast Site Services which is how they came to be in the back of Kewdale.
>
> So that was [the] work you were doing as a shareholder of West Coast Site Services?---I suppose, yes.
>
> It wasn't work for Workforce Logistics, was it?---Well, I was working for Workforce Logistics.
>
> West Coast Site Services was not a client of Workforce Logistics, was it?---At that time, I don't know what that arrangement was.

[49] Mr Ruffino also agreed that he travelled to Melbourne during September and that he would 'imagine' that he sought permission from Mr Read for that travel.[47]

[50] There were likewise contradictions and improbabilities in the evidence given by Mr Paul Hudston. He gave evidence that during his employment with Workforce Logistics he was exclusively working on writing safe work method statements for cranes, forklifts, rigging and scaffolding operations.[48] Mr Hudston gave evidence that he did not work on the Workforce Logistics Management Plan or the Workers Compensation, Rehabilitation, and Return to Work Procedure[49] that were produced to the Commission by Mr Read pursuant to the order for production.[50] No documents of the nature described by Mr Hudston were produced by Workforce Logistics in response to the orders for production, or entered into evidence by Workforce Logistics, to demonstrate that this work had actually been performed. Moreover, Mr Hudston's own evidence rendered this an improbable proposition. He said that, whilst still ostensibly employed by Workforce Logistics, he went back to work for Monadelphous — his pre-existing employer — on 10 or 12 September 2023,[51] working 70-80 hours per week.[52] His evidence that, notwithstanding this, he continued to work on safe work method statements for Workforce Logistics at night for 38 hours per week[53] is not credible.

Findings of fact

[51] Having considered the evidence before us, and noting our findings above at paragraphs [40] to [49] with respect to witness credibility, we make the following findings of fact in respect of the appeal.

[52] As outlined earlier in this decision, Workforce Logistics was registered on 19 August 2022 with a registered address of Unit 2, 1 Aitken Way, Kewdale, Western Australia.[54] Mr Blake Read was the Director, Secretary and sole shareholder of Workforce Logistics between 19 August 2022 and 20 December 2022.[55] Mr Read describes himself on his own LinkedIn profile as '[p]roviding Commercial, Finance and General management support across industrial, NFP's and Govt' [sic].[56] Mr Read has been a Certified Practising Accountant since 2002.

[53] At the time that Workforce Logistics was established, the Diablo business also operated at the Aitken Way premises. Diablo was registered as a company on 16 March 2016. Mr Ruffino has at all relevant times been the managing director and sole shareholder of Diablo. Diablo's business appears to have been the provision of traffic fencing,[57] although Mr Ruffino's LinkedIn profile gives a totally different description of the business including 'providing outsourced solutions for organisations looking to manage, improve, isolate or outsource critical business functions and processes where performance is foreseeably or historically problematic.'[58] On Mr Read's LinkedIn profile, he describes one of his positions as being Commercial Manager of Diablo from April 2019 to the present. However, he said in his oral evidence that he was not actually employed by Diablo but rather engaged to perform consulting work.[59] Mr Read and Mr Ruffino had previously known each other for many years, and had both been employed by the Skilled Group, a well-known labour hire business, some years earlier.

[54] At the time that Workforce Logistics was established, West Coast Site Services Pty Ltd (West Coast Site Services) was also operating at the Aitken Way premises. West Coast Site Services was registered as a company on 3 December 2021. Until 28 September 2022, the company was named '4D Construction Services Pty Ltd'. Mr Read was a director of West Coast Site Services alongside Mr Daniel Walters from its registration until 28 February 2022, after which time Mr Walters continued as the sole director. Mr Read was also secretary of the company from its registration until 16 February 2022, when he was replaced as secretary by Mr Walters. West Coast Site Services is owned by Blakjewel Pty Ltd (the trustee of Mr Read's family trust), Mr Walters and Mr Ruffino.

[55] On and from 25 August 2022, a week after its registration, Workforce Logistics ostensibly started entering into written contracts of employment with six employees: Mr Ruffino, Mr Walters, Paul Hudston, Alex Hudston, Mark Read, and Stephen Biddle. Paul Hudston is the brother and Alex Hudston is the nephew of Mark Hudston.[60] Mark Hudston is a person well known to the Commission: he works for Mapien (formerly known as Strategic Human Resources), an organisation providing industrial relations and human resource management consultancy and advocacy services to employers, and frequently acts as a representative for employers seeking approval of enterprise agreements in Western Australia. There was no credible recruitment process for these employees: we infer that they were simply people known to Mr Read or names provided to him by other persons as available and willing to engage in the process which followed. It is therefore no coincidence that one employee was Mr Read's brother, two employees were his existing business partners and two were relatives of Mark Hudston.

[56] The ostensible work roles of each employee under their contracts were as follows:

- Mr Ruffino – Mechanical fitter;[61]
- Mr Walters – Mechanical fitter;[62]
- Mr Paul Hudston – Rigger, scaffolder and crane operator;[63]
- Mr Alex Hudston – Rigger, scaffolder and crane operator;[64]
- Mr Mark Read – Electrician;[65]
- Mr Biddle – Scaffolder and painter.[66]

[57] Each contract, except for that of Paul Hudston, was for a 'Maximum Term of 4 weeks['] Assignment (unless terminated earlier or extended by Client)'. Paul Hudston's contract was for a 'Maximum Term of 6 weeks['] Assignment (unless terminated earlier or extended by Client).' Each contract specified a completion date aligning with the specified maximum terms. The date for commencement of employment in each contract was 29 August 2022. All of the contracts were for full-time employment of 38 hours per week, and the rate of payment was $45.00 per hour. Each contract specified the Building and Construction Award as the applicable industrial instrument.

[58] On 31 August 2022, two days after the ostensible commencement of employment, Mr Read advised the six employees of Workforce Logistics, via email, that Workforce Logistics had decided to commence bargaining for an enterprise agreement. His email did not attach the NERR.[67] Mr Ruffino sent the following reply by email (with his address being 'vince.ruffino@diabloindustrial.com.au') from his iPhone the same day:[68]

> There's no attachment? This is a mature hour [sic]. I nominate myself as the representative, and on behalf of the workers I request an immediate 20% pay rise, or we're going out on the grass.

[59] On 1 September 2022, the NERR was sent via email to all employees.[69]

[60] All employees of Workforce Logistics ostensibly nominated Mr Ruffino as their bargaining representative. Mr Walters formally nominated Mr Ruffino on 31 August 2022;[70] Mr Ruffino formally nominated himself on 30 August 2022;[71] Mr Mark Read nominated Mr Ruffino on 31 August 2022.[72] These nominations appear to be before the NERR was distributed on 1 September 2022 and in some cases before the email notifying employees that Workforce Logistics had decided to commence bargaining was sent on 31 August 2022. All other employees nominated Mr Ruffino after 1 September 2022.[73] A number of the employees had never met Mr Ruffino before they ostensibly nominated him as their bargaining representative and Mr Ruffino gave evidence asserting that he was not aware that he was nominated by some of those persons.[74]

[61] On 14 September 2022, the proposed Agreement was distributed to the six employees by email.[75] There was no bargaining with the employees about the terms of the Agreement before or after this time. On 15 September 2022, a notice of the vote on the Agreement was distributed via email to employees.[76] Mr Read's Form F17 declaration asserted, as earlier stated, that there were meetings with employees on 15, 19 and 21 September 2022 to explain the terms of the Agreement. However, Mr Read's evidence at the hearing made it clear that at least half the employees did not attend these alleged meetings, and Mr Read's assertion that Mark Hudston personally explained the Agreement to the non-attending employees was refuted by Paul Hudston's evidence. We find that at least half the workforce never had the Agreement explained to them, and we doubt that the alleged meetings on 15, 19 and 21 September 2022 actually occurred.

[62] On 23 September 2022, all six employees of Workforce Logistics voted to approve the Agreement, and thus the Agreement was nominally 'made' on that date. Employees voted by sending a text message to Mr Read, a method that self-evidently disclosed the identity of the voter and the nature of their vote to Mr Read.[77]

[63] The six employees were only paid for a four-week period ending on 25 September 2022, and their employment did not continue after that time (notwithstanding that Paul Hudston had a six-week contract of employment). We conclude that their employment ended not later than 25 September 2022 and, if their employment was on a Monday-Friday basis, it ended on Friday 23 September 2022 — the day of the vote. Each of the employees was paid the same total amount over the four-week period, in two fortnightly payments.

[64] None of the six employees performed the trades work they were nominally contracted to perform over the four-week period of their employment. Workforce Logistics had no such work to be performed because it had no clients. We do not accept the evidence of Mr Read, Mr Ruffino or Mr Paul Hudston concerning the work that was claimed to have been performed by the employees for Workforce Logistics over this period.

[65] On 4 October 2022, Mr Read and Mr Ruffino signed the Agreement.[78] Mr Ruffino signed the Agreement as the Employee Representative. Mr Ruffino was not an employee of Workforce Logistics at this time.[79] On 5 October 2022, Workforce Logistics applied for approval of the Agreement with the support of a Form F17 declaration made by Mr Read.[80] On 26 October 2022, the Agreement was approved by the Commission with undertakings.[81] In an email dated 26 October 2022, Mr Read informed the Commission that Mr Ruffino, as the employee bargaining representative, had been consulted about the undertakings, but Mr Read did not tell the Commission that Mr Ruffino was no longer employed by Workforce Logistics.

[66] The evidence makes it clear that Mark Hudston had a major role in the process by which the six employees were engaged and the Agreement was made. Mr Read has known Mark Hudston for a period of about 10 years[82] and described him as a 'trusted friend and adviser'.[83] Mr Read gave evidence that Mr Hudston was involved in the recruitment of at least some of the employees, provided advice concerning the drafting of the Agreement,[84] and allegedly helped to provide the employees with the NERR and explain the terms of the Agreement. Mr Read explained Mr Hudston's involvement in the process as follows:[85]

> What was Mark Hudston's connection with Workforce Logistics?---No, he - Mark was really just a bit of a helping hand to me. It was a busy time, so he had helped out where he could. I had lots going on in setting up this business, out to clients et cetera, and he had offered to help out. I had instructed him and took up that offer that he would communicate the two EAs and the workforce logistics EA, and had confirmation back that those conversations had been held, and I trusted Mark, obviously, him knowing the process and especially, I guess, with the two awards, what was in them. He had had exposure to the EA, the Workforce Logistics EA. So no, I was comfortable in that process, that he would have those conversations on my behalf.
>
> VICE PRESIDENT ASBURY: Well, can you just remind me, Mr Read, what qualifications that Mr Hudston had to explain awards and enterprise agreements?---Mark had been a consultant in that area for a long time. He had proved to me, when I was at Skilled. He had assisted us in certain matters, that he was a wealth of knowledge in that area and I could rest on him for that assistance. He understood that there was a lot going in this business for me to be prepared for these projects, and had offered to relay those communications to those who weren't in the Aitken Way premises.
>
> JUSTICE HATCHER: Now just remind me, why was he helping you?---Yes, look, I guess we have a relationship that went back a while. He saw what happened in the equipper business and

> had offered that. I had asked him to run his eye over the agreement. He - you'd have to ask him that, but, like, he was helping me get this thing off the ground and, well, offered his assistance with what I needed. I mean, I didn't engage him on a formal, paid capacity. Yes, he was giving me a helping hand to - in the hope, I guess, that I could make - yes, I could make this business work. He was understanding of how the (indistinct) business, had the seeds on that business many, many years before, and had offered assistance.

[67] The above explanation lacks plausibility, having regard to Mr Read's general lack of credibility as a witness, and we doubt that Mr Read has fully disclosed the nature and purpose of Mark Hudston's role in the process. However, the evidence is not such as to permit this issue to be further explored in the present proceedings.

[68] On 20 December 2022, Blake Read resigned as Director and Secretary of Workforce Logistics.[86] Mr Shane Kimpton, Chief Executive Officer of AusGroup Companies Ltd (AGC), a major labour hire business, became the Director and Secretary of Workforce Logistics after AGC bought all the shares in Workforce Logistics from Mr Blake Read. The bank records for Workforce Logistics show that AGC made a payment of $20,000 into its account on 19 December 2022.[87] This was said to be the price for AGC's purchase of Mr Read's shares in Workforce Logistics. If so, it is not clear why the sum was put in Workforce Logistics' account. In any event, since Workforce Logistics had no business, property or commercial assets, employees or goodwill, it is clear that the only value it had was in its approved enterprise agreement and that AGC paid the purchase price for the Agreement. AGC's purpose in buying Workforce Logistics was to set up a new labour hire business and employ employees under the terms of the Agreement.[88] It is also relevant, as subsequent events confirm, that AGC held a long-term contract to provide maintenance services to Chevron's onshore and offshore natural gas and oil production facilities in the north-west of Australia.[89]

[69] On 23 December 2022, Neil Sadler (Altrad Asia Pacific CEO) and John Werndly (Altrad Services APAC Director) became directors of Workforce Logistics after Altrad purchased AGC.[90]

[70] On 1 January 2023, Workforce Logistics became registered for GST[91] and, on 5 April 2023, it also became registered for MyLeave.[92]

[71] Workforce Logistics did not again employ any employees until April 2023.[93] At that time, AGC hired employees under the Agreement to perform Chevron maintenance work[94] and, in or around April 2023, Workforce Logistics mobilised employees to work on Chevron oil and gas facilities.[95] It has employed about 27 employees for that purpose.[96]

Extension of time and permission to appeal

[72] The principles concerning whether an extension of time to lodge an appeal should be granted pursuant to r 56(2)(c) of the FWC Rules which are usually applied are those stated in *Jobs Australia v Eland*.[97] The principal considerations are whether there is a satisfactory reason for the delay in filing the appeal, the length of the delay, the nature of the grounds of appeal and their prospects of success, and any prejudice to the respondent if time were extended. The question to be answered by reference to these considerations is whether, in all the circumstances, the interests of justice favour an extension of the time within which to lodge the appeal.[98]

[73] We consider that the AWU clearly has a satisfactory explanation for its delay in filing the appeal up until 31 May 2022, when it first became aware of the existence of the Agreement. The AWU filed its appeal 19 calendar days later, following receipt of relevant documentation from the Commission and further enquiries being made. We consider, in the circumstances described in the witness statement of Mr Heath,[99] that the AWU acted as quickly as reasonably practicable in initiating its appeal upon becoming aware of the Agreement. Overall, we therefore consider that there was a satisfactory reason for the delay. Workplace Logistics does not contend that the delay has prejudiced its capacity to respond to the appeal.

[74] The interests of justice militate in favour of the grant of an extension of time. Appeal grounds 1 and 2 raise the issue of whether the Agreement was genuinely agreed to by employees who voted to approve it, as required by s 186(2)(a) of the FW Act. This is not a question of mere technical non-compliance, since the AWU's case is that the Agreement was entirely unauthentic and lacking in moral authority and, effectively, a sham. As we discuss further below, the evidence in the appeal provides substantial support for these grounds. There are clearly, in the circumstances, significant public interest considerations at stake. Accordingly, we allow the AWU an extension of time until 19 June 2023 to lodge its appeal.

[75] For the same reasons, we consider that it would be in the public interest to grant permission to appeal. In that circumstance, s 604(2) of the FW Act requires that we grant permission.

Appeal grounds 1 and 2

[76] It is convenient to deal with these appeal grounds together, since they both address the question of whether the Agreement was genuinely agreed within the meaning of s 188 of the FW Act. For the reasons which follow, we do not consider that, having regard to the evidence adduced in the appeal, it was reasonably available for the Commission to be satisfied that the any of the elements of genuine agreement in s 188(1)(a)(i), (b) or (c) were satisfied.

Section 188(1)(a)(i)

[77] Section 188(1)(a)(i) relevantly requires the Commission to be satisfied that the employer complied with the pre-approval step in s 180(5). Section 180(5), as applicable to the application for the approval of the Agreement and this appeal, provides:

> *Terms of the agreement must be explained to employees etc.*
>
> (5) The employer must take all reasonable steps to ensure that:
>
> (a) the terms of the agreement, and the effect of those terms, are explained to the employees employed at the time who will be covered by the agreement; and
>
> (b) the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of those employees.

[78] As we have earlier found, the evidence of Mr Read and Mr Paul Hudston establishes that, in respect of at least half the workforce, no step at all was taken to explain the terms of the

Agreement and their effect. Further, we cannot be satisfied on the evidence that any of the alleged meetings to explain the Agreement on 15, 19 and 21 September 2022 actually occurred or that the Agreement was ever explained to anybody. Accordingly, it could not be concluded that Workforce Logistics took all reasonable steps to explain the terms of the Agreement and their effect.

Section 188(1)(b)

[79] Section 188(1)(b) requires the Commission to be satisfied that, in the case of a single-enterprise non-greenfields agreement, the agreement was made in accordance with s 182(1). Section 182(1) provides:

> **182 When an enterprise agreement is made**
>
> *Single-enterprise agreement that is not a greenfields agreement*
>
> (1) If the employees of the employer, or each employer, that will be covered by a proposed single-enterprise agreement that is not a greenfields agreement have been asked to approve the agreement under subsection 181(1), the agreement is made when a majority of those employees who cast a valid vote approve the agreement.

[80] Section 181(1), referred to in the above provision, provides that an employer that will be covered by a proposed agreement may request the employees employed at the time who will be covered by the agreement to approve the agreement by voting for it. It is an essential element of both provisions that the employees who are asked to, and do, vote to approve the proposed agreement are persons that will be covered by it. Section 53(1) of the FW Act relevantly provides that an enterprise agreement covers an employee if the agreement is expressed to cover (however described) the employee.

[81] The evidence before us makes it clear that the six employees who voted to approve the Agreement were, first, not covered by it at the time they voted and, second, never going to be covered by it once the Agreement had been made. As to the first proposition, the six employees never engaged in any work of the type covered by the Agreement. We have earlier set out the coverage provision. In order to be covered by the Agreement, an employee must be 'engaged to perform any work involving or in association with' the various industries and business functions specified in clause 2(b) and must be employed in a classification under the Agreement. As we have found, the employees did not perform work falling within any of the classifications in Schedule A to the Agreement for Workforce Logistics during the four-week period of their employment. We do not accept the evidence of Mr Read and Mr Paul Hudston that the employees prepared safe work method statements and other business documents, or that they performed other vaguely described work to assist in setting up the business. In any event, even if they had done some such work, it was not work falling within the classifications in Schedule A. Nor could it be said to be work 'in association with' the industries or business functions specified in clause 2(a), because Workforce Logistics did not at that time perform any work in any of those industries or any of those business functions and did not do so until April 2023. Nor could it be said that, by virtue of the role descriptions in their contracts, the employees were 'engaged to' perform the work of the classifications in the Agreement. We conclude that it was never intended that the employees perform any such work and, if necessary, we would find that each of the contracts was a sham — that is, a document which took the form

of a legally effective transaction but which the parties did not intend to have its ostensible legal consequences.[100]

[82] As to the second proposition, the employment of the six employees terminated almost immediately after the Agreement was made. This was, except in Paul Hudston's case, in accordance with the terms of the contracts. There is no reason to think, in the circumstances described, that it was ever contemplated that the Agreement would ever cover any of the employees.

[83] The Agreement was therefore not made in accordance with s 182(1) of the FW Act.

Section 188(1)(c)

[84] We find that the only conclusion available on the evidence is that the approval of the Agreement by the six employees was entirely lacking in authenticity and moral authority in the sense discussed in the Federal Court Full Court decision in *One Key Workforce Pty Ltd v CFMMEU*[101] and was therefore not *genuinely* agreed. The inference we draw from the evidence is that Mr Read established Workforce Logistics and nominally went through the steps of making an enterprise agreement, not for the purpose of establishing an operational business with employees to whom that agreement would apply, but merely for the purpose of establishing a corporate shell with an enterprise agreement for the purpose of sale. To that end, and with the assistance of his business partners, Mr Ruffino and Mr Walters, and his 'trusted friend and adviser' Mark Hudston, Mr Read recruited a purely nominal workforce for the purpose of making the Agreement. The arrangements made contemplated that that the employees would only be employed for four weeks, would be paid at a full-time rate of pay, would not be required to do any work of the type for which they were employed, and that their employment would terminate after the Agreement had been made. The appointment of the supposed bargaining representative, Mr Ruffino, did not comply with reg 2.06 of the FW Regulations because of his pre-existing business relationship with Mr Read and, in any event, no bargaining took place. Mr Read never seriously intended for Workforce Logistics to engage in any legitimate business activity while it was under his control, as evidenced by the facts that the business was not registered for GST or MyLeave and that he took no steps to check whether the employees held the White Cards necessary to work in the construction industry in Western Australia. The employees, when voting to approve the Agreement, knew that they would never be covered by it and thus had no interest or 'stake' in its terms. The sale of Workforce Logistics to AGC, and then to Altrad, 'followed hard upon' the approval of the Agreement. The value of the purchase was realised when the Agreement was able to be used to apply to maintenance employees working on a Chevron offshore platform.

[85] The ingenuine and fake nature of the whole process is best illustrated by the email which Mr Ruffino sent to Mr Read on 31 August 2022, which we have set out in paragraph [57] above. This was sent even before Mr Ruffino had received the NERR. The email was intended, and understood, as a joke, and indicates that the participants were simply not taking the process seriously.

[86] Accordingly, we consider that the Deputy President erred in being satisfied that the requirement for genuine agreement in s 186(2)(a) of the FW Act was met. The evidence before

us, which establishes the true picture, makes it clear that it was not reasonably open for the requisite state of satisfaction to be reached. Appeal grounds 1 and 2 are upheld.

Appeal ground 3

[87] In the circumstances, it is not necessary for us to determine appeal ground 3. It is sufficient to observe that the lack of travel entitlements in the Agreement raises a serious question as to whether employees covered by the Hydrocarbons Award would be better off overall under the Agreement when working on remote onshore and offshore facilities.

Rehearing

[88] Because we have upheld grounds 1 and 2 of the appeal, the decision to approve the Agreement must be quashed. Workforce Logistics did not contend that, on a rehearing of the application for approval of the Agreement, the Agreement was capable of being approved in accordance with s 186 on any basis. Given the findings we have earlier made, it is clear that the Agreement cannot meet the 'genuine agreement' requirement for approval in s 186(2)(a), and this is not a matter which can be rectified pursuant to ss 188(2) or 190. Accordingly, the application for approval of the Agreement is dismissed.

Further comments

[89] We consider that we should make two further comments about this matter. First, it should be clear that, although we have found appealable error in the Deputy President's decision, we have only done so on the basis of the new evidence adduced in the appeal, which disclosed the true picture concerning the circumstances in which the Agreement was made. Not only did the Deputy President not have the benefit of this evidence but he was also, we consider, misled by the contents of the Form F17 declaration which accompanied the application for approval of the Agreement and the lack of candour on the part of Workforce Logistics in prosecuting its application.

[90] Second, we consider that the circumstances in which the Agreement was made merit further inquiry. This is particularly so because it appears that a number of the persons involved in the sham exercise we have described here have also been involved in the making of a number of other enterprise agreements in Western Australia which have been approved by the Commission in recent years. The Schedule to this decision sets out the matters in this respect which we have been able to identify to date. We will refer these matters to the General Manager of the Commission for further inquiry in order to ascertain whether there has been any wider-scale abuse of the enterprise agreement-making facility in the FW Act.

Orders

[91] We order as follows:

(1) Time is extended until 19 June 2023 for the AWU to lodge its appeal.

(2) Permission to appeal is granted.

(3) Appeal grounds 1 and 2 are upheld.

(4) The decision of Deputy President Gostencnik of 26 October 2022 ([2022] FWCA 3757) is quashed.

(5) The application for approval of the *Workforce Logistics Pty Ltd Enterprise Agreement 2022* (matter AG2022/4202) is dismissed.

PRESIDENT

Appearances:

V Ghosh, counsel, for The Australian Workers' Union.
A Pollock, counsel, for Workforce Logistics Pty Ltd and Neil Sadler.
J Raftos, counsel, for Blake Read, Vincent Ruffino and Paul Hudston.

Hearing details:

2023.

Sydney with video link to Perth using Microsoft Teams:
August 29, 30.

Final written submissions:

Blake Read: 4 September 2023.

SCHEDULE

Enterprise Agreement (EA)	**AG2022/4202** ***Workforce Logistics Pty Ltd Enterprise Agreement 2022*** – Building, metal and civil construction industries – Construction and maintenance EA signed: 4/10/2022 EA lodged: 6/10/2022 EA approved: 26/10/2022
Employer	**Workforce Logistics Pty Ltd** ACN 661 845 727 Company registered on 19/09/2022 Contact Person: **Blake Read** Director
Employer Signatory / Name / Address	**Blake Read** **Unit 2, 1 Aitken Way Kewdale WA 6105**
External Employer's Representative	None
Employee Bargaining Representative Name / Address	**Vincent Michael Ruffino** **Unit 2, 1 Aitken Way Kewdale WA 6105**
Employee Signatory	**Vincent Michael Ruffino** Mechanical Fitter
Number of Employees covered at the time of the vote	6 employees: • **Vincent Michael Ruffino**, • **Mark Read**, • **Paul Hudston**, • **Alex Hudston**, • **Daniel Walters**, • **Stephen Biddle**.

Enterprise Agreement (EA)	**AG2023/1694** ***Mainspec Enterprise Agreement 2023*** – Mining industry – Mining Services Contractor EA signed: 31/05/2023 EA lodged: 1/06/2023 EA approved: 19/06/2023
Employer	**Mainspec Pty Ltd** ACN 667 562 736 Company registered on 27/04/2023 Contact Person: **Blake Read** Administration Manager
Employer Signatory / Name / Address	**Blake Read** 27 Sevenmile Way, Burns Beach WA 6028[102]
External Employer's Representative	None
Employee Bargaining Representative Name / Address	27 Sevenmile Way, Burns Beach WA 6028
Number of Employees covered at the time of the vote	6 employees including **Paul Hudston**

Enterprise Agreement (EA)	**AG2023/625** ***Westmin Enterprise Agreement 2023*** – Mining Industry – Mining Services Contractor EA signed: 3/03/2023 EA lodged: 14/03/2023 EA approved: 13/04/2023
Employer	**Westmin Pty Ltd** ACN 664 174 029 Company registered on 30/11/2022 Contact Person: **Vincent Ruffino** Director
Employer Signatory / Name / Address	**Vincent Michael Ruffino** 16 Hamersley Street, Kelmscott WA 6111[103] Signature witnessed by **Blake Read**
External Employer's Representative	None
Employee Bargaining Representative Name / Address	16 Hamersley Street, Kelmscott WA 6111
Number of Employees covered at the time of the vote	6 employees

Enterprise Agreement (EA)	**AG2022/5230** ***WA Project Services Enterprise Agreement 2022*** – Building, metal and civil construction industries EA signed: 1/12/2022 EA lodged: 12/12/2022 EA approved: 22/12/2022
Employer	**WA Project Services Pty Ltd** ACN 655 331 918 Company registered on 15/11/2021 Contact Person: **Daniel Walters** Director
Employer Signatory / Name / Address	**Daniel Walters** **Unit 2, 1 Aitken Way Kewdale WA 6105**
External Employer's Representative	None
Employee Bargaining Representative Name / Address	**Unit 2, 1 Aitken Way Kewdale WA 6105**
Number of Employees covered at the time of the vote	6 employees – Email providing explanation of agreement sent to email address for **Paul Hudston**.

Enterprise Agreement (EA)	**AG2022/2221** ***Whaleback Platinum Services Enterprise Agreement 2022*** *– Building, metal and civil construction industries* EA signed: 30/06/2022 EA lodged: 30/06/2022 EA approved: 7/07/2022
Employer	**Whaleback Platinum Services Pty Ltd T/A WPS Group** ACN 658 239 055 Company registered on 23/03/2022 Contact Person: **Blake Read** Managing Director
Employer Signatory / Name / Address	**Blake Read** **Unit 2, 1 Aitken Way Kewdale WA 6105**
External Employer's Representative	None
Employee Bargaining Representative Name / Address	**Daniel Walters** **Unit 2, 1 Aitken Way, Kewdale WA 6105**
Employee Signatory	**Daniel Walters** Fitter/Employee
Number of Employees covered at the time of the vote	3 employees, including **Mark Read**

Enterprise Agreement (EA)	**AG2020/2642** ***Vertigo Enterprise Agreement 2020*** **–** *Building, metal and civil construction industries* EA signed: 31/08/2020 EA lodged: 04/09/2020 EA approved: 5/10/2020
Employer	**Vertigo Group Pty Ltd** ACN 637 441 331 Company registered on 13/11/2019
Employer Signatory / Name / Address	
External Employer's Representative (Firm / Organisation / Company)	**Mark Hudston** Mapien
Employee Bargaining Representative Name / Address	**Stephen Biddle**
Number of Employees covered at the time of the vote	2 employees

Enterprise Agreement (EA)	**AG2019/4604** ***R.E.C. Maintenance & Construction Agreement 2019*** – Building, metal and civil construction industries – Fabrication and construction industries EA signed: 25/11/2019 EA lodged: 29/11/2019 EA approved: 30/01/2020
Employer	**REC Maintenance & Construction Pty Ltd** ACN 637 117 938 Company registered on 29/10/2019 Contact Person: Laurence John Reeves Director ASIC Historical Search and Company Extract for REC shows that MAS Australasia Pty Ltd purchased all shares in REC (owned by Laurence John and Lynette Marie Reeves) on 16 March 2021. ASIC Historical Search and Company Extract for MAS Australasia Pty Ltd shows that **Shane Francis Kimpton** was a Director of MAS from 12 February 2019 until 6 June 2023 and was appointed as a Director of REC 2 June 2020 and ceased on 6 June 2023.
Employer Signatory / Name / Address	Laurence John Reeves
External Employer's Representative	None
Employee Bargaining Representative Name / Address	**Stephen Biddle**
Employee Signatory	**Stephen Biddle** Bargaining Representative
Number of Employees covered at the time of the vote	5 employees

Enterprise Agreement (EA)	**AG2018/6027** ***Equipa Pty Ltd (ACN 622 860 557) On-hire Employees Enterprise Agreement 2018*** – Manufacturing and associated industries EA signed: 16/10/2018 EA lodged: 26/10/2018 EA approved: 5/04/2019
Employer	**Equipa Pty Ltd** ACN 622 860 667 Company registered on 15/11/2017 and deregistered on 15/11/2021 Contact Person: **Blake Read** Director
Employer Signatory / Name / Address	**Blake Read** 506B Hay Street, Subiaco WA 6008
External Employer's Representative	Allan Drake-Brockman Livingstones & SHR Group
Employee Bargaining Representative Name / Address	
Employee Signatory	
Number of Employees covered at the time of the vote	7 employees of whom 4 cast a vote to approve the Agreement

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[1] [2022] FWCA 3757.

[2] AE517955.

[3] Witness statement of Doug Heath, 11 July 2023 (Exhibit 4) at [34] and Attachment 7.

[4] Ibid at [38] and Attachment 7.

[5] Matter AG2022/4202.

[6] Appeal Book at 54.

[7] [2022] FWCA 3757.

[8] Exhibit 4.

[9] [1936] HCA 40, 55 CLR 499 at 504-505; *Coal and Allied Operations Pty Ltd v AIRC* [2000] HCA 47, 203 CLR 194 at [19]-[21] per Gleeson CJ, Gaudron and Hayne JJ; *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30, 264 CLR 541 at [35]-[50] per Gageler J; *Donnybrook Holdings Pty Ltd v CEPU* [2021] FWCFB 1825 at [20]; *National Electrical and Communications Association v Electrotechnology Group Training Company Ltd* [2021] FWCFB 6073 at [29].

[10] [2017] HCA 53, 262 CLR 593.

[11] Transcript, 29 August 2023 at PN370.

[12] Ibid.

[13] Ibid at PN373.

[14] Ibid at PNs 740-741, 763-769.

[15] Ibid at PNs 256-271.

[16] Ibid at PN 263.

[17] Ibid at PN 264.

[18] Ibid at PN 265.

[19] Ibid at PN 800.

[20] Ibid at PN 381.

[21] Transcript, 30 August 2023 at PNs 986-988.

[22] Transcript, 29 August 2023 at PNs 161, 193, 437-439.

[23] Ibid at PNs 437-439.

[24] Documents produced by Blake Read (Exhibit 1) (appellant's tender bundle at 205-224).

[25] Orders for production issued to the Proper Officer of Workforce Logistics, and to Mr Read, on 2 August 2023 required the production, among other things, of '… any… documents as evidence that the employees who voted on the Agreement … were engaged to undertake work for Workforce Logistics between when the company was registered on 19 August 2022 and when the Agreement was made on 23 September 2022.'

[26] Transcript, 29 August 2023 at PN 192.

[27] Transcript, 30 August 2023 at PNs 1046-1049.

[28] Ibid at PNs 541, 544-545.

[29] Transcript, 30 August 2023 at PNs 1030-1034.

[30] Ibid at PNs 1016-1018, 1035-1040.

[31] Transcript, 29 August 2023 at PN 548.

[32] Ibid at PNs 285, 541.

[33] Ibid at PNs 238-242.

[34] Ibid at PN 225.

[35] Ibid at PNs 548-550.

[36] Ibid at PN 353.

[37] Ibid at PNs 170-171.

[38] Documents produced by Blake Read (Exhibit 1) (appellant's tender bundle at 253-303).

[39] Transcript, 29 August 2023 at PNs 164-165.

[40] Ibid at PNs 216-217, 282, 317, 369.

[41] Ibid at PNs 172-174.

[42] Ibid at PNs 740-741, 763-767.

[43] Witness statement of Doug Heath, 11 July 2023 (Exhibit 4) at [21] and Attachment 3; transcript, 29 August 2023 at PN 680.

[44] Transcript, 29 August 2023 at PNs 680-686.

[45] Witness statement of Doug Heath, 11 July 2023 (Exhibit 4) at [20] and Attachment 3.

[46] Transcript, 29 August 2023 at PNs 742-760.

[47] Transcript, 29 August 2023 at PNs 819-825.

[48] Transcript, 30 August 2023 at PNs 994-999, 1010.

[49] Ibid at PNs 1046-1049.

[50] Documents produced by Blake Read (Exhibit 1) (appellant's tender bundle at 205-224).

[51] Transcript, 30 August 2023 at PNs 1017-1018.

[52] Ibid at PN 1039.

[53] Ibid at PN 998.

[54] Witness statement of Doug Heath, 11 July 2023 (Exhibit 4) at [34] and Attachment 7.

[55] Ibid at [38] and Attachment 7.

[56] Ibid at Attachment 4.

[57] Transcript, 29 August 2023 at PNs 127-128, 701-702.

[58] Ibid at PN 713.

[59] Ibid at PNs 113-114, 129-131.

[60] Transcript, 30 August 2023 at PNs 990-991.

[61] Documents produced by Blake Read (Exhibit 1) (appellant's tender bundle at 294).

[62] Ibid (appellant's tender bundle at 278).

[63] Ibid (appellant's tender bundle at 270).

[64] Ibid (appellant's tender bundle at 303).

[65] Ibid (appellant's tender bundle at 286).

[66] Ibid (appellant's tender bundle at 261).

[67] Ibid (appellant's tender bundle at 166).

[68] Documents produced by Vincent Ruffino (Exhibit 2) (appellant's tender bundle at 305).

[69] Documents produced by Blake Read (Exhibit 1) (appellant's tender bundle at 167-169).

[70] Ibid (appellant's tender bundle at 226).

[71] Ibid (appellant's tender bundle at 227).

[72] Ibid (appellant's tender bundle at 231).

[73] Ibid (appellant's tender bundle at 228-230).

[74] Transcript, 29 August 2023 at PNs 786-797.

[75] Documents produced by Blake Read (Exhibit 1) (appellant's tender bundle at 170-196).

[76] Documents produced by Vincent Ruffino (Exhibit 2) (appellant's tender bundle at 320-347).

[77] Documents produced by Blake Read (Exhibit 1) (appellant's tender bundle at 199-204).

[78] Ibid (appellant's tender bundle at 31).

[79] Ibid (appellant's tender bundle at 287-294).

[80] Appeal Book at 34-56.

[81] Ibid at 2-30.

[82] Transcript, 29 August 2023 at PN 305.

[83] Ibid at PN 475.

[84] Ibid at PNs 461-462.

[85] Ibid at PNs 545-547.

[86] Witness statement of Doug Heath, 11 July 2023 (Exhibit 4) at [38] and Attachment 7.

[87] Transcript, 29 August 2023 at PNs 877-880; 'Additional material produced 28 Aug 2023' (Exhibit 7) (appellant's tender bundle at 409).

[88] Transcript, 29 August 2023 at PNs 884-887, 902-903.

[89] Witness statement of Doug Heath, 11 July 2023 (Exhibit 4) at Attachment 12.

[90] Ibid at [40]-[41].

[91] Ibid at [32].

[92] Witness statement of Neil Sadler, 7 August 2023 (Exhibit 8) at [10].

[93] Ibid at [9].

[94] Transcript, 29 August 2023 at PNs 915-922; witness statement of Doug Heath, 11 July 2023 (Exhibit 4) at [45] and Attachment 12.

[95] Witness statement of Doug Heath, 11 July 2023 (Exhibit 4) at [46].

[96] Transcript, 29 August 2023 at PN 12.

[97] [2014] FWCFB 4822 at [5].

[98] Ibid at [6].

[99] Witness statement of Doug Heath, 11 July 2023 (Exhibit 4) at [5]-[12].

[100] *Equuscorp Pty Ltd v Glengallan Investments* [2004] HCA 55, 218 CLR 471 at [46].

[101] [2018] FCAFC 77, 262 FCR 527 at [131]-[165].

[102] Residential address for Blake Read in ASIC Current & Historical Company Extract record for Diablo Industrial Services Pty Ltd – Attachment 7 to the witness statement of Doug Heath, 11 July 2023 (Exhibit 4).

[103] Residential address for Vincent Michael Ruffino in ASIC Current & Historical Company Extract record for Diablo Industrial Services Pty Ltd – Attachment 7 to the witness statement of Doug Heath, 11 July 2023 (Exhibit 4).