



# DECISION

*Fair Work Act 2009*  
s.604—Appeal of decision

**Innovative Asset Solutions Pty Ltd Trading AS IAS**

**v**

**The Australian Workers' Union, The Communications, Electrical,  
Electronic, Energy, Information, Postal, Plumbing And Allied Services  
Union Of Australia (Electrical Division, Western Australia) and Others**  
(C2025/3042)

VICE PRESIDENT ASBURY  
DEPUTY PRESIDENT MASSON  
DEPUTY PRESIDENT BEAUMONT

BRISBANE, 19 DECEMBER 2025

*Appeal against decision [2025] FWC 904 of Commissioner Lim at Perth on 31 March 2025 in matter number AG2024/385.*

## Overview and decision under appeal

[1] Innovative Asset Solutions Pty Ltd trading as IAS (**IAS/Appellant**) has lodged an appeal, for which permission is required, against a decision of Commissioner Lim issued on 31 March 2025<sup>1</sup> (**Decision**) in which she refused to approve the *IAS Enterprise Agreement 2024 (2024 Agreement)*. The application for approval of the 2024 Agreement was opposed by The Australian Workers' Union (**AWU**) and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (Electrical Division, Western Australia) (**CEPU**) – collectively the Unions/Respondents. The Unions were bargaining representatives for the 2024 Agreement.

[2] In the hearing at first instance, the opposition of the Unions to approval of the 2024 Agreement was based on four main contentions, including that the Commission could not be satisfied for the purposes of s. 188(2)(b) of the *Fair Work Act 2009 (FW Act)* that the employees who voted to approve the 2024 Agreement were sufficiently representative of those who will be covered by it. The Unions submitted that the 2024 Agreement sets the terms and conditions for IAS employees in over three dozen classifications across several industries, Australia-wide and that the employees who voted on the 2024 Agreement were not sufficiently representative of the employees the Agreement is expressed to cover, because they represent:

- a third of the types of employment (full-time, part-time and casual);
- less than a third of the industries in which the Agreement operates;

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<sup>1</sup> [2024] FWC 904.

- a third of the sectors in the hydrocarbons industry;
- one eighth of the geographical areas in which the Agreement operates; and
- approximately one sixth of the classifications provided for in the Agreement.

[3] Section 188(2) has two limbs and is cast in the negative, so that the Commission cannot be satisfied that an enterprise agreement has been genuinely agreed unless satisfied that the employees requested to approve the agreement have a sufficient interest in its terms (s. 188(2)(a)) and are sufficiently representative having regard to the employees the agreement is expressed to cover (s. 188(2)(b)). We will refer to the matter in s. 188(2)(a) as the ‘**sufficient interest issue**’ and the matter in s. 188(2)(b) as the ‘**sufficiently representative issue**’. The two limbs of s. 188(2) are joined by the conjunction ‘and’ so that both are required to be met.

[4] The AWU raised the sufficient interest issue in its Form F18 Declaration, asserting that the employees who voted on the 2024 Agreement were on contracts of employment that provided for higher rates than the Agreement.<sup>2</sup> In their submissions and evidence the Unions did not press the ‘sufficient interest’ issue at first instance or in the appeal and the Commissioner did not decide that matter. The Commissioner decided that the employees who were requested to approve the 2024 Agreement were not ‘sufficiently representative’, on the basis they were casual employees given that the 2024 Agreement is expressed to cover full-time and part-time employees (**all-casual issue**)<sup>3</sup>. Given this conclusion the Commissioner determined that she was not satisfied that the 2024 Agreement was genuinely agreed to, and that it could not be approved. The Commissioner considered that it was not necessary to determine other objections to the approval of the 2024 Agreement raised by the Unions. Further, the Commissioner did not consider other relevant matters in the *Statement of Principles on Genuine Agreement* (**Statement of Principles**) required by s. 188(1) to be taken into account.

## The appeal

[5] The Appellant raises three grounds of appeal, pleaded in the alternative. For reasons we develop below, it is only necessary that we deal with appeal ground 1. By that appeal ground IAS contends that in finding that the all casual cohort of employees was not sufficiently representative of the group of employees the 2024 Agreement is expressed to cover, the Commissioner failed to take into account relevant considerations, namely a sample of resumes of the voting group tendered as Attachment DC-2 to the witness statement of the Appellant’s Operations Manager Mr Cochrane, which constituted ‘evidence of the experience’ of the all-casual group, and/or unreasonably turned her mind away from the obvious inferences that any decision maker, acting reasonably, would have drawn from DC-2, in the context of an application under s. 185, having regard to Part 2 – 4 of the FW Act generally.

[6] The disposition of the appeal sought by the Appellant is that permission to appeal is granted, the Decision is quashed, the appeal allowed, and the matter remitted to the Commissioner for redetermination in accordance with the decision of the Full Bench, and further determination of extant issues that the Commissioner refers to in ‘paragraph [57]’ of the

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<sup>2</sup> Appeal Book page 89 at 91.

<sup>3</sup> Subsequently revised to 46 employees after ten members of the voting cohort were found by the Appellant to have been ineligible to vote in the ballot and the ballot result was revised by the Ballot Agent.

decision.<sup>4</sup> Given the outstanding matters for determination, we infer that the Appellant is seeking that the matter be remitted for the Commissioner to determine all other outstanding matters, including those identified by the Commissioner at paragraphs [47] – [55] of the Decision concerning alleged detriments to ‘permanent’ employees, although this is not clear. The AWU submits that if the appeal is upheld, the entire matter, including further objections advanced by the Union at first instance, should be remitted to the Commissioner so that the AWU’s entire case can be heard in relation to all the matters raised at first instance.

[7] For reasons that follow, we have decided to grant permission to appeal, uphold the appeal, quash the Decision in relation to the sufficiently representative issue and redetermine that matter. We have also decided to determine on a *provisional* basis the sufficiently representative issue. Further, subject to confirmation from the parties about the scope of the outstanding matters concerning the application for approval of the 2024 Agreement, we intend to determine those matters ourselves, having regard to the submissions and evidence before the Commissioner at first instance. To assist us to determine the issues remaining in contention, we issue directions with this decision requiring the parties to confirm those issues. This step is necessary because of the lack of clarity from both parties about the status of issues that were raised at first instance by the Unions, and which do not appear to have been pressed in the hearing.

[8] We reject the submission by the AWU that its full case at first instance should be further heard in the redetermination of the application for approval of the 2024 Agreement. The parties were given an opportunity to advance their full cases before the Commissioner, to call evidence and to cross-examine witnesses. The parties took that opportunity. The fact that the Commissioner did not determine all the contentions of the parties is not to the point. The objections advanced by the Unions were fully ventilated before the Commissioner, the Appellant had an opportunity to respond to those matters and there is no basis for providing a further opportunity for them to be heard on those objections, subject to the confirmation of the issues remaining in dispute. Subject to the parties confirming the outstanding matters for determination, our view is that those matters can be determined ‘on the papers’ and there is no need for a further hearing. In relation to the sufficient interest issue, we provide the parties with an opportunity to advance written submissions in response to our provisional view, in accordance with the directions below. We consider that we are in as good a position as the Commissioner to finalise the matter, noting that the credit of witnesses was not in issue in the proceedings before the Commissioner.

## **The Decision at first instance**

### **Grounds for opposition to approval of the 2024 Agreement**

[9] In the proceedings before the Commissioner the Form F16 Application and Form 17B Employer declaration were tendered into evidence.<sup>5</sup> The AWU and CEPU each filed a Form F18 indicating their opposition to the approval of the 2024 Agreement and disagreement with the statements made in the Employer declaration, and the reasons for disagreement. The Form F18 for the AWU was lodged by its Senior National Legal Officer, Mr Zachary Duncalfe. The

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<sup>4</sup> Appellant’s submissions paragraph 29(4).

<sup>5</sup> Exhibit A1 and A2 respectively.

AWU's objection to the approval of the 2024 Agreement was on the basis that it was not genuinely agreed.<sup>6</sup> The AWU stated that it disagreed with the employer's statement that the group of employees who voted on the agreement have a sufficient interest and are sufficiently representative, and contended that, contrary to the employer's declaration, the employees who cast a vote were engaged in a minority of classifications, performing work at only a small number of hydrocarbons facilities in Western Australia and were only engaged in a single sub-sector of the hydrocarbons industry. The AWU also contended that the employees who voted on the Agreement are not sufficiently interested because 'the AWU understands that they each have contracts of employment that set out higher rates of pay than those contained in the proposed agreement'.

[10] Other grounds advanced by the AWU in opposition to the approval of the 2024 Agreement concerned allegations that the employer had 'artificially inflated' the numbers of employees who voted on the 2024 Agreement by temporarily transferring some 15 employees from another entity to IAS, significantly impacting the ballot outcome, and that those employees did not have an interest in the 2024 Agreement because of the transfer and the fact that they were paid wages in excess of those in the 2024 Agreement.<sup>7</sup>

[11] The CEPU made a similar assertion that the voting group was diluted by the addition of employees who had no interest in the 2024 Agreement and who were paid wage rates in excess of those in the 2024 Agreement. In addition, the CEPU contended that IAS had engaged in misrepresentation in relation to the application of the 2024 Agreement and that it did not pass the better off overall test (BOOT). In its written submissions at first instance, the CEPU withdrew its assertion that the employer was 'stacking the workplace' on the basis it had not 'proved to have an evidentiary foundation<sup>8</sup>', but maintained an allegation that a client of the Appellant had threatened to take adverse action against IAS if employees participated in protected industrial action, and made various assertions about Mr Cochrane's conduct and representations during the negotiations and representations during the explanation of the terms of the 2024 Agreement.<sup>9</sup> Both Unions also contended that the 2024 Agreement was not genuinely agreed because the employer had offered to pay employees a \$2000.00 sign on bonus if the 2024 Agreement was approved by a majority of employees.

[12] Prior to the hearing the Commissioner posed a question to the parties as to whether all the casual employees who voted on the 2024 Agreement, were eligible to vote. IAS advised in response that it had reviewed the list of voters and found that ten employees on the list were not eligible to vote. IAS further informed the Commissioner that Vero – the ballot agent for the vote – confirmed that if all 10 of those employees did not vote the same way, they could be removed from the ballot results while retaining voting anonymity, and that a revised declaration of results showed that out of 46 eligible voters, 29 voted to approve the 2024 Agreement while 17 voted against approval.

[13] Subsequently the Unions did not press their submissions about the voting cohort being artificially inflated and instead argued that the method by which the revision was undertaken

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<sup>6</sup> Appeal Book page 90.

<sup>7</sup> Appeal Book pages 91 – 92.

<sup>8</sup> CEPU submissions filed 21 November 2024, paragraph 2, Appeal Book page 119.

<sup>9</sup> Appeal Book page 119 paragraphs 2 – 5.

was opaque and the Commission should not accept that the 2024 Agreement was approved by a valid majority of employees eligible to vote. This was said to be inconsistent with ss 180(5) and 188(4A) of the Act.<sup>10</sup> The Unions also pointed to the information provided in the Form F17B Employer declaration, indicating that 56 employees were said to have been eligible to vote in the ballot, all 56 employees voted and 32 employees voted in favour of approving the 2024 Agreement. The Union contended that if these figures are adjusted to have regard to the ten ineligible voters, the Commission could not be satisfied that the 2024 Agreement was approved. Issue was also taken by the Unions concerning IAC identifying how each employee voted for the purpose of the reconciliation conducted by Vero.

[14] Further, it was contended by the Unions that IAS did not take all reasonable steps to explain the terms of the 2024 Agreement and effect of those terms in comparison with the industrial instrument that currently applies to the cohort of employees (the *IAS Group Enterprise Agreement 2019 – 2023 (2019 Agreement)*). As we have noted, the Commissioner did not decide contested matters, other than the sufficiently representative issue.

### **The Commissioner's reasons**

[15] The Commissioner commenced her summary of the evidence by stating that IAS is a labour hire company servicing a variety of industries, both offshore and onshore, and was acquired by UGL in 2021. The reference in the Decision for the source of the finding that IAS is a labour hire company, is in the witness statement of Mr Pickwell, the Appellant's Business Manager.<sup>11</sup> The document referred to is part of a series of documents showing the clients and sites IAS has worked for and on, and the numbers of employees who have been engaged on those sites, over the life of the 2019 Agreement which the 2024 Agreement was intended to replace. That document makes no reference to IAS being a labour hire company. It was tendered as evidence establishing that IAS has worked on projects in various Australian States and Territories and internationally, and that numbers of employees of IAS have fluctuated.

[16] In the Form F17B Employer declaration lodged with the Commission in relation to the application for approval of the 2024 Agreement<sup>12</sup>, Mr Geoff Weaver (Industrial Relations Manager) on behalf of IAS declares that its primary activity is 'industrial maintenance services in the Oil and Gas and Mining and Minerals Processing Industries'.<sup>13</sup> An online search indicates that IAS advertises its services as a specialist provider of asset life extension and critical repair solutions in the resources, infrastructure and industrial sectors, and as a technology enabled fabric maintenance business with capabilities including inspecting, preserving and repairing process equipment and structural assets, applying a range of coating and insulation solutions. This is consistent with evidence given in the proceedings about the work undertaken by IAS.<sup>14</sup>

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<sup>10</sup> Ibid at [17].

<sup>11</sup> Appeal Book p. 628, Annexure NP-1 to Mr Pickwell's Witness Statement.

<sup>12</sup> Exhibit A2, Appeal Book pages 349 – 379.

<sup>13</sup> Form F17B – Appeal Book p. 349; tendered in the first instance hearing as Exhibit A2, Transcript PN20 Appeal Book p. 17.

<sup>14</sup> Transcript of hearing 19 December 2024, PN120; Witness Statement of Neil Pickwell paragraph 23(c) Final amended appeal book page 626.

[17] Although no issue was taken with the Commissioner’s observation about the Appellant’s enterprise in the appeal, there is a distinction between businesses providing labour to supplement that of another business, and businesses undertaking specialised work under a contract with another business. For reasons we will return to, where an issue arises as to whether a group of employees requested to vote on an agreement is sufficiently representative of employees the agreement is expressed to cover, evidence about the nature of the employer’s enterprise and the work experience of the employees voting on the agreement, may be relevant to considering whether an agreement is genuine. In the present case, there was evidence of this kind, and in our opinion, it was not considered. We turn now to consider that evidence.

[18] In the hearing before the Commissioner, evidence was given for the Appellant (the Applicant at first instance) by Mr Weaver via the Form F17B he completed on behalf of the Appellant and a supplementary witness statement<sup>15</sup>; Ms Tamara Wheatcroft (Senior People and Culture Business Partner);<sup>16</sup> Mr Douglas Cochrane (Operations Manager);<sup>17</sup> and Mr Neil Pickwell (Business Manager).<sup>18</sup> Evidence was also given by Mr Ross Kumeroa, AWU Organiser,<sup>19</sup> and a witness statement made by Mr Ian Gill was tendered by the CEPU.<sup>20</sup>

[19] After noting that all the eligible employees who were requested to vote on the 2024 Agreement were employed on a casual basis, while the 2024 Agreement also covers full-time and part-time employees, the Commissioner observed at paragraph [38] that:

‘...It would be wrong to say that as a rule, a voting cohort comprising only casuals, or only permanent employees, cannot have a sufficient interest or be sufficiently representative in relation to an enterprise agreement that is expressed to cover all types of employment. This is just one of the considerations in evaluating whether there is genuine agreement, and each case turns on its own facts.’

[20] The Commissioner went on to determine that:

1. The all-casual cohort of employees requested to approve the 2024 Agreement was not sufficiently representative given the 2024 Agreement also covers full-time and part-time employees (Decision paragraph [39]);
2. The casual conversion term in the 2024 Agreement could possibly address how a casual cohort could have a sufficient interest or be sufficiently representative, but IAS had not drawn the Commissioner’s attention to this provision (Decision paragraph [40]); and
3. Although IAS was on notice of the Unions’ contentions regarding the all-casual voting cohort, it did not put on substantive evidence to address this and the Commissioner did not have any information about whether IAS has employed full-time or part-time employees in the past; whether employees are aware of the casual conversion provisions; or even if any employees had ever gone through the casual conversion process (Decision paragraph [40]).

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<sup>15</sup> Exhibit A5.

<sup>16</sup> Exhibit A8.

<sup>17</sup> Exhibit A7.

<sup>18</sup> Exhibit A6.

<sup>19</sup> Exhibit AWU1.

<sup>20</sup> Exhibit CEPU1.

[21] At paragraph [41] of the Decision, which is the focus of appeal ground 1, the Commissioner stated that ultimately, the only evidence IAS tendered on ‘this issue’ was a single sentence from a witness statement made by Mr Cochrane, that: ‘IAS employees have employment experience in the project contracting industries in a wide range of roles, engagement types and classifications... at a wide variety of locations throughout Australia and also internationally’. Further the Commissioner stated that no supporting data or documentation was provided in support of this contention regarding types of employment, in contrast with the documentation addressing the issues of roles, classifications and geographical engagement.<sup>21</sup> In those circumstances, the Commissioner did not find Mr Cochrane’s evidence to be persuasive and noted that IAS did not make any ‘substantive submission’ on how the Commission could be satisfied that the all-casual cohort could be sufficiently representative, given that the 2024 Agreement also covers full-time and part-time employees.

[22] It is apparent that the reference to ‘this issue’ in paragraph [41] is a reference to the ‘sufficiently representative issue’ and that the finding that employees who were requested to vote on the 2024 Agreement were not sufficiently representative, was based solely on the fact that they were all employed on a casual basis. As we have noted, the all-casual group was only one of the issues the Unions raised in relation to the contention that the 2024 Agreement was not genuinely agreed to. The extent to which the employees who vote on an agreement are employed across the full range of types of employment is only one of the issues the Commission is required to take into account.

[23] The Commissioner then made a number of observations to bolster her conclusion in relation to genuine agreement, to the effect that: contrary to the Appellant’s submission the 2024 Agreement was not a rollover of the 2019 Agreement; the 2024 Agreement includes changes to conditions in the 2019 Agreement so that it could not be said that the voting cohort was sufficiently representative because it had worked under a set of terms and conditions that had been rolled over<sup>22</sup>; the 2024 Agreement changed conditions that applied only to permanent employees<sup>23</sup>; the breadth of the coverage of the 2024 Agreement is significant and opens up a large opportunity for IAS to tender for work across Australia, to the extent that the Commissioner could not be satisfied that IAS would not engage full time or part-time employees in the future<sup>24</sup>; and the 2024 Agreement did not appear to provide for any allowances specific to permanent or casual employees, beyond the built-in casual loading and the flat hourly rate for casuals, and despite the 2024 Agreement stating that the casual loading is 25%, the difference between the permanent and casual rates is less than 25%.<sup>25</sup>

[24] Other than finding that the Appellant’s evidence (which was said to be limited to a single sentence in Mr Cochrane’s witness statement) did not address the all-casual issue, the Commissioner did not otherwise refer to the evidence called by IAS in relation to the nature of its business or the skills, qualifications and experience of the employees who were requested to approve the 2024 Agreement. Nor did the Commissioner provide reasons other than with

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<sup>21</sup> Ibid at [41].

<sup>22</sup> Decision paragraphs [43] – [46].

<sup>23</sup> Decision paragraphs [47] – [55].

<sup>24</sup> Decision paragraph [56].

<sup>25</sup> Decision paragraph [57].

reference to the all-casual issue, as to why the employees who voted to approve the 2024 Agreement were not sufficiently representative. While the Commissioner referred to Principle 17(b)(ii) and 17(b)(iii) of the Statement of Principles, which respectively refer to types of employment provided for in an agreement (for example full-time, part-time and casual) and geographical locations the 2024 Agreement covers, the Commissioner did not refer to other matters in Principle 17 or any other relevant Principles. Nor did the Commissioner address why Principles other than 17(b)(ii) and (iii) were not relevant to the matters she was determining.

[25] Based on her conclusion that the employees who were requested to vote on the 2024 Agreement were not sufficiently representative and that it was therefore not genuinely agreed, the Commissioner found it unnecessary to deal with the other objections advanced by the Unions and dismissed the application for approval of the 2024 Agreement.<sup>26</sup>

## **Approach to the Commission reaching a state of satisfaction**

### **Legislative provisions**

[26] Division 4 of Part 2-4 sets out the requirements for the approval of an enterprise agreement. Section 186 sets out the general requirements of which the Commission must be satisfied before deciding to approve an enterprise agreement, in the following terms:

#### **“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 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
  - ...

Note 1: For when an enterprise agreement has been genuinely agreed to by employees, see section 188. ...”

[27] Section 188 sets out matters about which the Commission must be satisfied in order to determine that an enterprise agreement has been genuinely agreed to by the employees covered. The provisions of s. 188 relevant to this appeal are as follows:

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<sup>26</sup> Decision at [58].

**“188 Determining whether an enterprise agreement has been genuinely agreed to by employees**

*Statement of Statement of Principles*

1. The FWC must take into account the statement of Statement of Principles made under section 188B in determining whether it is satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement.

...

*Sufficiently interested and sufficiently representative*

2. The FWC cannot be satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the employees requested to approve the agreement by voting for it:
  - a. have a sufficient interest in the terms of the agreement; and
  - b. are sufficiently representative, having regard to the employees the agreement is expressed to cover.

Note: In *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77 (2018) 262 FCR 527, a Full Court of the Federal Court observed that whether an agreement has been genuinely agreed involves consideration of the authenticity of the agreement of the employees, including whether the employees who voted for the agreement had an informed and genuine understanding of what was being approved.

...”

**[28]** As set out in the Commissioner’s decision, s. 188(2) was inserted by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*. The Revised Explanatory Memorandum to this bill reinforces the significance of the Full Court decision in *One Key* and the Statement of Principles it stands for, and relevantly is in the following terms:

*Sufficiently interested and sufficiently representative*

...

723. New subsection 188(2) is intended as a safeguard against agreements which are not the result of collective bargaining in good faith, including ‘unrepresentative’ and ‘low voter cohort’ agreements. For example, a small cohort of employees offered rates of pay above those provided in the enterprise agreement should not be capable of being found to have genuinely agreed (see, for example, *Re KCL Industries Pty Ltd* [2016] FWCFB 3048; (2016) 257 IR 266).
724. New paragraph 188(2)(a) is directed at ensuring that employees must have a ‘sufficient stake’ in the terms of the agreement. For example, employees would not have a sufficient interest in the terms of an agreement if no genuine collective bargaining in good faith occurred as part of the agreement-making process.
725. New paragraph 188(2)(b) is intended to ensure that employees requested to vote on an agreement are sufficiently representative, having regard to the coverage terms or intended coverage of the agreement. For example, employees engaged in one industry, occupation or classification should not be capable of being found to have genuinely agreed to an enterprise agreement intended to cover employees across a substantially wider range of industries, occupations or classifications.
726. A small cohort of employees would also not be sufficiently representative where the agreement is intended to ultimately cover a much wider workforce following transfers of employment, possibly within a corporate group.

**Authenticity**

**[29]** As is apparent from the legislative Note to s. 188(2) of the FW Act and the Explanatory Memorandum, the concept of ‘authenticity’ is derived from the decision of the Full Court of

the Federal Court in *One Key*<sup>27</sup>. The placement of the legislative Note under s.188(1) indicates that it is relevant to the application of the Statement of Principles, and to all matters in s. 188 about which the Commission is required to be satisfied, in order determine whether it can or cannot be satisfied, to decide whether an enterprise agreement is genuinely agreed. We turn now to consider the matters relevant to determining whether an enterprise agreement is genuine, discussed by the Full Court in *One Key*.

**[30]** In its decision, the Full Court observed that the authenticity of an enterprise agreement involves concern with its moral authority<sup>28</sup> and is at the heart of whether it is genuinely agreed.<sup>29</sup> The issues in *One Key* included whether three casual employees who had purportedly approved an enterprise agreement, had genuinely agreed to its terms, in circumstances where the agreement covered a significantly wider range of classifications than those in which they were employed.<sup>30</sup> The employer was a labour hire provider and a member of a related group of companies with over 300 employees in total.<sup>31</sup> The agreement would have allowed for the employer to deploy employees throughout Australia in industries and occupations in which the employer did not operate, the three employees did not work, and the employees would be unlikely to work in the future. The Court also observed that there was no reason to suppose that any of the three employees who voted on the agreement could have an interest in the agreement, there was no bargaining or negotiations nor was there a bargaining representative involved in the process of making the agreement.<sup>32</sup> It was also observed that there was no apparent rationale for the selection for employment of the three employees who purportedly made the agreement.

**[31]** When *One Key* was decided, s. 188 of the FW Act defined genuine agreement by reference to specified matters and that ‘there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees’ (s. 188(c)). The Full Court extensively considered the meaning of the term ‘genuine agreement’ and relevantly observed that ‘genuine’ signifies that mere agreement is not sufficient, and consent of a higher quality than simply the absence of fraud, coercion or duress, is required.<sup>33</sup> The Court referred with approval to the earlier decision in *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd*<sup>34</sup> (*John Holland*) where a Full Court said that the requirement that the Commission be satisfied that a group of employees covered by an enterprise agreement is fairly chosen, involves a value judgement that is very broad.<sup>35</sup> In our opinion, the same can be said of questions as to whether a group of employees has ‘sufficient interest’ in the terms of an agreement (s. 188(2)(a)) and is ‘sufficiently representative’, having regard to the group of employees the agreement is expressed to cover (s. 188(2)(b)). Similarly, it has been observed

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<sup>27</sup> Op. cit.

<sup>28</sup> Ibid at [136] citing *Construction Forestry Mining and Energy Union v Australian Industrial Relations Commission*

<sup>29</sup> Ibid at [143].

<sup>30</sup> But for the agreement, two of the three employees would have been covered by the *Black Coal Mining Industry Award 2010* and one by the *Building and Construction General On-site Award 2020*. The intended coverage of the agreement extended to employees throughout Australia employed under awards covering a wide range of other industries, including clerical, road transport operations (local and long distance), hydrocarbons, hospitality, oil refining and manufacturing, and offshore oil and gas.

<sup>31</sup> *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77 at [80].

<sup>32</sup> Ibid at 530 – 531, 536.

<sup>33</sup> Ibid at [141].

<sup>34</sup> [2015] FCAFC 16.

<sup>35</sup> *John Holland* op. cit. at [60] per Buchanan J (Besanko and Barker JJ agreeing).

by a Full Bench of the Commission (in relation to the requirement all reasonable steps are taken by an employee to explain the terms of an enterprise agreement and their effect to employees) that the process by which satisfaction about a prescribed matter is, or is not reached, involves the making of an evaluative judgment of a discretionary nature. The Full Bench also observed that the exercise of the discretion involved will be wider where the prescribed matter is one of ‘opinion or policy or taste’ than where it is one of ‘objective fact’.<sup>36</sup>

[32] Self-evidently, the terms ‘sufficient’ or ‘sufficiently’ in s. 188(2) indicate that the Commission is not required to be satisfied in an absolute sense that the employees requested to approve an enterprise agreement have an interest in the agreement or are representative of a broader group the agreement is expressed to cover and that evaluating these matters involves questions of fact and degree. As the Full Court observed in *One Key*, the employees who are requested to approve an enterprise agreement are not acting as agents for a later group who may be covered, and what is required is that the group can genuinely speak for the terms and conditions in the agreement.<sup>37</sup>

[33] We do not understand *One Key* to be authority for the proposition that a group of employees cannot have a sufficient interest in an agreement or be sufficiently representative for the purposes of determining whether it has been genuinely agreed, unless the group comprises employees in every classification and type of employment provided for in an agreement, or employees who are working in every geographical location, industry or sector where the agreement is capable of operating. Rather, the concept of sufficiency means that the employees have an interest in the agreement and are representative of the group of employees it will cover, to the extent that the Commission can reach a state of satisfaction that this matter indicates that the agreement is an authentic exercise in bargaining (or that the agreement is inauthentic). Accordingly, in determining whether the Commission is or is not satisfied that an enterprise agreement is genuinely agreed, all relevant facts and circumstances should be assessed with reference to the provisions in s. 188 and the Statement of Principles.

### **Statement of Principles on Genuine Agreement**

[34] The Statement of Principles supplements the requirements in s. 188(2) by setting out matters which may indicate whether an enterprise agreement lacks authenticity. Section 188(1) of the FW Act requires the Commission to take the Statement of Principles into account in determining whether it is satisfied that an enterprise agreement has been genuinely agreed by the employees covered. The requirement to take a matter into account means that the matter is a ‘relevant consideration’ which the decision maker is bound to ‘take into account’.<sup>38</sup> Taking a matter into account requires that it is evaluated and given due weight having regard to all other relevant factors. A matter is not taken into account by being noticed and erroneously discarded as irrelevant.<sup>39</sup>

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<sup>36</sup> *United Fire Fighters Union of Australia v Fire Rescue Victoria* [2023] FWCFB 180 at [27] citing *Buck v Bavone* [1976] HC 24, 135 CLR 110 at 118 – 119 (Gibbs CJ).

<sup>37</sup> *Ibid* at [157].

<sup>38</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 27.

<sup>39</sup> *Nestle Australia Ltd v Federal Commissioner of Taxation* (1987) 16 FCR 167 184.

**[35]** Principal 17 of the Statement of Principles deals with the sufficient interest and sufficiently representative issues relevant to this appeal, and is in the following terms:

17. In considering whether employees have a sufficient interest in the terms of an enterprise agreement as required by section 188(2)(a) of the Fair Work Act, and whether the employees are sufficiently representative as required by section 188(2)(b), the FWC may take into account:

- a. whether the employees entitled to vote on the enterprise agreement are to be paid the rates of pay provided for in the agreement, and
- b. the extent to which the employees entitled to vote on the enterprise agreement are employed across the full range of:
  - i. classifications in the agreement
  - ii. types of employment in the agreement (for example, full-time, part-time and casual)
  - iii. geographic locations the agreement covers, and
  - iv. industries and occupations the agreement covers.

...

NOTE: Section 188(2) provides that the FWC cannot be satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the employees requested to approve the agreement by voting for it:

- (a) have a sufficient interest in the terms of the agreement (section 188(2)(a)), and
- (b) are sufficiently representative, having regard to the employees the agreement is expressed to cover (section 188(2)(b)).

**[36]** The Statement of Principles is not exhaustive and nor are the Principles intended to operate as a checklist requiring a finding that an agreement is not authentic simply because one of the indicators of lack of authenticity listed in the Statement of Principles is identified. As a Full Bench of the Commission observed in *Shop, Distributive and Allied Employees Association v Allen Family Pty Ltd t/a Subway Clare, Subway Findon, Subway Broken Hill, Subway Kadina, Subway Port Adelaide, Subway Port Pirie*:<sup>40</sup>

[76] The important point to be made is that while the Commission is required to take into account the Statement of Statement of Principles in determining whether an agreement has been genuinely agreed, it does not operate as a set of mandatory rules that must be complied with by an employer absent which the Commission cannot be satisfied that an agreement has been genuinely agreed. Where an employer follows pre-approval steps that are consistent with the Statement of Statement of Principles, that would weigh more favourably towards a conclusion that an agreement has been genuinely agreed. The converse is equally true of course. The requirement to take into account the Statement of Statement of Principles does not displace the requirement to consider each of the other matters set out in s 188 in determining whether an agreement has been genuinely agreed.

**[37]** The Statement of Principles informs, but does not dictate or exclusively define, the scope of the broad evaluative exercise involved in the Commission determining whether the necessary state of satisfaction as to genuine agreement has been reached. The matters identified in the Statement of Principles are required to be evaluated and given due weight in the context of other relevant matters. We are also of the view that the amendments to the FW Act and the introduction of the Statement of Principles, do not limit the matters to which the Commission can have regard in reaching a state of satisfaction in relation to genuine agreement and the observation of the Full Court in *One Key* in relation to the former s. 188(c), that anything logically bearing on the question of whether the agreement of employees is genuine would be

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<sup>40</sup> [2024] FWCFB 48.

relevant to the exercise of determining whether a state of satisfaction that an enterprise agreement is genuinely agreed can be reached, continues to be apposite.<sup>41</sup>

### **Legislative framework relevant to sufficient interest and sufficiently representative**

[38] The Statement of Principles is made under the FW Act and must be construed to operate consistently with the objects and other relevant provisions of the FW Act. Relevantly, the term ‘enterprise’ in s. 12 of the FW Act is defined broadly to mean ‘a business, activity, project or undertaking’. It is trite that enterprises come in all shapes and sizes. Just as enterprises are different, so are the cohorts of employees who are employed in them. Consistent with the objects of the Act in relation to encouraging collective bargaining, and the diversity of enterprises and groups of employees involved in the bargaining process, the Statement of Principles should be applied in a way that supports the objective in s. 171(a) of a simple, flexible and fair framework, enabling collective bargaining in good faith, particularly at the enterprise level, for agreements that deliver productivity benefits.

[39] It is also necessary that the assessment in relation to the matters in s 188(2)(a) and (b) is undertaken in the context of the rationale for the legislative framework for enterprise bargaining. In relation to genuine agreement, the evaluative approach to be applied does not simply involve identifying the existence of objective facts relevant to each Principle and then deciding that because those facts exist, an enterprise agreement is or is not genuine. As the Full Court explained in *One Key*, the rationale for the requirement that an enterprise agreement is genuinely agreed, is to support the framework of the FW Act, which focuses on encouraging collective bargaining at the enterprise level as a means of achieving productivity and fairness, and provides that together with modern awards and the NES, enterprise agreements are one of the main sources of terms and conditions of employment. In this respect the Full Court made clear that the concept of genuine agreement is directed at preventing collective bargaining from being undermined by employees who vote on an enterprise agreement having no basis for appreciating its nature and terms, and no conceivable interest in classifications and jobs other than their own and likely acting out of self-interest.<sup>42</sup>

[40] It is important to note that notwithstanding the cases concerned with inauthentic small-cohort agreements, the Full Court in *One Key* said that there is nothing inherently wrong or impermissible in the idea that a small group of employees can fix the terms and conditions that will be available to a larger group of future employees.<sup>43</sup> The Full Court also said that concerns that such agreements may undermine collective bargaining are addressed by the FW Act’s ‘protective provisions’ rather than prohibition. In this regard, the protective provisions identified by the Full Court are the ‘fairly chosen’ requirement, the BOOT, and the requirement for ‘genuine agreement’.<sup>44</sup>

[41] The rationale for the previous legislation identified by the Full Court in *One Key*, also underpins the amendments to the FW Act which provide for the Statement of Principles and the

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<sup>41</sup> *One Key* op. cit. at [142].

<sup>42</sup> *Ibid* at [156].

<sup>43</sup> *Ibid* at [161].

<sup>44</sup> *Ibid* at [152] – [154], citing the High Court decision in *ALDI Foods Pty Ltd v Shop, Distributive and Allied Employees Association* [2017] HCA 53; (2017) 350 ALR 381 at [84] – [87].

current provisions of the Act relevant to genuine agreement. The protective provisions identified by the Full Court are still in effect and to those could be added the right of employees to be represented in bargaining, the right of bargaining representatives to have their views considered in the process of the approval of an enterprise agreement, the application of the principle of open justice to applications for approval of enterprise agreements<sup>45</sup>, and the ability of organisations having the right to represent employees covered, to seek to be heard in the approval of an enterprise agreement in relation to matters including whether the agreement has been genuinely agreed and is an authentic exercise in bargaining. These protective provisions apply in addition to the requirement that the Commission be satisfied that an enterprise agreement is genuinely agreed before approving it.

[42] Those cases Also relevant are the characteristics of the employees who are requested to approve the agreement, including their work history, skills, qualifications and experience. If those matters are relevant to a finding that employees do not have a sufficient interest or that the relevant group of employees is not sufficiently representative, so that an enterprise agreement is inauthentic and ingenuine, the converse applies, and the same matters may also be relevant to the Commission reaching a state of satisfaction that an agreement is authentic and genuinely agreed. To make good this proposition, we turn now to consider the discussion of these matters in *One Key* and other relevant cases.

### **The nature of the employer’s business/enterprise**

[43] *One Key* and the cases considered in that decision establish that relevant matters for determining whether voting has a sufficient interest in an agreement or is not sufficiently representative of the employees it is expressed to cover, include the nature of the business or enterprise seeking to make the agreement, its history, activities, the industries or sectors it operates in, its plans for growth or expansion and its bargaining history. The life cycle of a business making an agreement has been relevant in several cases concerning genuineness. The Full Court in *One Key* said that an agreement made early in the life of an enterprise, with two or three employees, and before the employment of a larger workforce necessary to operate the business of the enterprise, is more likely to be inauthentic because it reflects characteristics of individual rather than collective bargaining, with a resultant power imbalance.<sup>46</sup>

[44] Similarly, in *Re KCL Industries (KCL)*<sup>47</sup> a Full Bench of the Commission noted that the employer’s industry was declared to be manufacturing with its primary activity described as ‘manufacturing including providing services on coal sites’.<sup>48</sup> The employer submitted in response to concerns of the Commission about whether the ‘genuinely agreed’ requirement in then s. 188(c) was met, that the broad coverage of the agreement was necessary because while the employees who voted to approve it were covered by the *Manufacturing and Associated Industries and Occupations Award* it was ‘feasible’ that in time its business ‘may develop and be mine based’ requiring classifications under the *Black Coal Mining Industry Award*.<sup>49</sup>

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<sup>45</sup> *Construction, Forestry, Mining and Energy Union v Ron Southon Pty Ltd* [2016] FWCFB 8413; *Construction, Forestry, Mining and Energy Union v Mobilise Group Pty Ltd* [2021] FWCFB 552.

<sup>46</sup> *One Key Op.* cit. at [151].

<sup>47</sup> [2016] FWCFB 3048 at [41].

<sup>48</sup> *Ibid* at [32].

<sup>49</sup> *Ibid* at [35]

[45] The Full Bench rejected KCL’s submission stating that ‘the [A]greement covers a wide range of classifications most of which have no relevance to the work performed by KCL’s three existing employees, encompasses industries in which KCL does not currently operate, and contains rates of pay which, even in respect of classifications relevant to the current employees, are not to apply to those employees.’<sup>50</sup> The Full Bench in *KCL* also referred with approval to a decision of the Commission concerning an agreement incorporating industries that no voting employee was engaged in at the time, where the following observation was made:

‘It is understandable and unremarkable that employees voting on an agreement will not always cover the full range of classifications in a modern award that the agreement is to either supplant or as in this Agreement, incorporate, subject to the terms of the Agreement. It is another matter for employees to make an enterprise agreement covering industries where no employees in any classification are engaged when the agreement is made and may possibly never be engaged.’<sup>51</sup>

[46] The Full Bench in *KCL* also rejected the contention that agreements covering a wide range of classifications and a few employees had commonly been approved based on an employer’s intention to expand its operations and said that the submission did not pay regard to the distinction between an agreement which accommodates a wider range of classifications in the business in which the employer is currently engaged, and an agreement which extends into industries in which the business has never previously operated.<sup>52</sup>

[47] Relevantly in *John Holland Buchanan J* set out the pros and cons of an agreement made early in the life of an enterprise and one made later, and went on to say:

33. There is no requirement that employees who vote to make an agreement must have been in employment for any length of time, and there is no requirement that they remain in employment after the agreement is made. Presumably, the presently employed members of such a group will act from self-interest, rather than from any particular concern for the interests of future employees. The potential for manipulation of the agreement-making procedures is, accordingly, a real one. However, no suggestion of that kind is made in the present case and the possibility may therefore be put to one side for the purpose of the discussion. That is an important consideration because it suggests, as the primary judge thought, that determination of whether the group of employees was fairly chosen in the present case needed to bring to account the business rationale for the choice, as well as deal with any possibility of unfair exploitation. It was not irrelevant in that assessment to bear in mind, as the primary judge said, that the agreement provided benefits, not detriments, for those to whom it would apply.<sup>53</sup>

[48] The passage above indicates that it is not always the case that a small group of employees making an agreement early in the life of an enterprise will be inauthentic. If the matters outlined above indicate that an agreement lacks authenticity, then conversely, evidence that a business is well established and has a history of operations in industries or industry sectors, may indicate that an enterprise is an authentic exercise in agreement making, notwithstanding that the agreement covers a narrower range of employees at the time it is made than the group it is expressed to cover. A distinction in this regard was drawn in *KCL* with an earlier Full Bench decision in *Communications, Electrical, Electronic, Energy, Information,*

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<sup>50</sup> Ibid at [36].

<sup>51</sup> *McMah Pty Ltd Enterprise Agreement 2014 – 2018* [2015] FWCA 253 at [31] per Bull C (as he then was).

<sup>52</sup> *KCL* op. cit. at [40] – [41].

<sup>53</sup> *John Holland* op. cit. at [33].

*Postal, Plumbing and Allied Services Union of Australia v Sustaining Works Pty Ltd*<sup>54</sup> (*Sustaining Works*) where the employer's business was to obtain a small-scale project in a particular industry sector which would later require a broader range of employees than it employed when the agreement was made, and the planned expansion was an 'intelligible and legitimate business rationale' for the selection of the employees to be covered by the agreement.<sup>55</sup>

[49] In our opinion, the cases allow for a distinction between an agreement made by a business that already undertakes work in one industry sector, and seeks to expand its operations in that sector or to perform the same or similar work in industries or industry sectors where it does not currently operate, and a business seeking to make a wide ranging agreement purporting to operate in diverse industry sectors, on a hypothetical basis, to cover work it does not currently perform, or industries where it does not currently operate. In the former case there may be an intelligible and legitimate business rationale for the selection of a small group of employees with specific skills, to be covered by an agreement, with the intention of increasing that workforce contingent on the success of the planned expansion, while in the latter case there is not such a rationale.

[50] Finally, it is unremarkable that employers undertaking project work have peaks and troughs in terms of employee numbers when they win and lose projects or complete projects in circumstances where there are no prospective projects on the horizon, and that numbers of employees increase and decrease accordingly. It is also unremarkable that employers who undertake work of this kind employ casual employees, and in some cases exclusively.

### **The skills, qualifications and experience of the voting group**

[51] *One Key* and the cases considered in that decision also establish that the skills, qualifications and competency of employees covered by a proposed agreement are relevant for the purposes of determining that a voting group does not have a sufficient interest in an agreement or is not sufficiently representative of the employees it is expressed to cover. It is well established that an enterprise agreement covering a wide range of classifications in which employees are not currently employed, encompassing industries in which the employer does not operate, and containing rates of pay not applicable to those employees, will likely be found not to be genuinely agreed because the employees have no stake in the agreement and could not have given informed consent in relation to occupations and industries in which they do not work and in relation to which they have no experience.<sup>56</sup> *One Key* is an example of such a case. There the Full Court noted the questions raised by the primary Judge as to the ability or appropriateness of three employees (with their particular employment backgrounds in the black coal and manufacturing industries) being called upon to agree to terms and conditions covering other employees in other diverse areas.<sup>57</sup>

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<sup>54</sup> [2015] FWCFB 4422.

<sup>55</sup> *KCL* op. cit. at [41] noting that the decision in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Sustaining Works Pty Ltd* concerned whether the group of employees was fairly chosen.

<sup>56</sup> *Appeal by KCL Industries Pty Ltd* [2016] FWCFB 3048 at [36].

<sup>57</sup> *One Key* op. cit. at [78].

[52] The Full Court in *One Key* also said that although members of the group of employees covered by a proposed enterprise agreement are not required to be representatives for, or agents of, the wider group of employees who may ultimately be covered, the fact that the group does not broadly reflect the occupational scope of the agreement restricts the terms and conditions for which the group can genuinely speak.<sup>58</sup> The ‘vast disparity of occupational classifications as between those held by the three individuals who voted and the classifications covered by the Agreement’,<sup>59</sup> was also noted by the Full Court in *One Key* as a matter of relevance to genuine agreement and the court opined in relation to the decision of the Commission to approve the agreement, that:

‘How it was that the three employees might be regarded as having had a sufficient appreciation of the appropriateness of the terms and conditions proposed for the disparate occupational classifications covered, including in industries foreign to their own, was not identified by the Commissioner as a factor relevant to the genuineness of the approval and was not the subject of his consideration. Whether the three employees had appreciated the terms and conditions provided for by the Agreement, beyond those of direct interest and relevance to them, and thereby “genuinely agreed” to its terms (not just those that directly affected them) should have been considered.’<sup>60</sup>

[53] In addition to dealing with the relevance of the employer’s operations to the question of ‘genuine agreement’, the Full Bench in *KCL* referred to an obvious disjunction between the experience of the employees who voted to approve the agreement and the work covered. The relevant facts in that case were that three employees (including two casual employees) employed at the trades level under the *Manufacturing and Associated Industries and Occupations Award*, were requested to approve an agreement in circumstances containing classifications and rates of pay including classifications for private sector clerical employees, and production and staff employees in the black coal mining industry. The Full Bench noted that there was nothing to suggest that employees who had worked in the manufacturing industry had any knowledge of the existence of provisions in the *Black Coal Mining Industry Award* tailored to the unique circumstances of that industry, and that it was impossible to conclude that provisions of the agreement applicable to black coal mining were agreed with the informed consent of the employees who were requested to approve the agreement.<sup>61</sup>

[54] In *The Australian Workers’ Union v Moag Pty Ltd*<sup>62</sup> (*Moag*) it was contended by the AWU that the employees who voted on the agreement did not have a sufficient interest in its terms, and were not representative of the employees who would be covered by it, and that one matter that could logically bear on the question of ‘genuine agreement’ was whether a small voting cohort had sufficient appreciation of the appropriateness of the terms and conditions proposed for disparate occupational classifications. In that case, it was argued that four employees employed in four occupations out of the 39 listed in the Agreement, could not have been familiar with the conditions of the other classifications and had no stake in the bulk of its terms such that the Agreement lacked authenticity.<sup>63</sup> The Full Bench rejected this proposition finding that:

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<sup>58</sup> Ibid at [157].

<sup>59</sup> Ibid at [168].

<sup>60</sup> Ibid at [168].

<sup>61</sup> *KCL* op. cit. at 37.

<sup>62</sup> [2024] FWCFB 259.

<sup>63</sup> Ibid at [15].

‘...although there was a small voting cohort, it was not the case that they had no stake in the Agreement, nor were they unrepresentative. A critical point of context was that the employees were employed under the predecessor agreement which was being rolled over with a significant wage increase. They had an obvious stake in the agreement, and they were representative of its coverage, in the sense that they were all of the employees employed at the time who were covered by the previous agreement and hence would be covered by the new one. There is no suggestion in this case of the Agreement being an artifice designed to serve as an instrumental Trojan horse, one in which a small few would vote into existence a framework soon to apply to a large and disparate group.’ The voting group was covered by an agreement that had existed for a number of years and was now voting on a new agreement with the same coverage.’<sup>64</sup>

**[55]** Another circumstance involving the skills, qualifications and experience of employees which may be relevant to ‘genuine agreement’ involves a group of employees in higher level classifications with higher wage rates approving an enterprise agreement providing significantly lower wage rates for employees in lower-level classifications, where there are no employees in those lower-level classifications.<sup>65</sup>

**[56]** It is axiomatic that a conclusion that an agreement was not genuinely approved, based on an assessment of disparity between the ‘occupational classifications’ of the employees who voted on the agreement and the classifications covered, or the fact that the voting group comprises employees in only a few classifications, requires consideration of the actual skills, qualifications and experience of the members of the voting cohort, rather than a simple comparison between classifications the voting group is employed in at the time the agreement is voted on, and other classifications in the agreement which members of the voting cohort are not employed in.

**[57]** The capacity of employees to understand the terms and conditions in an enterprise agreement, and the effect of those terms, as discussed by the Full Court in *John Holland* is crucial to genuine agreement. Capacity of that kind relates to the actual capacity of the employees who made the agreement and cannot be decided in the abstract or hypothetically. Nor can it be decided based on experience, skills and qualifications that employees are using at the time they are requested to approve an agreement, in circumstances where they hold other experience, skills and qualifications from past employment, that are relevant to the classifications that they are not presently employed in and which are provided for in the proposed agreement. To disregard the previous working history, skills, qualifications and experience of employees who are requested to approve an enterprise agreement is an artificial constraint that has no regard to the reality, that employees may have the capacity to appreciate the appropriateness of the terms and conditions proposed for classifications in which they are not currently employed but have previously been employed in, or may be employed in at a future time.<sup>66</sup>

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<sup>64</sup> Ibid at 18.

<sup>65</sup> See analysis of Durham C in *Hawthorn Plant and Logistics Pty Ltd* [2024] FWC 2756 which considered circumstances where employees classified at CW3 – CW6 voting to approve an enterprise agreement providing significantly lower rates for classification levels CW1 and CW2, in which no employees were employed. Durham C found that the group of employees classified at higher levels were not sufficiently representative of employees who would be classified at lower levels, and in circumstances where there were BOOT and other issues, refused to approve an enterprise agreement.

<sup>66</sup> *One Key* op. cit. at [155] citing *Construction, Forestry Mining and Energy Union v John Holland Pty Ltd* [2015] FCAFC 16; 228 FCR 297 at [33] per Buchanan J (Besanko and Barker agreeing).

[58] This approach is also consistent with the observations of the Full Court in *One Key* with respect to the Commission reaching the necessary state of satisfaction in relation to requirement that the terms of an agreement and their effect are explained to employees. The Court said that for this purpose, it is necessary that the Commission consider not only whether an explanation of the terms of agreement was provided, but in addition, the content of the explanation and the terms in which it was conveyed, ‘having regard to the circumstances and needs of the employees’. The Full Court also observed that while the FW Act does not expressly require this, the question of whether an administrative decision maker is required to consider a matter, is not determined by the express words of the Act but may also be determined by reference to the subject-matter, scope and purpose of the Act.<sup>67</sup>

[59] Applying the same principle in the present case, the purpose of s. 188(2)(b) is to focus the attention of the Commission on the capacity of members of the group of employees who are requested to approve an agreement, to speak for the agreement, not only on their own behalf, but on behalf of other future employees in other classifications in the agreement. As we have stated, the group who vote on an agreement is required to be ‘sufficiently representative’ and not representative in an absolute sense, and there is no requirement that the employees who make an agreement are able to speak for all the classifications of employees it will cover. In considering the sufficiently representative issue, it is open to the Commission to have regard to evidence of previous work experience, where it is determining whether satisfaction can be reached in relation to the capacity of the group of employees to speak for the agreement. The capacity of an employee to speak for an agreement from the perspective of a particular employment classification or type of employment, may be acquired from previous work experience.

[60] Similarly, an all-casual group of employees may be found to be representative of full-time and part-time employees an agreement is expressed to cover, because the agreement contains a casual conversion term that casual employees may benefit from, the employees have previous experience of working on a full-time and/or part-time basis, and they are otherwise classified across the range of classifications provided for in the agreement.

[61] The observations of the Court in *John Holland* indicate the need for an evaluative approach to reaching a state of satisfaction in relation to genuine agreement, and that the search is for authenticity, rather than factors which, while they may be indicators of an agreement being ingenuine, are also capable of being found to be matters that are legitimate or unremarkable, based on the nature of the enterprise or the characteristics of the employees who were requested to approve the agreement.

### **Other matters relevant to genuine agreement**

[62] Matters such as the provision of misleading information or the absence of full disclosure or the likelihood that the relevant employees understood the operation of the awards affected by the agreement, and the extent to which wages and working conditions under those awards

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<sup>67</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39 – 44 per Mason J.

would change, for better or worse, under the terms of the agreement will be relevant to the authenticity of the agreement.<sup>68</sup>

**[63]** The size of a cohort of employees who make an enterprise agreement is relevant but not determinative as to whether it has been genuinely agreed. An enterprise agreement may be made with two or more employees for an already existing enterprise, so long as they are the only employees employed at the time of the vote who will be covered by the agreement and it does not matter that the agreement, may come to apply to many more employees. In the case of a small but already existing enterprise, it is uncontroversial that the votes of a few original employees may eventually bind a much larger group as the enterprise grows.<sup>69</sup>

**[64]** Further matters that may inform a view on the authenticity of the agreement-making process include whether the agreement was truly intended to cover and apply to the employees with whom it is made or is merely a device to achieve a collateral industrial or commercial objective, or an ‘instrumental Trojan horse’.<sup>70</sup> Also relevant will be the history of bargaining in the enterprise, whether the employer operates a genuine and well-established business enterprise and that the agreement was made for the purpose of setting the terms and conditions of employment of the relevant employees.<sup>71</sup> Whether formal bargaining has taken place is relevant, but not determinative, as is whether bargaining representatives were involved in the agreement-making process.<sup>72</sup> However where one or more employee organisations acting as bargaining representatives for a significant proportion of employees covered by an agreement support its approval, and do not have concerns that it was not genuinely agreed, this should be given significant weight by the Commission.

**[65]** In some cases, it will be clear on the face of the application and supporting documents that the agreement is an authentic exercise in bargaining. In other cases, there may be indications that the agreement of employees is not genuine, as was the case in *One Key*. There may also be cases where on the face of the supporting documentation genuine agreement has been reached, but the documentation contains false information and the process by which the agreement was purportedly made, is a sham. The significance of the right of employees to be represented in bargaining, and the role of registered organisations in maintaining the integrity of bargaining process, cannot be overstated. However, the fact that an organisation of employees considers that the terms and conditions of employment provided for in an enterprise agreement are beneath industry standards in other enterprise agreements, is not of itself a legitimate basis for opposition to the approval of an enterprise agreement or an indication that an agreement is not genuinely agreed to.

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<sup>68</sup> Ibid at [142] albeit this observation was made in relation to former s. 188(c), which provided that after considering other listed matters relevant to genuine agreement, the Commission was required to be satisfied that there were no other reasonable grounds for believing that the agreement had not been genuinely agreed.

<sup>69</sup> *ALDI* op. cit. at [86].

<sup>70</sup> *Moag* op. cit. at [18].

<sup>71</sup> *Shop, Distributive and Allied Employees Association v Allen Family Pty Ltd t/a Subway Clare, Subway Findon, Subway Broken Hill, Subway Kadina, Subway Port Adelaide, Subway Port Pirie* [2024] FWCFB 48 at [97].

<sup>72</sup> Ibid at [96].

## Whether permission to appeal should be granted

[66] For permission to appeal to be granted and for the appeal to be upheld, it is necessary for IAS to demonstrate appealable error. The provisions of the FW Act concerning the Commission being satisfied that an enterprise agreement is genuinely agreed to involve broad value judgments and a considerable degree of subjectivity. The consequence is that the decision-making process required to approve an enterprise agreement involves the exercise of discretion or satisfaction in relation to statutory criteria. What might constitute appealable error in an appeal from a decision of the Commission to approve an enterprise agreement was discussed in *Diamond Offshore General Company v Baldwin*<sup>73</sup>, where a Full Bench of the Commission explained:

[25] To the extent that part of the decision-making process required to approve an agreement involves the exercise of discretion or satisfaction in relation to statutory criteria, the Statement of Principles relevant to appealable error in relation to such decisions are well established. An appealable error in a decision involving the exercise of discretion is an error of the kind identified in *House v The King*. An error in relation to satisfaction is a question as to whether the decision maker has reached a 'state of mind which must be formed reasonably and on a correct understanding of the law.'<sup>74</sup> (emphasis in original)

[67] The Full Bench in that case also observed that there is an element of overlap between discretionary error and satisfaction error. Discretionary error involves an error in the exercise of discretion, or acting on a wrong principle, being guided or affected by extraneous matters, mistaking facts or failing to take a material consideration into account.<sup>75</sup> Satisfaction error involves misdirection in law or failure to consider matters that were required to be considered in reaching a state of satisfaction, or taking irrelevant matters into account.<sup>76</sup> Regardless, of whether the error is discretionary error or satisfaction error, as the Full Court of the Federal Court observed in *One Key*, where a statute vests a power in, or imposes a duty on an administrative decision maker to do something upon reaching a state of satisfaction, and matters the decision maker is required to take into account are not considered, as a matter of law, the requisite state of satisfaction is not reached and relief may be granted.<sup>77</sup> These descriptions are apt to describe error in a decision of the Commission approving or refusing to approve an enterprise agreement.

[68] In our opinion the Commissioner erred in the present case by determining that the 2024 Agreement was not genuinely agreed, based on the finding that the employees who were requested to approve the 2024 Agreement were not representative of the employees it is expressed to cover, for the sole reason that the voting cohort was comprised of only casual employees. In focusing only on the casual status of the voting cohort, the Commissioner did not have regard to evidence of other matters relevant to determining whether the necessary state of satisfaction had been reached, that were required to be taken into account. That evidence weighed in favour of a finding that the group of employees who made the 2024 Agreement was

<sup>73</sup> [2018] FWCFB 6907; (2018) 284 IR 1.

<sup>74</sup> Ibid at [25].

<sup>75</sup> *House v The King* (1936) 55 CLR 499 at [504]-[505] per Dixon, Evatt and McTiernan JJ.

<sup>76</sup> *Buck v Bavone Bavone* [1976] HCA 24, 135 CLR 110 at 118-119 (Gibbs J).

<sup>77</sup> Ibid at 109, citing *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 (Dixon J); *Buck v Bavone* (1976) 135 CLR 110 at 118-119 (Gibbs J) (approved by Brennan CJ, Toohey, McHugh and Gummow JJ in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 275); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [54].

sufficiently representative of the employees the Agreement was expressed to cover, notwithstanding that the voting cohort was composed entirely of casual employees.

[69] It is also the case that the Commissioner did not take into account the Statement of Principles, other than Principle 17(b)(ii) (types of employment in the agreement) and Principle 17(b)(iii) (geographical operation of the agreement) in relation to genuine agreement, contrary to the requirement (must) in s. 188(1) of the FW Act that all relevant provisions in the Statement of Principles are to be taken into account. As a result of relevant evidence not being considered and the Commissioner's failure to take into account the Statement of Principles as described, the decision-making process by which the Commissioner determined, that she had not reached the required state of satisfaction as to the 'sufficiently representative issue' and genuine agreement, miscarried. That determination is unsound and should not stand.

[70] We are also of the view that the appeal raises issues of wider importance and general application concerning the approach to considering whether an enterprise agreement has been genuinely agreed, in circumstances where all members of the cohort of employees who were requested to approve the agreement were employed on a casual basis and to the relevance of the previous work history of employees to considering whether they have a sufficient interest in the agreement and are sufficiently representative having regard to the employees the agreement is expressed to cover.

## **Consideration**

### **Appeal ground 1 – the 'sufficiently representative' issue**

[71] Appeal ground 1 centres on the Commissioner's findings in relation to whether the Agreement was genuinely agreed by the employees who were requested to approve it. As we have noted, the Commissioner decided that the 2024 Agreement was not genuinely agreed based on not being satisfied that the employees requested to approve the Agreement were sufficiently representative of employees it was expressed to cover. The Commissioner reached this conclusion on the basis that employees in the voting cohort were employed solely on a casual basis, having had regard to the 2024 Agreement not being a 'rollover' of the 2019 Agreement such that it included changes to conditions applicable only to permanent employees, and the breadth of coverage. The Appellant contends that in reaching this conclusion, the Commissioner failed to have proper regard to Attachment DC-2 to the witness statement of Mr Cochrane.

[72] As the Commissioner correctly observed in paragraph [38] there is no rule to the effect that a voting cohort comprising only casuals or another category of employees, cannot have a sufficient interest in, or be representative of employees in relation to, an enterprise agreement that covers other categories of employment. However, having made that observation, the Commissioner determined that the relevant employees were not sufficiently representative, based almost entirely on the fact of their casual employment.

[73] The Commissioner's focus on the all-casual nature of the cohort rather than the evidence and submissions about other relevant matters, including the characteristics of the voting cohort, as indicated by Attachment DC-2 to Mr Cochrane's witness statement and other evidence, is apparent from the following conclusions: the cohort was not representative given that the

2024 Agreement also covers full-time and part-time employees (paragraph [39]); IAS did not provide evidence about whether it had employed full-time and part-time employees in the past (paragraph [40]); the only evidence tendered on the [sufficiently representative] issue is a single sentence in Mr Cochrane’s witness statement about the employment experience of IAS employees (paragraph [41]); and that as the Commissioner was not satisfied that the employees requested to approve the 2024 Agreement were sufficiently representative, it was not genuinely agreed to and could not be approved (paragraph [58]).

[74] In oral submissions in the appeal, counsel for the Appellant observed that the cases conducted at first instance by the parties ‘passed like ships in the night’ and that the Commissioner decided the matter on a basis that differed from the submissions of the parties – the all-casual issue. That assertion is not entirely accurate. We accept that to the extent the all-casual issue was raised with the Appellant by the Commission’s enterprise agreements team, it was raised in the context of whether all employees were eligible to vote in the ballot to approve the Agreement. However, the Appellant was on notice prior to the first instance hearing that the all-casual cohort was an issue that would be pressed by the Unions as an element of their contention that the voting cohort was not sufficiently representative. The AWU and the CEPU filed their submissions before those of IAS. While the all-casual nature of the cohort who voted to approve the 2024 Agreement was not advanced as a determinative or standalone point, it was one of the matters identified in the AWU and ETU submissions to assert that the 2024 Agreement was not genuinely agreed.

[75] In relation to other matters going to the sufficiently representative issue, the written submissions filed by the AWU in the first instance hearing state that the 2024 Agreement was intended to operate throughout Australia, to employees in 31 ‘classifications’ (described in the 2024 Agreement as tasks), the employees who were requested to approve the Agreement were classified in only five classifications, and those employees were working only in Western Australia. The AWU also submitted that:

‘Taken together, the employee cohort that voted on the Proposed Agreement are all casual employees (a single type of employment), the vast majority are engaged in maintenance work on offshore hydrocarbons facilities (a single sub-sector of one industry) off the coast of Western Australia (a single state) in only five of approximately 40 classifications – a dramatically smaller and more specific cohort than that represented by the incredibly broad scope of the Proposed Agreement.

If approved, the vast majority of employees to be covered by the Proposed Agreement will have had no input into the terms and conditions of their employment.’<sup>78</sup> (emphasis added)

[76] That the all-casual cohort was not central to the submission in relation to lack of authenticity, is also apparent from paragraph 25 of the AWU’s written submission that:

‘The Proposed Agreement sets the terms and conditions of employment for all employees in over three dozen classifications in several industries and sectors of industry, Australia wide. The cohort of employees who voted on these terms and conditions were representative of only a small fraction of these employees:

- a. A third of the employment types;
- b. Less than a third of the industries;
- c. A third of the sectors in the hydrocarbons industry;

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<sup>78</sup> Appeal Book page 107 – AWU written submissions

- d. One eighth of the geographical areas (arguably less as the employees are all engaged offshore and the Proposed Agreement applies both on - and offshore); and
- e. Approximately one sixth of the classifications.<sup>79</sup> (emphasis added)

[77] The reference to employment types, is a reference to what are described in modern awards as ‘categories’ of employment comprising full-time, part-time or casual employment. These contentions were repeated in the AWU’s submission in reply. The AWU also took issue with the sample resumes tendered by IAS and contended that the past roles of employees with other companies are not relevant and the only relevant employment for determining whether the cohort who voted for the Agreement is representative, is the employment being undertaken by members of the cohort at the time they are requested to approve an agreement. The CEPU’s written submissions supported those of the AWU and emphasised that while the 2024 Agreement provides for full-time, part-time and casual employees, only casual employees were represented in the ballot. The CEPU’s submissions in reply did not refer to the all-casual issue and emphasised that the employees who voted in the ballot, did not include those classified as: Instrument Electrician, Senior Trade Technician, Tube Fitter, Supervisor, and Trade Skilled Services. It was also submitted by the CEPU that the ‘overwhelming majority’ of employees on the schedule of those who participated in the ballot, are not described by reference to their role under the 2024 Agreement and that the 2024 Agreement was unclear in relation to how appointments under the classification structure operate.

[78] The asserted breadth of the classification structure and the limited number of classifications filled by employees who were requested to approve the 2024 Agreement was also emphasised in the AWU’s oral submissions<sup>80</sup> at the first instance hearing, with the issue of the all-casual cohort being only briefly referred to.<sup>81</sup> The CEPU’s oral submissions supported those of the AWU and made one reference to the all-casual cohort issue.<sup>82</sup> The written submissions filed by IAS at first instance in relation to the assertion that the cohort was not representative, emphasised that the 2024 Agreement was a ‘roll-over’ agreement of existing arrangements including coverage, which date back through two previous agreements, to 2014.

[79] As IAS acknowledged in its submissions in the appeal, the term ‘roll over’ is not apt to describe the 2024 Agreement. That concession is correct and, in our opinion, the use of this term by IAS in its first instance submissions muddied the waters. The correct position is that the 2024 Agreement operated in the same geographical areas, covered the same work, and encompassed essentially the same classifications as those in the previous 2019 Agreement – albeit the 2024 Agreement contains additional classification levels. Otherwise, the 2024 Agreement differed from the 2019 Agreement in numerous aspects and could not be described as a ‘roll over’ of the kind discussed by the Full Bench in *Moag*. Notwithstanding the infelicity of expression associated with the Appellant’s description of the 2024 Agreement as a roll over, consistent with the decision in *Moag* the voting group was covered by an agreement that had existed for a number of years and was now voting on a new agreement with the same coverage, and there was no suggestion that the 2024 Agreement was an ‘instrumental Trojan horse’ – the AWU explicitly disavowed such a suggestion.<sup>83</sup>

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<sup>79</sup> Ibid.

<sup>80</sup> Transcript of hearing on 19 December 2024, PN570 – PN 578.

<sup>81</sup> Transcript of hearing on 19 December 2024, PN569 and 578.

<sup>82</sup> Transcript of hearing on 19 December 2024, PN615.

<sup>83</sup> Transcript of hearing on 19 December 2024, PN582.

**[80]** The Commissioner's observation that the evidence from IAS about the sufficiently representative issue consisted of a single sentence in Mr Cochrane's witness statement, is not correct. The Commissioner's observation was concerned with the perceived lack of evidence from IAS about whether it had employed full-time or part-time employees in the past, or whether employees were aware of the casual conversion process in the 2024 Agreement, or if they had gone through a casual conversion process. IAS did not rely on the sample resumes only as a response to the assertion that the group of employees was not sufficiently representative because it comprised only casual employees. The resumes were also relied on to support a submission that the employees in the voting group had a broad range of skills, qualifications and experience, to be sufficiently representative of all the classifications in the 2024 Agreement, to address the all-casual issue, and to counter the contentions of the AWU and the CEPU to the contrary.

**[81]** In this regard, IAS submitted at first instance that having regard to the sample resumes, the cohort of employees who were requested to approve the 2024 Agreement had more than sufficient experience in number, types of work and locations for the FWC to be satisfied that they were sufficiently representative for the purposes of the Statement of Principles, ensuring that collective bargaining was genuinely engaged in, and that the employees were represented by the AWU and the CEPU, together with individual bargaining representatives. In oral submissions at first instance, IAS emphasised Mr Cochrane's evidence that the employees were employed in six of the eight classifications provided for in the 2024 Agreement and that proportionality between the cohort of employees and the scope of the Agreement was only one factor to be considered.<sup>84</sup> The Commissioner does not appear to have considered this evidence or to have weighed it against the concern about the all-casual issue.

**[82]** In the appeal, IAS submitted that if the Commissioner had considered the evidence including Attachment DC-2 to the witness statement of Mr Cochrane, the only reasonable inference that could have been drawn, would be that the voting cohort had significant knowledge and experience in part-time and full-time employment that would allow them to make informed decisions in regards to any provisions of the 2024 Agreement affecting those types of employees and to represent their interests. While we would not go so far as to agree that this inference was the only reasonable one that could have been drawn in relation to Attachment DC-2, we agree with the Appellant's contention that the Commissioner did not have regard to the evidence of Mr Cochrane in this respect, other relevant evidence tendered by the Appellant, and to contextual information that was available from the application and supporting material and also the 2019 Agreement, and that this constitutes appealable error.

**[83]** For the reasons we have set out above in relation to the relevance of the work history, skills, qualifications and experience of employees to the question of 'genuine agreement', we do not accept the submission of the Unions in the appeal that the resumes in DC-2 were irrelevant to the Commissioner's analysis in relation to s. 188(2)(b). Contrary to the Unions' submission, the relevance of the resumes is not limited to the categories of employment (full time, part time and casual) in which the employees had previously been employed. The resumes also established that at least some of the employees have the necessary skills, competence and training relevant to all the classification levels in the Agreement, noting that the classification

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<sup>84</sup> Transcript of hearing on 19 December 2024, PN487 – 496.

structure does not require an employee to perform all the duties at a particular level to be classified at that level. Mr Cochrane and other witnesses for the Appellant gave detailed evidence in their witness statements about DC-2 and the conclusions they said should be drawn from the resumes and other material appended to their witness statements. That evidence was given in the context of evidence about the operations undertaken by IAS which also supports the proposition that its employees have a broad range of skills and have exercised them in a range of industry sectors and at locations throughout Australia. As we have noted that evidence was uncontested. It was relevant to the matters the Commissioner was required to determine, and was not taken into account in the Commissioner reaching her conclusion that the 2024 Agreement was not genuinely agreed.

**[84]** Further we do not accept the assertion that even if the Commissioner had considered DC-2, that it is unclear what the evidence would prove. We are of the view that the failure to have regard to this evidence was material and that had these matters been considered, it is probable that the outcome would have been different. Further, the Commissioner did not have regard for the Appellant's submissions that the sufficiently representative issue involves a search for authenticity, and that regard must be had to other relevant matters in that search including the history of bargaining, the scope of any predecessor agreement, fluctuations in the employer's workforce and the nature of its business. The employees who voted to approve the 2024 Agreement were all the employees covered by the 2019 Agreement employed at the time.<sup>85</sup> However, as we have noted, the Commissioner was not assisted in her task, and the Appellant at first instance did not clearly articulate its case or identify key aspects in the evidence that was before the Commissioner, relevant to the issue she was deciding.

**[85]** The Unions' submissions are based on a proposition that, at the point the Commission is determining whether it is satisfied that an enterprise agreement is 'genuinely agreed' for purpose of determining the sufficiently representative issue (and the sufficient interest issue), the only relevant skills, qualifications and experience of employees who are requested to approve the agreement, are those actually being used by the cohort of employees covered by the agreement at the time it is negotiated and made. A related proposition is that to the extent that the classification of employees under the proposed agreement is relevant, consideration in relation to whether the employees are 'sufficiently representative' is determined by, and limited to, the classifications that will apply to them under the proposed agreement based on their current duties. Implicitly the same proposition is advanced for the 'sufficient interest' issue. The proposition cannot be accepted for the reasons set out below.

**[86]** *Firstly*, acceptance requires that the assessment of 'sufficient' is conducted from a notional ground zero, with no regard to the attributes that employees bring to their employment from experience with other employers, and in industries other than the one in which they are working at the time they are requested to approve an agreement. Such an approach is counterintuitive and unrealistic. It is also inconsistent with the history of the modern awards underpinning bargaining, including the development of classification structures based on skills and qualifications, and the portability of skills, intended to benefit employees and employers. In the present case, it is probable – given the nature of the Appellant's business – that some employees are selected for employment by IAS based on skills, competency, qualifications and experience, obtained in previous employment.

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<sup>85</sup> Transcript of hearing on 19 December 2024, PN502 – 508.

[87] *Secondly*, the proposition is inconsistent with the provisions of the FW Act relevant to genuine agreement. If an explanation of the terms of an agreement is required to be provided in an appropriate manner having regard to characteristics of employees such as cultural and linguistic background, youth and lack of representation<sup>86</sup> characteristics that enable employees with certain skills, qualifications and experience to understand and appreciate terms and conditions that apply to themselves and other employees, are also relevant. The source of the skills, qualifications and experience is irrelevant. An employer is entitled to assert that its workforce has the capacity to understand and agree to the terms of a proposed agreement by reference to any relevant attribute, regardless of how it is obtained, including from past employment with another business or enterprise.

[88] *Thirdly*, the proposition fails to grapple with the reality that portable skills and qualifications can be applied in a range of industry contexts. In the present case, IAS employees are working offshore on a range of rosters, and there are no other industry or award specific matters that have been pointed to by the Unions which would not be understood by the employees who approved the 2024 Agreement. There is nothing remarkable about fly-in-fly-out (FIFO) work and associated rosters and they are not unique to the industry in which the Appellant is currently operating. We note the submission by the Unions at first instance that employees of IAS working at a coal export terminal are covered by the *Coal Export Terminals Award 2020* and that employees may not be aware of that Award. We observe, without deciding, that it is by no means certain that this submission is correct, given the application of that Award and our provisional view is that the submissions of the Appellant with respect to that Award are correct. We also note that in any event, the *Coal Industry Export Terminals Award 2020* does not appear to have the range of provisions in the *Black Coal Mining Industry Award* which the Full Bench in *KCL* observed were specifically tailored to the unique circumstances of that industry, about which employees outside of that industry may not have knowledge.<sup>87</sup>

[89] *Fourthly*, to interpret the provisions of s. 188 in the matter contended for by the AWU would be contrary to the objective of promoting economic prosperity through workplace laws that provide *inter alia* flexibility for employers and the Objects of Part 2-4 of the FW Act which include at s. 171(a) providing a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits. The ground zero approach would require that enterprises seeking to make an agreement would be required to have employees in every classification, or even most classifications provided for in the agreement, and in all or most locations covered, before they could make the agreement. The effect would be to prevent businesses from making enterprise agreements to support an expansion, before they employ all, or most of the employees necessary to undertake the expanded work or had commenced operating in a new location. Such an approach would make bargaining for businesses engaged in contracting, difficult if not impossible. It would also be inconsistent with object of the FW Act in s. 3(f) of achieving productivity and fairness.

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<sup>86</sup> Refer s. 185(6).

<sup>87</sup> Op. cit. at [37].

### **Summary of the evidence**

[90] We now turn to consider the evidence relevant to the sufficiently representative issue which was before the Commissioner at first instance. We reiterate our opinion that at first instance the Appellant provided little assistance to the Commissioner in identifying the evidence and its relevance to the matters the Commissioner was required to determine. We are also of the view that the grounds of appeal are not well drafted and that appeal ground 1 focuses on Attachment DC-2 to the witness statement of Mr Cochrane, at the expense of other matters relevant to ‘genuine agreement’ about which there was evidence that was not considered in the first instance proceedings.

[91] In relation to the nature of the Appellant’s business, the primary activity of IAS is ‘industrial maintenance services in the Oil and Gas and Minerals Processing Industries’.<sup>88</sup> Over the life of the 2019 Agreement IAS operations have been performed both onshore and offshore, in Western Australia, New South Wales, Northern Territory, Queensland, South Australia, Victoria, New Zealand and Papua New Guinea.

[92] The classification structure in the 2024 Agreement is found at Schedule A, read in conjunction with Schedule B. The structure has eight grades. Schedule A sets out flat hourly rates of pay for each grade based on:

- a. Location of employment – Yard, Offshore and Onshore.
- b. Category of employment – Permanent (which includes Part-time) and Casual.
- c. Mode of work – Ordinary Hours, Overtime, Shift Work and Shiftwork Overtime.

[93] Schedule B is headed ‘Classification Structure’ and has a table with two headings: ‘Classification’ (under which are listed Grades 1 – 8) and ‘Tasks Undertaken’ which lists tasks in two ways – as tasks/duties or roles. For example, the list includes ‘General labouring and cleaning duties’ and ‘Trades Assistant’. The distinction between the classification level or grade at which the tasks/duties or roles are placed is the level of skill required to carry them out – for example, the role of Store person is classified at Grade 2 and the role of Senior Store person at Grade 3; Operators of mobile cranes are classified at Grades 4, 5, and 6 based on the lifting capacity of the crane; and the Operator of the crane with the greatest lifting capacity (not a mobile crane) is classified at Grade 7.

[94] Relevantly, clause 5.1 of the Agreement provides for workplace flexibility including the requirement that employees perform a diverse range of functions within the level of their skill and competence, without demarcation or restrictions or limitations on the performance of work between traditional crafts, trades, occupations, vocations or callings. In a similar vein, clause 5.2 provides that IAS may direct employees to carry out duties that are within the limits of their skills, competence and training at either a higher or lower level, and employees are required to comply. A further indication that employees work flexibly and may be required to undertake a range of tasks within and between classification levels, are the provisions in clause 12 which require the employer to appoint employees to a particular classification and that employees may be required to perform all duties comprehended by their classification.

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<sup>88</sup> Appeal Book page 349.

[95] A comparison of the classification structures in the 2019 and 2024 Agreements indicates that the skills, qualifications, roles, tasks and duties are essentially the same. The 2019 Agreement has a six-level structure while the 2024 Agreement structure has eight levels. The key differences are that most of the skills that were previously at the lowest level classification in the 2019 Agreement structure have been moved to Grade 2 in the 2024 Agreement structure and there are three levels about the tradesperson equivalent level in the 2024 Agreement and two levels above the trade level in the 2024 Agreement. The 2024 Agreement also has more levels including above the trade level, for crane operators and advanced tradespersons. Notwithstanding the changes, there is no evident expansion of the coverage of the classifications of employees covered by the 2024 Agreement when compared with the 2019 Agreement.

[96] It is clear from Attachment DC-2 to the Statement of Mr Cochrane that employees covered by the 2024 Agreement hold a range of skills, competencies and qualifications which are relevant to the work carried out by IAS – maintenance projects at client sites. Further, Mr Cochrane’s evidence, supported by the evidence of Mr Weaver, was that an assessment of the current workforce at the time of the first instance hearing showed that IAS had employees in six of the 8 employment classification grades in the 2024 Agreement employed in occupations including: Instrument Electrician, Electrician, Mechanical Fitter, Tube Fitter, Rope Access Technician Level 1, 2 and 3, Boilermaker/Welder, Rigger/Scaffolder, UHP Water Blaster, Painter, Trade Assistant, Supervisor. It is also the case that the employees who were requested to approve the 2024 Agreement comprised all of the employees who are the time the ballot was conducted, were undertaking work for IAS.

[97] Mr Weaver tendered a report he caused Mr Pickwell to make, in relation to IAS operations over the life of the 2019 Agreement, which shows an ebb and flow of employee numbers consistent with IAS being a contracting business and employing workers throughout Australia and internationally for clients offshore and onshore.<sup>89</sup> It is also the case that IAS has grown its workforce when employees numbers at the time the 2019 Agreement was voted on, are compared to the voting group in relation to the 2024 Agreement. The Form F17 Employer declaration completed by IAS in relation to the 2019 Agreement, indicates that 29 employees were covered when the 2019 Agreement was voted on. When the 2024 Agreement was voted on, there were 46 employees, taking into account ten employees who were not eligible to vote.

[98] Mr Weaver’s evidence also establishes that IAS has a history of bargaining, has had agreements from 2014 – 2018 and 2019 – 2023 and that bargaining for the 2024 Agreement involved extensive negotiations in which employees had been represented by the AWU and the CEPU in their capacity as bargaining representatives. Mr Weaver said that the Appellant initiated bargaining for the 2024 Agreement on 24 July 2023 with the first meeting being held on 24 August 2023. Mr Weaver traced the history of the negotiations and said that the Company has facilitated 5 ballots for the 2024 Agreement. Bargaining meetings have discussed a comprehensive log of claims provided by the Unions, and a breakdown of the rolled-up rates proposed by the Company, with consensus being reached about the basis for the calculation of the rates but not the quantum. After a ninth meeting on 17 April where a detailed ‘page turn’ of the proposed Agreement was conducted, the first ballot was held on 12 June 2024. Mr Weaver said that from this time onwards, the draft of the proposed 2024 Agreement has

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<sup>89</sup> Ibid Attachment DC – 3.

included a rolled-up rates structure and changes have been made to the draft following feedback from bargaining representatives and following successive ballots where the Agreement was rejected. Changes were also made to the draft following lengthy negotiations held as part of conferences preceding the making of a protected action ballot order, on 30 May, 4 June and 8 July 2024. There were four unsuccessful ballots before the 2024 Agreement was approved.

**[99]** With respect to the question of whether employees are paid the rates in the 2024 Agreement, the evidence can be summarised as follows. As we have noted, the AWU asserted in the Form F18 filed in opposition to the approval of the 2024 Agreement that contracts of employment provided by IAS indicated that employees were being paid amounts in excess of the 2024 Agreement.<sup>90</sup> In its submissions at first instance, IAS said that the 2024 Agreement was catching up with how employees are paid in the contracting industry and the rates were being increased and enshrined in the 2024 Agreement. It was also submitted that the rates in the 2024 Agreement and their ‘build up’ were the subject of lengthy negotiations, including with the AWU and the CEPU, and the issue was the overall quantum rather than the ‘build up’ process.<sup>91</sup> Mr Cochrane said in his witness statement that the employees at Chevron informed him at the session he conducted with them on 22 September 2024 that they were happy with the main terms of the agreement, including rates of pay because this is a market correction for this site, but that their outstanding issues concerned local site issues such as travel to be paid from Perth to Barrow Island, an increased rate for ‘Overcycle’ and income protection for all long term casual employees.

**[100]** Appended to Mr Weaver’s statement was a sample letter of offer said by Mr Weaver to illustrate rolled-up rates of pay. Mr Weaver said that these rates were already in operation at Chevron before the 2024 Agreement was negotiated and that some employees were being paid accordingly. Mr Weaver also said that during the second bargaining meeting on 11 October 2023, IAS stated its desire to move away from the ‘base line’ style agreement and to establish a classification structure with rates of pay clearly set out in the agreement that reflected actual rates of pay that were already being paid to employees. In his oral evidence at the first instance hearing Mr Cochrane provided information about the hourly rate plus penalty payments that employees were receiving at the time the 2024 Agreement was negotiated, and that the proposed pay rates moved away from that to a loaded rate.<sup>92</sup> Mr Cochrane also said that employees were asking when they would get the new rates and backpay.<sup>93</sup> Mr Cochrane was not cross-examined in relation to this evidence.

**[101]** With respect to the geographical scope of the 2024 Agreement, while it is correct that at the time the 2024 Agreement was made, the projects being undertaken by IAS were in Western Australia, it is also the case that the 2019 Agreement also applied throughout Australia and that projects were performed in other States during the life of the 2019 Agreement. Accordingly, there was no change to the geographical scope of the 2024 Agreement in comparison with that of the 2019 Agreement. In relation to the skills, qualifications and experience of employees, we accept DC-2 as a sample of resumes of employees who were eligible to vote for the 2024 Agreement and that it exemplified the range of experience of those

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<sup>91</sup> Digital Court Book in first instance hearing – page 167 paragraph 15.

<sup>92</sup> Transcript of proceedings PN233 Appeal Book page 37.

<sup>93</sup> Ibid. PN234.

employees obtained by working in various industries. We also accept Mr Cochrane's evidence, that IAS employees have employment experience in the project contracting industries in a wide range of roles, engagement types and classifications covered by the *Hydrocarbons industry Upstream Award 2020*, the *Manufacturing and Associated Industries and Occupations Award 2020* and the *Electrical, Electronic, and Communications Contracting Award 2020*, at a wide variety of locations throughout Australia and internationally.<sup>94</sup> The resumes of some of the employees who voted to approve the 2024 Agreement tendered by Mr Cochrane indicated that they had worked across a range of industries and in modes of work including FIFO projects. Counsel for the Appellant contended in the appeal that these resumes point to:

'Extensive experience in different types of industries, including the ones that are subject to this agreement. The roles that these people occupied, including apprenticeships and leading hand roles, can only be presumed to be full-time or permanent, with leave, with extreme length of tenure, on varying rosters of work, on FIFO and, in other cases, what could only be described as Monday to Friday or Monday to Sunday work, unquestionably familiar with RDO systems.'<sup>95</sup>

[102] We accept that submission. The evidence of Ms Wheatcroft, the Senior People & Culture Business Partner for IAS,<sup>96</sup> was that the business of IAS is comprised of a Perth yard and the company services various offshore and onshore projects across Australia with key clients including Chevron, Jadestone and Woodside. It was noted by the Commissioner that Ms Wheatcroft's evidence included payslips of every employee eligible to vote in the ballot for the 2024 Agreement, indicating that those employees were engaged in positions designated Instrument Electrician, Mechanical Fitter, Tube Fitter, Welder, Advanced Rigger, Supervisor, Senior Trade Technician, Pipefitter and Painter Blaster. The cross-examination of Ms Wheatcroft was limited to the eligibility of employees who had voted to approve the agreement, to participate in the ballot. Mr Cochrane was cross-examined, but not about the evidence we have summarised above, and Mr Weaver was not required for cross-examination. Accordingly, the evidence we have set out above was not challenged in the hearing before the Commissioner.

### **Findings on the evidence**

[103] In our opinion, the sample resumes and the other evidence that was before the Commissioner establish to the required standard that the Commission can be satisfied that the employees who approved the 2024 Agreement were sufficiently representative of the employees the Agreement is expressed to cover, so as to weigh in favour of a finding that the 2024 Agreement was genuinely agreed. We are also of the view that the failure to have regard to this evidence was material and that had the matters outlined above been considered, the outcome of the sufficiently representative issue would have been different. Taking into account the Statement of Principles, we are satisfied that the matters required to be considered under Principle 17 support a finding that the employees who were requested to approve the 2024 Agreement are sufficiently representative of the employees the Agreement is expressed to cover. Our conclusion is based on the following findings on the evidence.

[104] *Firstly*, IAS is not a newly established business making an agreement before the employment of a larger workforce. IAS is an established contract maintenance business which

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<sup>94</sup> Exhibit A7: Witness Statement of Doug Cochrane – Appeal Book page 100 paragraph 18.

<sup>95</sup> Transcript of proceedings PN xxx

<sup>96</sup> Exhibit A8 Appeal Book pages x – x.

has operated under enterprise agreements since 2014. The Company has undertaken project work throughout Australia and internationally in the same or similar industries since at least the 2019 Agreement was made. The 2019 Agreement, which preceded the 2024 Agreement, operated throughout Australia and covered essentially the same work using employees with the same skills and qualifications as will be necessary to carry out work under the 2024 Agreement. To the extent that the 2024 Agreement provides for a broader scope of work and a wider range of classifications than was the case under the 2019 Agreement, the scope relates to industries in which the employer has previously operated rather than to industries where it has not operated.

[105] We are satisfied that the fact that IAS is currently working in a narrower range of industries than may previously have been the case, is a feature of its operations which require that it tender for and win work, rather than being an indicator that the 2024 Agreement is an attempt to cover a wide range of industries and classifications which have no relevance to the Company's current business and where there is no evidence of the possibility that the broader coverage and classifications will be relevant in the future. To the contrary, it is probable that IAS will utilise all the classifications in the 2024 Agreement in future, given the nature of its operations. We are also of the view that there is an intelligible and legitimate business rationale for the geographical and industry scope of the 2024 Agreement and the classifications of employees it covers – IAS has worked throughout Australia on contract maintenance projects under the previous 2019 Agreement and wishes to continue to do so. To undertake its existing business IAS requires a national agreement providing for a broad range of classifications.

[106] *Secondly*, the maintenance contracting business carried out by IAS is subject to peaks and troughs in terms of work. This provides a rational explanation for the fact that the employees who are currently undertaking work for the business, and who voted on the 2024 Agreement, are all employed on a casual basis. Those employees are all the employees currently undertaking the work the 2024 Agreement is proposed to cover. If IAS wins a new project, those employees, or other employees in the same classifications will undertake that work. That they may be employed on a casual basis or on a permanent full-time basis is not a reason to find that the 2024 Agreement was ingenuine. This is not a case where a small group of casual employees with limited work experience, has been selected for employment, without any rational basis for their selection, and requested to vote to approve an enterprise agreement covering a wide range of employees, occupations and industries of which they have had no experience. In those circumstances, the all-casual voting cohort does not, of itself, weigh in favour of a finding that the employees do not have a sufficient interest in the terms of the 2024 Agreement and are not sufficiently representative having regard to the employees the Agreement is expressed to cover.

[107] It is also likely that at least some of the employees who voted for the 2024 Agreement were covered by the 2019 Agreement, which currently remains in effect and operates throughout Australia, and had worked on other IAS projects in States other than Western Australia. As we have noted, while the employees who voted to approve the 2024 Agreement were employed only in Western Australia at the relevant time, the Company has undertaken projects in other Australian States and Territories and internationally, during the term of the 2019 Agreement. In any event, for the reasons we have discussed above, to require a business of the kind operated by IAS to employ persons in every State and Territory where a proposed

enterprise agreement would operate, before the agreement could be made, is counterintuitive and contrary to the objects of Part 2 – 4 and the FW Act generally.

[108] Further, while Attachment DC-2 to Mr Cochrane’s witness statement does not make clear whether the employees in the sample had been employed on a permanent or casual basis, we agree with the contention of IAS in the appeal that it is probable that there were employees who had been employed on a permanent or full-time basis in other industry sectors, and had received benefits pertaining to such employment. In this regard, the cohort of employees who voted to approve the 2024 Agreement, prior to their employment with IAS, had been employed in a range of contexts including CBD construction work, their own businesses, project-based work and FIFO work both on shore and offshore. In the context of the industries the Appellant operates in, that employees may not have worked on a part-time basis is largely irrelevant given the likelihood that this category of employment would be infrequently used. If we are wrong in relation to that assumption, full-time and part-time employment are both forms of ‘permanent employment’ for the purposes of the wage rates in Schedule A of the 2024 Agreement.

[109] In our opinion, the fact that the 2024 Agreement provides for casual conversion, of itself, substantially address the contention that the employees who were requested to approve the 2024 Agreement are unrepresentative because of their status as casual employees or that they have no stake or interest in the terms of the Agreement as they relate to permanent employees. It is self-evident that casual employees who can benefit from a provision of an enterprise agreement allowing them to convert to permanent employment, have an interest in agreement terms applicable to permanent employees. In any event, the fact that all the employees who were requested to approve the 2024 Agreement were employed on a casual basis was neither determinative of the genuineness of their agreement nor the end of the inquiry into authenticity. In this regard, the matters weighing in favour of a finding that the employees who approved the 2024 Agreement were sufficiently representative of the employees it was expressed to cover, should have outweighed the fact that the employees who approved the 2024 Agreement were all casual employees.

[110] *Thirdly*, it cannot be said that there is a vast disparity of occupational classifications as between those who voted on the 2024 Agreement and those it is expressed to cover. We do not accept the Unions’ assertion that the 2024 Agreement provides for over 40 classifications. It contains eight classifications with over 40 tasks or roles allocated to different grades based on the level of skill required to undertake the tasks. While employees may be performing ‘one sixth’ of the roles and tasks listed in the column in Schedule B of the Agreement headed ‘Tasks Undertaken’, the tasks are not separate roles or classifications and relate to the same or similar plant, equipment or duties. Based on the resumes tendered in Attachment DC-2, it is likely that the employees who voted to approve the 2024 Agreement can undertake multiple tasks and roles in the classification structure.

[111] To construe the classification structure as providing for over 40 classifications, is inconsistent with the Workplace Flexibility provisions in clause 5.1 and with the description of many of the purported ‘classifications’ being described as ‘duties’ and with the flexibility provisions in clause 12. We accept Mr Cochrane’s uncontested evidence that the employees who were requested to approve the 2024 Agreement were employed in six of the eight classifications provided for in the Agreement.

[112] Further, the roles and duties encompassed in the classification structure in the 2024 Agreement do not differ substantively from those in the 2019 Agreement, except that the structure in the 2024 Agreement is expanded and incorporates additional grades. This is not an agreement of the kind discussed in *One Key* and related cases, covering a wide range of classifications, irrelevant to the work performed by the employees to be covered, encompassing industries in which the employer does not operate and containing rates of pay not applicable to employees covered by it. Nor is the 2024 Agreement made with a few employees working in a few occupations who have consented to an enterprise agreement covering a wide range of classifications. In fact, the number of employees covered has increased from 29 at the time the 2019 Agreement was made to 56 at the time the 2024 Agreement was made, evidenced by the documents lodged with the Commission by the Appellant when approval for the Agreements was sought. It is also the case that the 2024 Agreement was made with all employees of IAS doing work covered by the Agreement, who were employed at that time.

[113] *Fourthly*, Attachment DC-2 to the witness statement of Mr Cochrane in the first instance proceedings, establishes that the employees who were requested to approve the 2024 Agreement hold a wide range of skills and competencies across mechanical, electrical and instrumentation trades together with related skills and competencies in safety, materials handling, working at heights, working in confined spaces and operation of a wide range of plant and equipment. Many of the resumes indicate skills related to the application of paint and specialist coatings. These are all skills and qualifications that are transportable between industries and industry sectors and significantly, are relevant to the enterprise of the employer – the provision of industrial maintenance services including the application of insulation and protective coatings.

[114] Given the nature of the industries in which the Appellant’s enterprise operates, it is unsurprising that the qualifications and skills of individual employees are diverse, and that a single employee may have a wide range of experience and a disparate collection of skills, for example as a specialist tradesperson, and as a painter or a blaster. It is likely that the broad and disparate range of skills held by individual employees is the reason they are employed by IAS. It therefore cannot be said that the employees who made the 2024 Agreement have not appreciated the appropriateness of the terms and conditions for disparate classifications, foreign to their own.

[115] *Fifthly*, there is no evidence of a collateral or industrial purpose that would indicate that the 2024 Agreement is inauthentic and attempts in the first instance hearing to establish irregularities in the ballot process or that Mr Cochrane had coerced employees in relation to voting to approve the 2024 Agreement, were not successful.

[116] In relation to the matters referred to by the Commissioner to bolster her conclusion that the 2024 Agreement was not genuinely agreed, we make the following observations. While the first observation that the Agreement is not a roll-over<sup>97</sup> is technically correct, the geographical and occupational scope of the 2024 Agreement does not differ from that of the 2019 Agreement. The 2019 Agreement operated throughout Australia and had a classification structure that encompassed all the classifications in the 2024 Agreement. The second observation that the

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<sup>97</sup> Decision at [43].

2024 Agreement has changes to conditions that apply only to casual employees<sup>98</sup> is countered by the fact that the 2024 Agreement has casual conversion provisions. The Commissioner's finding that the breadth of the coverage of the 2024 Agreement opens large opportunity for IAS to tender for work<sup>99</sup> and that this supports the conclusion that the Agreement was not genuinely agreed, is contrary to the evidence. The 2024 Agreement does not open opportunities for IAS to work throughout Australia. IAS can work throughout Australia under the existing 2019 Agreement and there was evidence that it had done so.

[117] The Form F17 filed in support of the 2019 Agreement states that IAS has employed permanent employees in its past operations and that the number of employees has increased over time. We note that this is a matter that was referred to in the submissions of the Appellant at first instance, although regrettably, the relevant document was not tendered by the Appellant at first instance or in the appeal. This document could have answered the Commissioner's questions on this matter. However, in relation to the Commissioner's concerns about the history of IAS employing permanent employees, we note that there is a contradiction in the findings. On the one hand the Commissioner expressed the view that she cannot be satisfied that the 2024 Agreement was genuinely agreed because she did not have information that IAS had employed permanent employees in the past<sup>100</sup>, and on the other hand the Commissioner indicated that because IAS did not lead evidence that it only employs casual employees, the Commissioner could not be satisfied that IAS will not employ permanent employees in the future.<sup>101</sup> Further, the Commissioner's concern that casual employees did not understand the casual conversion provision in the 2024 Agreement<sup>102</sup> could have been allayed by the fact that the 2019 Agreement also provided for casual conversion.

[118] We now turn to consider the relevant aspects of the Statement of Principles as required by s. 188(1).

### **Application of Statement of Principles**

[119] We are satisfied on the evidence, that as required by s. 188(2)(b) the employees who were requested to approve the 2024 Agreement are sufficiently representative of the group of employees the 2024 Agreement is expressed to cover. For the purposes of s. 188(1) we are satisfied of the following matters relevant to the 'sufficiently representative' issue, taking into account the Statement of Principles.

[120] In relation to Principle 17(a), the evidence establishes that there were employees already being paid rolled up rates equivalent to those in the 2024 Agreement and that the Agreement would enshrine those rates. Mr Weaver also gave uncontested evidence that employees were asking when they were going to be paid the new rates and backpay. There was evidence that negotiations for the 2024 Agreement were conducted between 24 July 2023 (the notification time) and 16 September 2024 when the ballot notice was sent to employees. The ballot resulting in the approval of the 2024 Agreement was the fifth ballot conducted with four previous ballots

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<sup>98</sup> Decision at [47].

<sup>99</sup> Decision at [56].

<sup>100</sup> Decision at [40].

<sup>101</sup> Decision at [56].

<sup>102</sup> Decision at [40]

having rejected the Agreement. The negotiations for the 2024 Agreement were protracted and were conducted between 24 July 2023 (the notification time) and 16 September 2024 when the ballot notice was sent to employees. The ballot resulting in the approval of the 2024 Agreement was the fifth ballot conducted with four previous ballots having rejected the Agreement. Three conferences were conducted by the Commission prior to the making of a protected action ballot order. Other than a bare assertion made by the AWU in the Form F18, there was nothing to suggest that the employees were not paid the rates in the 2024 Agreement. We also think it unlikely that negotiations would have extended over such a lengthy period and taken the course that they did, if employees were not to be paid the rates of pay in the 2024 Agreement and were being paid in excess of those rates.

**[121]** On balance, we are satisfied that most of the employees of IAS were to be paid the rates in the 2024 Agreement, and for others, the 2024 Agreement enshrined rates they were already being paid. This is not a case where a few selected employees were being paid rates in excess of the rates in an enterprise agreement they were purporting to approve. The present case is one where there were hard fought negotiations, which of itself indicates that employees stood to gain actual wage increases from the 2024 Agreement. The process by which the 2024 Agreement was made, is in our view, an authentic exercise in bargaining. We are satisfied that this matter weighs in favour of a finding that the employees who voted to approve the 2024 Agreement were sufficiently representative of the employees the Agreement is expressed to cover.

**[122]** Relevant to Principle 17(b)(i) we are satisfied on the evidence that the employees who were requested to approve the 2024 Agreement are employed across 6 of the 8 classification levels in the Agreement. A comparison with the classification structure in the 2019 Agreement indicates that there are no classifications in the 2024 Agreement which could not have been accommodated within the 2019 Agreement structure. We are also of the opinion that the classification structure and the provisions in clauses 5.1 and 5.2 of the 2024 Agreement will operate so that at least some of the employees whose resumes were provided in DC-2 (or other employees having similar skills) will likely work in all the levels of the classification structure in the 2024 Agreement in the future, based on the needs of clients. The same can be said of the industries and occupations the 2024 Agreement covers. Further, as we have noted, there is no expansion of the occupational or geographical coverage of the 2024 Agreement compared to the 2019 Agreement.

**[123]** Based on the evidence, including the skills, qualifications and employment history of the voting cohort in Attachment DC-2 to Exhibit A7, and for the reasons set out above, we are satisfied that there are employees in the voting cohort who are competent to work across the full range of the classifications in the 2024 Agreement. This weighs in favour of a finding that the employees who made the 2024 Agreement are sufficiently representative of the group of employees it is expressed to cover.

**[124]** In relation to Principle 17(b)(ii) the relevant employees are employed across only one of the types of employment the 2024 Agreement is expressed to cover – casual employment. While this weighs against a finding that the employees are representative of those who may be employed as full-time employees in the future, this is balanced by the fact that the 2024 Agreement has a casual conversion provision and based on their resumes, at least some of the employees who approved the Agreement have previously worked on a full-time basis in their

past employment. It is unlikely that employees working in the industries and industry sectors where IAS operates, regularly work on a part-time basis. On balance, this Principle weighs in favour of a finding that the employees who made the 2024 Agreement are sufficiently representative of the group of employees it is expressed to cover.

[125] In relation to Principle 17(b)(iii) and for the reasons set out above, IAS has traditionally worked throughout Australia and in our view, it is likely that at least some employees worked under the 2019 Agreement. It cannot be said in relation to this Principle, that the employees who made the 2024 Agreement do not have a sufficient interest in its terms, or are not sufficiently representative of the group of employees it is expressed to cover. Finally, we are satisfied that the employees who were requested to approve the 2024 Agreement work across a range of industries and occupations so that they are sufficiently representative of the employees the 2024 Agreement is expressed to cover. For the purposes of Principle 17(b)(iv) we have taken into account that the industry and occupational coverage of the 2024 Agreement is consistent with the primary activity of, and the business operated by IAS, being the provision of industrial maintenance services in the oil and gas and mining and minerals processing industries. We have also taken into account that the skills, qualifications and experience of the employees who were entitled to vote on the 2024 Agreement are consistent with the work that employees of an employer engaged in the business of the employer. We are satisfied based on the previous work experience of the employees who were requested to approve the 2024 Agreement, that they are sufficiently representative of the employees the Agreement is expressed to cover.

## Disposition of the Appeal

[126] For the reasons given, we have decided to quash the decision under appeal and to redetermine ourselves the Appellant's application for approval of the Agreement, having regard to our findings in the appeal, the material on the Commission's file on the application for approval of the 2024 Agreement, and to the evidence and submissions that were before the Commissioner. For the reasons given above and having considered relevant matters in the Statement of Principles, we have reached a state of satisfaction in relation to the matter in s. 188(2)(b), that the group of employees who were requested to approve the 2024 Agreement, are sufficiently representative of the employees the Agreement is expressed to cover. This weighs in favour of an overall conclusion that the 2024 Agreement was genuinely agreed.

[127] For the reasons given above, we have also reached a *provisional* view that we are satisfied that the relevant employees have a sufficient interest in the terms of the Agreement as required by s. 188(2)(a). Further, our *provisional* view is that the matters remaining in dispute for the purposes of redetermining the application are as follows:

- (a) Whether the 2024 Agreement was made in accordance with ss. 181 and 182(1) of the FW Act, having regard to the revised Declaration of Result provided by the Ballot Agent, Vero.
- (b) Whether the Appellant took all reasonable steps to explain the terms of the 2024 Agreement and the effect of those terms as required by ss. 188(4A) and 180(5) and Principles 8 – 14 of the Statement of Principles.
- (c) Whether the 2024 Agreement passes the BOOT.

- (d) Whether the Appellant engaged in misrepresentation in relation to the application of the 2024 Agreement.
- (e) Whether employees were coerced with respect to their approval of the 2024 Agreement by threats that adverse action would be taken against IAS if employees participated in protected industrial action.

[128] The Full Bench will receive any written submissions that the parties wish to make in response to its provisional view in relation to the sufficient interest issue, within 14 days of the date of this decision. Reply material will be filed within a further seven days.

[129] The parties are directed to confer and to confirm that the matters set out above are all of the matters remaining in dispute, within 14 days of the date of this decision. In the absence of agreement in relation to remaining matters in dispute, the matter will be listed before the Presiding Member for the purposes of identifying those matters.

[130] Upon receiving confirmation as to whether the matters set out above are all the matters remaining in dispute, the Full Bench will determine the application for approval of the *IAS Enterprise Agreement 2024* based on the material on the Commission's file.

[131] For the present, we Order as follows:

1. Permission to appeal is granted in relation to Ground 1.
2. The appeal is upheld in relation to Ground 1.
3. The decision under appeal ([2023] FWCA 3996) is quashed. On a redetermination we are satisfied, that the requirements in s. 188(2)(b) are met and that the employees who were requested to approve the 2024 Agreement are sufficiently representative of the group of employees the Agreement is expressed to cover.



VICE PRESIDENT

*Appearances:*

*C. Gianatti and L. Massouras of KHQ Lawyers for the Appellant*

*P. Boncardo of counsel instructed by Z. Duncalfe of the Australian Workers' Union for the First Respondent*

*J. Fox of counsel for Second Respondent*

*Hearing details:*

2025.  
Melbourne.  
19 June.

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