DECISION

Fair Work Act 2009
s.604—Appeal of decisions

Appeal by The Australian Workers' Union re *Hawthorne Civil Pty Ltd Gold Coast Light Rail Stage 3 Project Agreement*

(C2025/8498)

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT BOYCE
DEPUTY PRESIDENT WRIGHT

SYDNEY, 20 NOVEMBER 2025

Appeal against decision [2025] FWCA 2640 of Commissioner Lee at Melbourne on 8 August 2025 in matter number AG2025/1800 – appeal upheld.

Introduction and background

[1] The Australian Workers' Union (**AWU**) has appealed a decision made on 8 August 2025[1] by Commissioner Lee to approve the *Hawthorne Civil Pty Ltd Gold Coast Light Rail Stage 3 Project Agreement* (**Agreement**), a greenfields agreement made by Hawthorne Civil Pty Ltd (**Hawthorne**) and the Construction, Forestry and Maritime Employees Union (**CFMEU**). The main issue in the appeal concerns s 187(5)(a) of the *Fair Work Act 2009* (Cth) (**FW Act**) which requires, as a prerequisite for the approval of a greenfields agreement, that the Commission be satisfied that:

> (a) the relevant employee organisations that will be covered by the agreement are (taken as a group) entitled to represent the industrial interests of a majority of the employees who will be covered by the agreement, in relation to work to be performed under the agreement; …

[2] The AWU contended below that this requirement was not satisfied in that the CFMEU, being the only employee organisation covered by the Agreement, was not entitled to represent the industrial interests of a majority of the employees who would be covered by the Agreement in relation to the work to be performed under the Agreement. In his decision, the Commissioner rejected this contention, found that he was satisfied in relation to the s 187(5)(a) prerequisite, and approved the Agreement.

[3] For the reasons which follow, we have determined that the Commissioner erred in approving the Agreement because there was no material upon which a state of satisfaction could reasonably have been reached that the s 187(5)(a) requirement was met. Accordingly, we grant permission to appeal and uphold the appeal, the decision to approve the Agreement is quashed, and we dismiss the application for the approval of the Agreement.

Relevant terms of the Agreement and the approval application

[4] The scope of coverage of the Agreement is set out in clause 1.1 as follows:

> 1.1 This Agreement is made under the Fair Work Act 2009 (Cth) and those covered by this Agreement are:
> 1.1.1 Hawthorne Civil Pty Ltd ABN: (40163856924) (Employer);
> 1.1.2 Employees employed by Hawthorne Civil Pty Ltd on the Gold Coast Light Rail Stage 3 Project (Project) for which classifications and rates of pay are prescribed by this Agreement (Employees).
> 1.1.3 The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU); and
> 1.1.4 The Construction, Forestry and Maritime Employees Union (CFMEU).

[5] Clause 1.1.2 provides that the employees covered by the Agreement are those employed by Hawthorne on the 'Gold Coast Light Rail Stage 3 Project' (**Project**) for whom classifications and rates of pay are prescribed by the Agreement. It is not in dispute that the Project is a civil construction undertaking to extend the Gold Coast light rail line from Broadbeach to Burleigh Heads in Queensland. The classifications of employees are set out in Appendix B to the Agreement. Appendix B sets out the classifications in two parts. First, there are 'Construction Worker/Labourer' classifications. These comprise 'CW' classifications at eight levels. Each classification level is defined by reference to prescribed job functions; for example, CW1 is defined as consisting of 'New Entrant (an entry level with less than 12 months['] experience); General Labourer; Stores Assistant'. The rates of pay for these classifications are set out in clause 42.1 of the Agreement. Second, there are 'Plumbing and Mechanical Services' classifications. These consist of classifications at nine levels, each of which is defined by reference to the qualifications, skills and task required at each level. The rates of pay for these classifications are set out in clause 42.4. Appendix B also sets out 'Roof Plumber' classifications at four levels, but the Agreement does not prescribe any pay rates for these classifications. Consequently, 'Roof Plumbers' are not covered by the Agreement under clause 1.1.2.

[6] The Agreement was signed by Zdravko Cvetanoski, the General Manager of Hawthorne, on 9 June 2025, and by Paul Dunbar, the Industrial Relations Co-ordinator of the CFMEU's Construction and General Division, Queensland Northern Territory Divisional Branch on the behalf of the CFMEU on 10 June 2025. The final page of the Agreement contains an execution section for the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**), which includes the name and work address of the intended signatory on behalf of the CEPU. However, this has not been filled in, and it is not in dispute that the Agreement was never signed on behalf of the CEPU.

[7] The assessment required by s 187(5)(a) in respect of the Agreement was therefore whether the CFMEU was entitled to represent the industrial interests of a majority of the employees to be covered by the Agreement 'in relation to work to be performed under the Agreement'. The 'work to be performed under the Agreement' may be characterised as work on the Project in the classifications of 'Construction Worker/Labourer' or 'Plumbing and Mechanical Services'. We discuss later in this decision the principles to be applied in undertaking this assessment.

The application and the proceedings below

[8] The application for approval of the Agreement (Form F19) was lodged by the CFMEU on 10 June 2025. In its application, the CFMEU:

- answered 'No' to the question 'Are you aware of any other agreement that has been lodged or dealt with by the Commission that has identical or substantially identical terms?';
- identified 'Civil Construction' as the industry of the employer covered by the Agreement; and
- identified itself as the only employee organisation involved in the process for making the Agreement as a bargaining representative.

[9] Two declarations in support of the application for approval of the Agreement were lodged together with the application. First, a Form F20 declaration was made by Mr Cvetanoski on 9 June 2025 (the same day that he signed the Agreement and a day before it was signed by the CFMEU). In his declaration (**Cvetanovski declaration**), Mr Cvetanoski:

- described the kind of work that would be covered by the Agreement as 'Construction';
- affirmed that, at the date the Agreement was made, Hawthorne had not employed any persons who would be necessary for the normal conduct of the new enterprise and who would be covered by the Agreement;
- affirmed that the employee organisations covered by the Agreement, taken as a group, were entitled to represent the industrial interests of a majority of the employees who would be covered by the Agreement in relation to work to be performed under the Agreement;
- stated that the primary activity of Hawthorne was 'Civil Construction'; and
- said that Hawthorne agreed to bargain, or initiated bargaining, for the Agreement on 9 June 2025 (the same day that Mr Cvetanoski signed the Agreement and made the declaration).

[10] Second, a Form F21 declaration was made by Mr Dunbar on 10 June 2025 (**Dunbar declaration**). In his declaration, Mr Dunbar likewise affirmed that the employee organisations covered by the Agreement, taken as a group, were entitled to represent the industrial interests of a majority of the employees who would be covered by the Agreement in relation to work to be performed under the Agreement. He also stated, as a reason why approval of the Agreement would be in the public interest, that 'The Employee *Organisations* have appropriate coverage of the majority of the employees' (emphasis added).

[11] The AWU apparently became aware of the application for approval of the Agreement shortly after it was filed. On 17 June 2025, the AWU made a request to the Commission that it be provided with the application and the declarations filed in the matter. After the documents were sent to the AWU, with redactions, on 17 June 2025, the AWU sent an email to the Commission on 20 June 2025 confirming that it sought to be heard in the matter under s 590 of the FW Act and stating:

> Noting in particular paragraph 21 of the Form F20 in which the employer declares that its primary activity is in civil construction, please note that the AWU is the principal union in the civil construction sector and has the capacity to represent workers engaged in civil construction.

[12] The Commissioner conducted an initial hearing in the matter on 26 June 2025, which does not appear to have been attended by any representative of Hawthorne. At a further preliminary hearing on 9 July 2025, the Commissioner determined that he would allow the AWU to be heard in respect of the s 187(5) approval requirement. He subsequently made directions requiring the CFMEU and Hawthorne to file their evidence and submissions in support of the application by 16 July 2025, for the AWU to file its evidence and submissions on 23 July 2025, and for any material in reply to be filed by 30 July 2025. The matter was listed for hearing on 7 August 2025.

[13] Pursuant to the directions, the CFMEU filed a submission on 15 July 2025. This submission contained an analysis, in tabular form, of how the workforce to be employed by Harthorne under the Agreement was said to fall within the eligibility rule of the CFMEU. The analysis was premised on two documents annexed to the submission. The first was an email sent by Mr Cvetanoski to Mr Dunbar on 14 July 2025 (**Cvetanoski email**) which relevantly stated:

> Hi Paul,
>
> As discussed, please see below what we believe JH will require for our scope of works on the Gold Coast Light Rail Project;
>
> **Track Slab Works & Pavement Works**
> - Area Prep – 1 x GPS excavator Operator
> - Edge Form, placement of mesh and Setting Up Rail = 4 x Qualified Tradespersons, 1 x Labourer
> - Pouring Concrete (2 Concrete Finishers, 4 x Concrete Labouring Crew made up of Qualified Tradespersons and Labourers) x 1 Day only.
> - Stripping of Formwork = 4 x Qualified Tradesperson[s], 1 x Labourer
>
> We generally see this as a 5 day turn around for the works, with the Area prep taking 1 day, Edge form taking 3, pouring taking 1 and stripping also taking 1.

[14] The second was an email sent on 15 July 2025 from Mr Dunbar to the CFMEU's industrial officer (**Dunbar email**), which reproduced the four bullet points from the Cvetanoski email and then stated:

> The break down of the above would be the following.
>
> 4 x Carpenter = CW5 (Trade qualified Tradesperson)
> 2 x Concrete finisher = CW4 Concrete Finisher
> 1 x Labourer = CW2 Skilled General Labourer
> 1 x Excavator Operator = CW6 Excavator not exceeding 3[ ]cubic metres
>
> Another analysis of the work rotation is listed below but I am unsure if it is helpful as I believe we have e[x]cavators, carpentry\Formwork, and concrete but don't have the labourer.

[15] The email then quoted the last sentence of the Cvetanoski email. The CFMEU's submission also attached what appears to be a text message exchange between two unidentified persons. In the exchange, one person extracts the workforce 'breakdown' set out in the Dunbar email and asks 'Does this look right??', to which the other person answers 'Yes mate'.

[16] On 16 July 2025, the CFMEU in addition filed a witness statement made by Stuart Maxwell, the Senior National Industrial Officer for the CFMEU Construction and General Division. In his statement, Mr Maxwell referred to the CPC Construction, Plumbing and Services Training Package, and annexed a document setting out the qualifications within this training package. These include a range of Certificate I, II, and III and Diploma qualifications. Mr Maxwell also annexed the qualifications description and packaging requirements for the Certificate III in Carpentry (CPC30220), which states that it '[s]upersedes and is not equivalent to' the Certificate III in Carpentry and Joinery (CPC32011) or the Certificate III in Formwork/Falsework (CPC31511). Mr Maxwell further annexed the qualification description and packaging requirements for the latter Certificate III, which relevantly states the following:

> This qualification provides a trade outcome in construction of formwork and falsework. covering work in residential and commercial applications.
>
> Occupational titles may include:
>
> - Formworker.
>
> The qualification has core unit of competency requirements that cover common skills for the construction industry, as well as a specialist field of work.

[17] In his witness statement, Mr Maxwell explained the relationship between these qualifications as follows:

> The development of the current Certificate III in Carpentry and the decision for it to supersede the Certificate III in Formwork/Falsework was done by the Construction Industry Reference Committee… The Construction Industry Reference Committee submitted a Case for Endorsement to the Australia Industry and Skills Committee to restructure the overlapping qualifications of CPC30219 Certificate III in Carpentry, CPC32011 Certificate III in Carpentry and Joinery and CPC31511 Certificate III in Formwork/Falsework into one new qualification CPC30220 Certificate III in Carpentry. This restructure finally took effect on 26th November 2020.
>
> When a qualification is superseded, it is the practice of the Australian Skills Quality Authority (ASQA) to allow for a transition period for the qualification so that those apprentices who have already started their training under the old qualification can complete it within a set period of time. ASQA has approved a transition period for the Certificate III in Formwork/Falsework until 30th June 2026 …
>
> A further development is that BuildSkills Australia has now commenced a project to review the training requirements for formwork and falsework workers. According to the BuildSkills website… the scope of the project is the following:

What we are working on

In most states and territories, learners working in formwork and falsework are required to complete CPC30220 Certificate III in Carpentry. Some industry stakeholders have raised concerns with BuildSkills that the Carpentry qualification is not fit for purpose for formwork and falsework workers.

BuildSkills acknowledges that views may differ, but based on feedback received, we are undertaking an assessment of current and deleted training products to ensure industry needs are met. Further industry input is encouraged to help align training with practical role requirements.

In my experience, the trade skills required for formwork have always been based on the trade skills of carpenters. This is demonstrated by the common units of competency within the Certificate III in Carpentry and the Certificate III in Formwork/Falsework.

[18] On 23 July 2025, the AWU filed its submissions pursuant to the Commissioner's directions. It submitted, in summary, that the CFMEU had filed no rationally probative evidence that would satisfy the Commission in respect of the s 187(5)(a) approval requirement. The CFMEU filed reply submissions in accordance with the directions on 29 July 2025. Hawthorne did not file any evidence or submissions.

[19] On 7 August 2025, less than an hour before the listed commencement of the hearing before the Commissioner, the CFMEU sent the Commission and the other parties an email which, in addition to attaching copies of case authorities referred to in its earlier submissions, also attached an analysis of the 'Construction Worker/Labourer' classifications in Appendix B to the Agreement by reference to the CFMEU's eligibility rule (**Classification analysis**). The analysis was set out in tabular form, including shading as follows to indicate the roles in respect of which the CFMEU claimed to have eligibility:

Classification	Definition	**CFMEU RULES**
CW1	New Entrant (an entry level with less than 12 months['] experience) General Labourer Stores Assistant	 2(E)
CW2	Skilled General Labourer Earthworks Trim Grade Checker Heavy Plant Spotter Concrete Gang Concrete Float Hand Paving Stringliner Store-person Yardman Chainman	 2(E) 2(E) 2(A)(A)(3)(i) 2(A)(A)(3)(i) 2(A)(A)(3)(i)
CW3	Elevated Work Platform Operator with Ticket Hoist Driver Form Work Labourer Road Roller Operator under 12T Heavy Mobile Plant Operator (0-5T) Ticketed Dogman Steel fixer	2(E) 2(E) 2(A)(A)(3)(i) 2(E) 2(E) 2(E)

Classification	Definition	**CFMEU RULES**
	Ticketed Forklift Driver	2(E)
	Ticketed Rigger/Scaffolder	2(E)
	Telehandler (Up to 4.5T)	2(E)
	Hiab Operator	
	Shotcreter	2(A)(A)(3)(i)
	Shotcrete Crew	2(A)(A)(3)(i)
	Painter	
	Rail Track Worker – TLI Cert 2 in Rail Infrastructure	
	Railway Safety Protection Officer Level 1	
CW4	Concrete Line Pump Operator	2(E) and 2(A)(A)(3)(i)
	Road Roller Operator 12T and over	2(E)
	Concrete Finisher	2(A)(A)(3)(i)
	Concrete Paving Spreader	2(A)(A)(3)(i)
	Non-certified Tradesperson	
	WHSO	
	Rail Track Worker – TLI Cert 2 in Rail Infrastructure (commenced Cert 3)	
	Sleeper gantry operator	
	Railway Safety Protection Officer Level 2	
CW5	Trade Qualified Tradesperson	
	Crane Operator (5-20T)	2(E)
	Operators of:	
	Tractor up to but not exceeding 48kw (65bhp)	2(E)
	Skid Steer Excavator up to but not exceeding 48kw (65bhp)	2(E)
	Dumper/Water Cart not exceeding 40T	2(E)
	Mobile Concrete Pump Boom,	2(E)
	Forklift not exceeding 48kw,	2(E)
	Shotcrete Placing Machine, Paver	2(A)(A)(3)(i)
	Gantry Crane Operator	2(E)
	Rail Track Vehicle Operator	
	Trade Qualified welder (Cert 3)	
	Rail Track Worker – TLI Cert 3 in Rail Infrastructure	
	Railway Safety Protection Officer Level 3 or 4	
CW6	Heavy Mobile Plant Operator (>20T-60T)	2(E)
	Operators of:	2(E)
	Tractor 48kw up to but not exceeding 370kw,	2(E)
	Loader-Front End and Overhead from 48kw up to but not exceeding 370kw including: 960, 966, 980,	2(E)
	Dry Batch Plant, Pug Mill,	2(E)
	Skid Steer Tractor from 48kw,	2(E)
	Forklift from 48kw but not exceeding 220kw,	2(E)
	Excavator not exceeding 3[ ]cubic metres,	2(E)
	Dumper/Water Cart over 40T but not exceeding 100T,	2(E)
	Dozer D8 without GPS,	2(E)
	Compactor 825 without GPS,	2(E)
	Graders 140,143,14,16 without GPS	2(E)
	Rail Track – Team Leader – Track Inspection / Certification / Quality Control	2(E)
CW7	Heavy Mobile Plant Operator (>60-100T)	2(E)
	Operators of:	

Classification	Definition	**CFMEU RULES**
	Tractor from 370kw up to but not exceeding 450kw including Scraper 651/Dozer DION, Trimmer,	2(E)
	Excavator from 3 cubic metres,	2(E)
	Loader-Front End and Overhead from 370kw up to but not exceeding 450kw,	2(E)
	Wet batch Plant, Scraper 651,	2(E)
	Compactor 825 with GPS,	2(E)
	Graders 140,143,14,16 with GPS,	2(E)
	Dozer D8 with GPS	2(E)
	Tower Crane Operator	2(E)
CW8	Heavy Mobile Plant Operator (>100T)	2(E)
	Operators of:	
	Tractor from 450kw including Dozer D11, D10-48kw, 475, Grader with Final Trim	2(E) []
	Scraper 637	2(E)

[20] The CFMEU, Hawthorne and the AWU appeared at the hearing on 7 August 2025. Hawthorne was represented by Mr Cvetanoski. The AWU submitted that the material filed by the CFMEU, including the Cvetanoski email and the Dunbar email, was not rationally probative evidence of satisfaction of the s 187(5)(a) approval requirement, and noted that Hawthorne had chosen not to file any evidence. The AWU also submitted that the CFMEU did not have coverage of formworkers in civil construction. The CFMEU submitted that that the 1984 decision of Commissioner Coleman of the former Australian Conciliation and Arbitration Commission in *Jennings Industries Limited v The Building Workers' Industrial Union of Australia*[2] (***Jennings***) established that 'formworkers and carpenters' were eligible to be members of the CFMEU[3] and that Mr Maxwell's evidence provided 'a broader understanding of how formwork and carpentry [are] tied'.[4] The CFMEU also submitted that its Classification analysis demonstrated that the CFMEU had 'a clear majority in relation to the industrial interests of the majority of employees there' and that its coverage could also be demonstrated by reference to the Cvetanoski email. Mr Cvetanoski declined to say anything at all on behalf of Hawthorne.

The decision

[21] In his decision, the Commissioner commenced his consideration in relation to the s 187(5)(a) approval requirement by noting that the evidence before him included the Cvetanoski declaration and the Dunbar declaration, both which answered 'yes' to the question 'Are the employee organisations covered by the agreement, taken as a group, entitled to represent the industrial interests of a majority of the employees who will be covered by the agreement, in relation to work to be performed under the agreement?'[5] The Commissioner then said:

> [6] Ordinarily, the Fair Work Commission… will proceed on the basis that statutory declarations made in support of agreement approvals are true and correct and proceed to approve the agreement once satisfied of all of the other statutory requirements. The exception of course is where the Commission has some reason to doubt the truth of a claim made, including when evidence is brought forward to challenge the truth of a claim made in such a statutory declaration. There is no evidence that has been filed in these proceedings by the AWU that calls into question the truth of the declarations made.

[22] The Commission then further noted that, in any event, further evidence was provided by CFMEU including the Cvetanoski email, and said:

> [8] At the hearing the AWU referred to the above email as containing vague references and being unsure of what 'JH' might refer to. However, the AWU ultimately conceded that in context it[']s very likely this refers to John Holland.

[23] The Commissioner then referred to and considered the CFMEU's Classification analysis:

> [9] Immediately prior to the hearing, Mr Elliot Dalgleish of the CFMEU provided a version of Appendix B from the Agreement which listed the relevant CFMEU occupational rule[s] that demonstrated their eligibility to represent each of the various occupations covered by the Agreement.
>
> [10] It's apparent from that document that the CFMEU are eligible to represent the vast majority of occupations covered by the Agreement. The only challenge to that document by the AWU was to the occupation of 'Formwork Labourer' which they claim the CFMEU is not eligible to represent. The CFMEU rely on [*Jennings*] to support the proposition that they can represent Formworkers. Having considered that decision and not having been taken to any contrary authority, I accept that the CFMEU has eligibility to cover Formworkers, to the extent they are carpenters and builders' labourers. However, even if that is not correct it's apparent that the vast majority of occupations listed in Appendix B fall within the CFMEU rules.

[24] The Commissioner then concluded:

> [11] Having regard to the totality of the evidence from the CFMEU and the employer I am satisfied that the CFMEU is entitled to represent a majority of employees who will be covered by the proposed agreement in relation to work to be performed under the proposed agreement.
> . . .
> [16] For the foregoing reasons and in accordance with s 187(5)(a) of the Act, I am satisfied that the Construction, Forestry and Maritime Employees Union is entitled to represent the industrial interests of a majority of employees who will be covered by the Agreement in relation to work that is to be performed under it. …

[25] The Commissioner was also satisfied that the other requirements in the FW Act for approval of the Agreement were met, and consequently approved the Agreement.

Appeal grounds and submissions

[26] The grounds of appeal stated in the AWU's notice of appeal of 29 August 2025 are as follows:

> 1. The Commission erred in law in finding that, pursuant to s 187(5)(a) of the *Fair Work Act 2009* (Cth) ('FW Act'), the Construction, Forestry and Maritime Employees' Union ('CFMEU') is entitled to represent the industrial interests of a majority of employees who will be covered by the *Hawthorne Civil Pty Ltd Gold Coast Light Rail Stage 3 Project Agreement* ('Agreement').

2. The Commissioner erred in being satisfied, as required by section 187(5)(a) of the FW Act, that the CFMEU was entitled to represent the industrial interests of a majority of the employees who will be covered by the Agreement.

3. The Commission erred in law in finding that the CFMEU is entitled to represent the industrial interests of formworkers covered by the Agreement, to the extent they are carpenters and builders' labourers.

4. In paragraph [10] of the reasons, the Commission concluded, amongst other things, that '[i]t's apparent from that document (referred to in paragraph [9] as the version of Appendix B from the Agreement which listed the relevant CFMEU occupational rule) that the CFMEU are eligible to represent the vast majority of occupations covered by the Agreement'.

   The Commission erred by relying on the contents of that document without cross[-]referencing the classifications with the provisions in the CFMEU's eligibility rule to test the accuracy of the contents of the document.

   Had the Commission undertaken such cross[-]referencing, it should have been apparent to the Commission that, on the proper construction of the CFMEU's eligibility rules, the content of the document was inaccurate and inconsistent with the CFMEU's Rules.

5. The Commission erred in law by making findings of fact based on material filed by the CFMEU immediately prior to the hearing, in circumstances where that material was not rationally probative.

6. The Agreement has not been validly or lawfully signed on behalf of the Applicant which has not provided any 'explanation of authority to sign the Agreement' in Appendix F of the Agreement.

7. The answer 'No' to question 1.3 in the Form F19 (dated 10 June 2025) is inaccurate and misleading because the Queensland/Northern Territory Divisional Branch of the CFMEU was aware of other agreements in substantially identical terms that had been lodged or dealt with by the Commission; in particular *Application by John Holland Queensland Pty Ltd* [2022] FWC 1524 and the agreement considered by the Full Bench in *The Australian Workers' Union v John Holland Queensland Pty Ltd & Ors* [2022] FWCFB 190.

8. Mr Dunbar, as the Industrial Relations Co-Ordinator of the Construction and General Division, Queensland/Northern Territory Divisional Branch of the CFMEU was not authorised, pursuant to Rules 30, 31(e) and 51 of the Rules of the CFMEU to execute or sign the Form F19 and Form F21.

[27] Grounds 1–5 above may be regarded as articulating, in varying ways, the same substantive proposition, namely that the Commissioner erred in reaching a state of satisfaction that the requirement for approval of the Agreement in s 187(5)(a) was met. These appeal grounds may accordingly be considered together. For the reasons set out later in this decision, it is not necessary to consider appeal grounds 6–8 or the submissions made in relation to them.

[28] The AWU submitted that because the CFMEU, unlike the AWU, did not have industry coverage in the civil construction sector, the CFMEU bore the onus of demonstrating as a fact that a majority of the relevant employees would be employed to perform tasks which have, as their primary purpose, the performance of work falling within the occupational categories of

the CFMEU's eligibility rule in rules 2(A)(A)(3)(i) or 2(E). The Cvetanoski email did not constitute probative evidence that the primary purpose of the work of the relevant employees fell within these occupational categories, in that it did not identify the primary employment purpose of 'Qualified Tradespersons' referred to in the email or the occupation of the '1 x GPS excavator Operator' also referred to. The AWU also submitted that the Commissioner erred in finding, at [10], that the CFMEU had eligibility to cover 'Formworkers' under the Agreement, since the initial general reference to 'carpenters or joiners' in rule 2(A)(A)(3)(i) should be read as confined to the building industry, and the subsequent qualified reference to carpenters and joiners employed in various aspects of the civil construction sector only applied in a number of specified states which did not include Queensland. More generally, the AWU submitted that formworkers, labourers, and concreters performing work on a civil construction project are not eligible to be members of the CFMEU under either rule 2(A)(A)(3)(i) or rule 2(E).

[29] The AWU also submitted that the Commissioner erred in relying on the CFMEU's Classification analysis in circumstances where that document was a submission and of no probative value in relation to an assessment of the primary purpose of the relevant employees' employment under the Agreement. The Classification analysis also took no account of the 'Plumbing and Mechanical Services' classifications in the Agreement, and was in error to the extent that in respect of a number of the classification job functions said to fall within rule 2(A)(A)(3)(i), the CFMEU either had no coverage or its coverage was confined to the building industry and did not extend to civil construction. This included the job functions of: General Labourers, Concrete Gang, Concrete Float Hand, Paving Stringliner, Form Work Labourer, Ticketed Dogman, Ticketed Rigger/Scaffolder, and Operator Tractor up to but not exceeding 48kW (65bhp).

[30] The CFMEU submitted that the AWU did not have standing to bring its appeal because it was not able to demonstrate that the decision had affected it in a way which was different from the effect on an ordinary member of the public, and permission to appeal should be refused on that ground alone. As to the appeal itself, the CFMEU submitted that because s 187(5)(a) required the Commission to reach a state of satisfaction about the matter identified in the decision, this indicated that a degree of latitude was allowed in making the required decision such that the *House v The King*[6] standard of appellate review applied. In respect of appeal grounds 1–5, the CFMEU submitted that the only dispute below about its Classification analysis was whether the CFMEU had coverage in respect of the occupation of 'Formwork Labourer', and the CFMEU's coverage in this respect was established by the decision in *Jennings*. As to the AWU's submission about the occupation of the excavator operator, the CFMEU submitted that this was immaterial because this was only one of the 17 employees which the Cvetanoski email disclosed would be covered by the Agreement, so that even if the CFMEU did not have coverage pursuant to rule 2(E), this did not diminish coverage to below a majority of the employees.

[31] During the hearing of this appeal on 17 October 2025, an issue arose as to the basis upon which the CFMEU claimed coverage of the employees engaged in 'Pouring Concrete' referred to in the third bullet point in the Cvetanoski email. The CFMEU was given leave to file a written note about this after the completion of the hearing, and the AWU was given to file a note in response. Subject to the receipt of these notes, we reserved our decision at the completion of the hearing.

[32] The CFMEU sent its written note as an attachment to an email sent to the presiding member's chambers on 22 October 2025. In this note, the CFMEU relied upon that part of rule 2(A)(A)(3)(i) which referred to '…those engaged in the preparation and/or erection of terrazzo or similar compositions…' and referred to the decisions in *Rescrete v Jones*[7] (***Rescrete***) and *Enco Precast Pty Ltd v CFMMEU*[8] (***Enco Precast***) as supportive of that proposition. The CFMEU submitted that the Cvetanoski email could be read as identifying that there would be 17 persons performing work under the Agreement (if the five 'Edge Form' employees and the five 'Stripping of Formwork' employees were separate), or alternatively 12 (if the five 'Edge Form' employees and the five 'Stripping of Formwork' employees were the same employees). In either case, the CFMEU submitted, it had coverage of a majority of the employees identified in the Cvetanoski email.

[33] Also attached to the CFMEU's email of 22 October 2025 time was a letter signed by Mr Dunbar (**Dunbar letter**) and personally addressed to the presiding member. It did not have leave to send this, and it is apparent that it did not inform let alone obtain the consent of the AWU or Hawthorne before doing so. In this letter, Mr Dunbar said:

> Despite the fact that the hearing has come and gone and we have leave to address only a specific point and so we are constrained in what we can provide to the Commission, I provide the following information…

[34] Mr Dunbar went on to assert that he had 'spoken today' to the employer, and 'they have confirmed the current state of affairs on site'. This was said to be that there were nine employees in total performing work, on a five-day rotation, on each section of rail being built, comprised of the following:

- one person who is an excavator driver who prepares the ground described as the 'Area Prep';
- five tradespeople who are 'carpenter/form workers' that frame up and strip the mould for the cement to be poured into, described as 'Edge Form' and 'Stripping of Formwork'; and
- three persons who are concrete finishers that finish off the concrete surface described as a 'Concrete Finisher' with the above five 'carpenter/form workers' assisting with the concrete pour. This assistance is 'work incidental to the form work performed by them as a carpenter which is their substantial role'.

[35] Mr Dunbar contended that the CFMEU was entitled to represent all of the above employees. He also went on to refer to alternative 'constructions' of the 'evidence' (presumably meaning the Cvetanoski email) by which it might be read as identifying either 17 or 12 employees and described these 'constructions' as 'theoretical and misleading and approximate'.

[36] In response to the CFMEU's note, the AWU submitted that *Rescrete* was distinguishable from the present circumstances because it concerned the fabrication at a factory of concrete components to be used as prefabricated elements of buildings under construction and did not concern laying concrete *in situ*, and that *Enco* did not take the matter any further. In respect of the Dunbar letter, the AWU repeated its submission that the CFMEU's coverage of carpenters and joiners was confined to the building industry and the CFMEU did not have coverage of the edge formworkers, or employees pouring or finishing concrete, or employees engaged in stripping formwork which was 'quintessentially labouring work'. The AWU submitted that the

Dunbar letter should not be admitted because it was inadmissible opinion evidence and was filed without leave.

[37] Hawthorne, as a respondent to the appeal, was directed to file its written submissions for the appeal by 30 September 2025. It did not file any submissions in accordance with this direction and, after it was advised that it was in default of this direction, Mr Cvetanoski sent an email to the Commission on 1 October 2025 stating: 'We do not wish to be heard on the matter'. Consistent with this position, Hawthorne did not appear at the hearing of the appeal. However, on 30 October 2025 (at a time when preparation of these reasons for decision was well advanced), Mr Cvetanoski sent an email to the Commission (**Hawthorne email**), which attached the Dunbar letter and stated:

> I make reference to the attached letter from Mr Dunbar, in relation to the current state of affairs on the Gold Coast light rail project. Mr Dunbar spoke to myself prior to the issuing of the letter to confirm the accuracy of the contents within the letter, particularly work crew breakdown and approximate sizes. The contents within the letter are correct, subject to site conditions and available work areas, and are generally what is expected and required to complete track slab formwork, reinforcement, and concrete works.
>
> Thank you for your consideration and assistance.

[38] As with the Dunbar letter, the Hawthorne email was sent to the Commission without leave to do so and without the prior knowledge or consent of the AWU. The AWU submitted in response that, like the Dunbar letter, the Hawthorne email should not be received as evidence in the appeal.

Consideration

Standing and permission to appeal

[39] Contrary to the CFMEU's submissions, we accept that the AWU has standing to bring its appeal. Under s 604(1) of the FW Act, a 'person who is aggrieved by a decision' may appeal the decision subject to the grant of permission to do so. For a putative appellant to be a 'person aggrieved', it is sufficient that the decision will have an effect on their interests which is beyond that of an ordinary member of the public. It is not necessary that they have a legal, financial or proprietary interest in the subject matter of the proceeding.[9] In this case, we consider that the AWU has a sufficient interest in the decision to be a 'person aggrieved' for two reasons. First, it is not in dispute that the AWU has wide coverage of employees working in the civil construction sector. Under rule 5(4)(c)(i) of its rules, the AWU has eligibility to enrol as members 'every bona fide worker employed in or in connection with the industries or callings of… [t]he construction, repair[,] maintenance or demolition of… [c]ivil and/or mechanical engineering projects'. The material in this matter demonstrates clearly enough that the Project is a civil engineering project, meaning that the AWU has the capacity to enrol as members all employees covered by the Agreement. That gives the AWU an interest in whether the Agreement is approved, noting that the process by which the Agreement was made excluded the AWU and the AWU is not covered by the Agreement. Second, the AWU was permitted by the Commissioner to be heard as to whether the s 187(5)(a) approval requirement was satisfied, and its case in that respect was considered and rejected by the Commissioner in his decision.

[40] We also consider that permission to appeal should be granted since, as the reasons which follow make apparent, we consider that the AWU has a strongly arguable case that there was no reasonable basis upon which the Commissioner could have reached a state of satisfaction that the approval requirement in s 187(5)(a) was met.

Appeal principles

[41] Both the AWU and the CFMEU submitted that the *House v The King* standard of appellate review applies to the Commissioner's decision that the approval criterion in s 187(5)(a) was satisfied. This approach is consistent with the decision in *The Australian Workers' Union v John Holland Queensland Pty Ltd*,[10] in which a Full Bench stated at [17] that, because meeting the s 187(5)(a) criterion depends upon the Commission reaching a state of satisfaction, this indicates that the statute intended to allow a degree of latitude as to the choice of decision to be made. An alternative view might be that, to the extent that the required consideration under s 187(5)(a) involves the construction of the eligibility rules of the relevant employee organisations, that is a matter for which there can be only a single correct answer[11] and, further, the consideration of whether the relevant organisations are entitled to represent the industrial interests of the employees in question involves the application of a legal standard (the organisation's eligibility rule, as construed) to the evaluated facts (being findings made as to which employees will be covered by the relevant agreement). These matters suggest that the correctness standard of appellate review may apply.[12]

[42] We do not need to determine this issue because, as we shall explain, the AWU's appeal succeeds on the application of either appellate standard.

The consideration required under s 187(5)(a)

[43] The s 187(5) approval criterion has a number of elements. First, it is necessary to identify the 'relevant employee organisations that will be covered by the agreement'. This would normally be a simple and uncontroversial task. However, in this case, there is a complication because clause 1.1.3 of the Agreement provides that the CEPU is covered by the Agreement, in addition to the CFMEU (clause 1.1.4). As earlier explained, although the signature pages for the Agreement clearly contemplated that the CEPU would sign the Agreement, this never occurred.

[44] Under s 53(2)(b) of the FW Act, a greenfields agreement *covers* an employee organisation if the agreement is *made* by the organisation. Under s 182(3), a greenfields agreement is *made* when it has been signed by each employer and each relevant organisation that the agreement is expressed to cover. This implies at least that, in order for a greenfields agreement to *cover* an employee organisation under the FW Act, that organisation needs to have signed the agreement. It may have an additional significant implication which we discuss later in this decision. Accordingly, because the CEPU did not sign the Agreement, it was not an employee organisation which made the Agreement and is not covered by it. For the purpose of s 187(5)(a), the CFMEU was therefore the only relevant employee organisation requiring consideration. The Commissioner approached the matter on this basis and no party in the appeal contended that he erred in doing so.

[45] The second element is the identification of 'the employees who will be covered by the agreement, in relation to work to be performed under the agreement'. Because, at the time a greenfields agreement is made, the employer must by definition not have any employees employed within the coverage of the agreement (see ss 172(2)(b)(ii), (3)(b)(ii) and (4)), the evaluative exercise of ascertaining the employees 'who will' be covered by the agreement — that is, the persons who will actually be employed in positions within the scope of the agreement's coverage — will usually involve 'a predictive element'[13] (although there may be cases where, by the time the Commission gives consideration to the approval of a greenfields agreement, the employer may have begun employing persons under the agreement).

[46] Third, it is then necessary to consider whether the identified relevant employee organisations are 'entitled to represent the industrial interests' of a majority of the identified relevant employees. The entitlement to represent referred to is the entitlement of the organisation to enrol the employees as members pursuant to its eligibility rule.[14]

[47] In most cases, the assessment required under s 187(5)(a) is straightforward and uncontroversial because the relevant employee organisations will have eligibility in respect of the entirety of the coverage of the greenfields agreement, meaning that the organisations will be entitled to represent anybody employed under the agreement in future. This matter was not such a case because the CFMEU, as the only organisation covered by the Agreement, has only limited occupational eligibility in the civil construction sector, as we discuss later. It was therefore necessary for the Commissioner to make evaluative findings, based on some probative material, as to the employees who would in future be employed under the Agreement, and then to determine whether a majority of these would fall within the scope of the CFMEU's eligibility rule.

The CFMEU's eligibility rule

[48] The CFMEU in its current form is the result of a series of amalgamations between employee organisations, and its eligibility rule (rule 2, Constitution) reflects that fact. The rule consists of a large number of separate categories of membership, each of which reproduces the eligibility rule of an amalgamating organisation.[15] The CFMEU relies upon two categories of membership to justify its claim for coverage in this matter. First, it relies upon rule 2(A)(A)(3)(i), which reflects the eligibility rule of the original constituent organisation of the CFMEU, the Building Workers' Industrial Union (**BWIU**). Rule 2(A)(A)(3)(i) must be read together with the chapeau to rule 2(A)(A) and rules 2(A)(A)(1), (2) and (3),[16] which provide (not including exceptions and provisos to eligibility which are not presently relevant):

> (A)(A) The following unlimited number of persons, whether male or female, are eligible to be members of the Union:
>
> (1) employed in, usually employed in or qualified to be and desirous of being employed in or seeking to be employed in or in connection with the industry or industries, and/or occupations, and/or calling, and/or vocations and/or industrial pursuits of and/or
>
> (2) who, otherwise than as employees or employers, follow an occupation in or in connection with the industry or industries of: and/or

(3) who, otherwise than as employees or employers, are engaged in the industrial pursuit or pursuits of:

(i) carpenters or joiners (including foremen and sub-foremen) and carpenters or joiners employed in the States of New South Wales, Tasmania and Western Australia or in the Australian Capital Territory on bridges, wharves, jetties or piers or employed in the State of Victoria on bridges, wharves, jetties or piers which are wholly or substantially built of concrete and in respect of which the performance of formwork requires the exercise of a substantial amount of the knowledge and skill of a tradesman carpenter, or employed in one of the said States or in the State of Queensland or the said Territory on dams, ship carpenters or joiners (including foremen and sub-foremen) or tilelayers, including without limiting the meaning of the word tilelayers, persons employed in the laying or fixing of tiles, faience, mosaic, ceramic, opalite and the like not exceeding in measurement .093 square metres when such opalite and the like is fixed with cement composition or stonemasons, marble masons, polishers, machinists, sawyers and all other persons engaged in the dressing and preparation and/or erection of stone, marble or slate also those engaged in the preparation and/or erection of terrazzo or similar compositions, or bricklayers, tuckpointers, or in a trade or calling of a slater, roof tiler, shingler, ridger or cement tiler, fixer of roofing sheets of asbestos, fibro, fibrolite or cement mixtures and accessories, malthoid sisalkraft or bituminous roofing materials and all accessories made of the same materials and without limiting the meaning of the above they shall be deemed to include terra cotta, glazed, semi-glazed roofing tiles, cement tiles, slates, fibro slates, tiles, asbestos, fibro fibrolite, fibrous mixtures, cement and any mixtures that may replace or be used in conjunction with the foregoing or any materials incidental thereto or in place thereof, or in New South Wales journeymen and other labour engaged in the plate, sheet and ornamental glass trade, or apprentices or trainees to or in any of the foregoing trades together with such other persons whether employees in the industry or not as have been appointed officers of the Union and admitted as members thereof PROVIDED however that notwithstanding the foregoing:-
…

[49] Second, the CFMEU relies on rule 2(E), which is derived from the eligibility rule of the former Federated Engine Drivers and Firemen's Association (**FEDFA**). Rule 2(E), not including exceptions and provisos to eligibility which are not presently relevant, provides:

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

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

of the Union are elected as representatives of any working-class organisation to which the Union or a branch thereof is affiliated, or as a working-class member of Parliament.

…

(aa) …

(b) Further, provided that, without limiting the generality of the foregoing the following classes of workers engaged in or in connection with or incidental to the erection, repair, renovation, maintenance, ornamentation, alteration, removal or demolition of any building are eligible to be members of the Union. For the purposes of this sub-rule (b) building shall include a building-type structure for the purpose of housing persons, goods or workshop equipment (other than mechanical or electrical plant) on a civil or mechanical engineering site.
Dogman
Hoist or Winch Driver
Gantry Hand or Crane Hand
Crane Chaser
Dogman/Crane Hand
Trainee Dogman/Crane Hand
Pile Driver
Pile Driver Assistant
Rigger performing rigging work that is an integral part of, or is incidental to, cranage operations
Assistant Rigger
Drilling Machine Operator
Dump Cart Operator in respect of Victoria only

…

[50] For completeness, it is also necessary to refer to rule 2(B) which, again, not including exceptions and provisos to eligibility which are not presently relevant, provides:

(B) Without limiting the generality of the foregoing, or being limited thereby the Union shall also consist of:-

(1) workers (other than tradesperson[s]), on any work in or in connection with or incidental to the erection, repair, renovation, maintenance, ornamentation, alteration, removal or demolition of any building.

For the purpose of this sub-rule (B) building shall include a building-type structure for the purpose of housing persons, goods or workshop equipment (other than mechanical or electrical plant) on a Civil or Mechanical Engineering Site.

(2) without limiting the generality of the foregoing, persons eligible for membership of the Union shall include any worker:

(i) assisting any bricklayer, mason, plasterer, carpenter, or other tradesperson engaged on the work described in Part (1) of this sub-rule; or

(ii) employed on any making or contracting job in wood, stone, brick, concrete, iron or steel, or combination of these or other materials incidental to any of the work described in Part (1) of this sub-rule, and in particular as
Bricklayers Labourer
Plasterers Labourer
Concrete Finisher

Dump Cart Operator
Scaffolder
Powder Monkey
Foundation Shaftsman
Steel Fixer (including Tack Welder)
Assistant Powder Monkey
Demolition Worker
Gear Hand
Jackhammerman
Mixer Driver (Concrete)
Steel Erector
Aluminium Alloy Worker Structural Erectors (whether prefabricated or otherwise)
Cement Gun Operator
Concrete Cutting and Sawing Machine Operator
Concrete Gang worker (including Concrete Floater)
Roof Layer (Malthoid or similar material)
Underpinner
Concrete Formwork Stripper
Builders Labourer
Tackle Hand
Floor Sanding and/or Smoothing Machine Operators
Leading Hand Labourer
Labourer on Refractory work
Labourer excavating ground for foundations or basements of building or levelling ground on a proposed building site or doing concrete work, tar paving or asphalt work or mortar or concrete mixing in connection with or incidental to the construction, repair, demolition or removal of buildings
Rigger performing rigging work that is an integral part of, or is incidental to, a tradesman's work
Assistant Rigger assisting a rigger specified in immediate preceding classifications
Drilling Machine Operator except in the mining or mineral exploration or hydrocarbon industries
...

[51] Rule 2(B) reflects the coverage of the former Australian Building Construction Employees' and Builders Labourers' Federation (**BLF**) acquired by the BWIU following the former's deregistration in 1986.[17]

[52] It is convenient at this point to make the following two observations concerning the above parts of the CFMEU's eligibility rule. First, rule 2(B) gives the CFMEU industry coverage of non-tradespersons in respect of what might be termed the 'building sector' only, since all of the subrule is confined by the following words in rule 2(B)(1): 'any work in or in connection with or incidental to the erection, repair, renovation, maintenance, ornamentation, alteration, removal or demolition of any *building*' (emphasis added). A 'building' is, according to its ordinary meaning, 'a substantial structure with a roof and walls'.[18] This includes certain types of buildings on civil and mechanical engineering projects ('a building-type structure for the purpose of housing persons, goods or workshop equipment (other than mechanical or electrical plant)'). Apart from this, the CFMEU does not (unlike the AWU) have any general

eligibility in respect of non-tradespersons in the civil construction sector — that is, the sector concerned with the construction in respect of 'civil and mechanical engineering projects' — and any coverage of specific categories of such non-tradespersons must be found in the occupational parts of the eligibility rule.

[53] Second, notwithstanding the references to 'industry or industries' in rules 2(A)(A)(1) and (2), the eligibility described in rule 2(A)(A) is occupational in nature only. The same is true of rule 2(E) which, as earlier stated, is derived from the eligibility rule of the former FEDFA, which was a 'craft' or occupational union.[19] It is important to note that the occupational coverage identified in rule 2(E)(b) is, using the same terminology as rule 2(B)(1), confined to the building sector. For an employee to fall within the occupational coverage of rule 2(A)(A)(3) or rule 2(E), the primary purpose of the employee's employment must be to undertake one or more of the occupations identified in these rules.[20]

The reasons for decision

[54] We have earlier summarised the Commissioner's reasons for reaching a state of satisfaction in respect of the s 187(5)(a) criterion. There are three stages in the Commissioner's course of reasoning. The first, at [4]–[6] of the decision, is that the Commissioner evidently placed weight upon the affirmative answers given by Mr Cvetanoski and Mr Dunbar in their respective declarations to the question 'Are the employee organisations covered by the agreement, taken as a group, entitled to represent the industrial interests of a majority of the employees who will be covered by the agreement, in relation to work to be performed under the agreement?' In particular, the Commissioner described the ordinary approach of the Commission as being to proceed on the basis that the statutory declarations made in support of the approval of an agreement are true and correct, and said that the AWU had not filed any evidence that 'call[ed] into question the truth of the declarations made'.

[55] The approach taken by the Commissioner misconceives, with respect, the nature of the specific question which Mr Cvetanoski and Mr Dunbar answered. Insofar as statutory declarations made in support of the approval of an enterprise agreement aver as to specific propositions of fact, the Commissioner was correct to say that the Commission is ordinarily entitled to rely upon such declarations as being truthful in the absence of evidence to the contrary. However, the question here cannot reasonably be characterised as one involving a simple matter of fact to which there is a single truthful answer. Consistent with our earlier analysis of the consideration required under s 187(5)(a), any answer to the question would need to involve the identification of the relevant employee organisations, a predictive evaluation of the employees who would in the future be employed under the agreement, and an assessment of whether those employees would fall within the eligibility rules, correctly construed, of the relevant organisations. Thus, the answers given by Mr Cvetanoski and Mr Dunbar are better characterised overall as expressions of opinion rather than as averments of fact. There is no reason to question whether the opinions were honestly given, but that is far from demonstrative of their correctness.

[56] In the proceedings below, once the AWU put the expressions of opinion by Mr Cvetanoski and Mr Dunbar in their respective declarations into contest, including on the basis of a construction of the relevant parts of the CFMEU's eligibility rule that was significantly different to the CFMEU's position, little if any weight could reasonably be assigned to those

opinions since the basis upon which they were formed was necessarily not disclosed in the declarations. Further, there is good reason to doubt whether the opinions even proceeded upon the same premise as the Commissioner's decision in respect of s 187(5)(a). As earlier outlined, clause 1.1.3 and the signature pages of the Agreement contemplated that the CEPU as well as the CFMEU would be covered by the Agreement. There is nothing before us to suggest that Mr Cvetanoski knew, when he signed the Agreement and made his declaration (on 9 June 2025), that the Agreement would not ultimately be signed by the CEPU as well as the CFMEU. It is therefore likely that his expression of opinion as to the union coverage of Hawthorne's future employees under the Agreement had in mind the coverage of the CEPU as well as the CFMEU. That proposition may more firmly be stated in respect of Mr Dunbar's declaration of 10 June 2025 since, as earlier identified, he separately stated in his declaration that '[t]he Employee *Organisations* have appropriate coverage of the majority of the employees' (emphasis added). His use of the plural is consistent with the proposition that he understood, consistent with the terms of the Agreement, that it would cover the CEPU as well as the CFMEU. The Commissioner, correctly, proceeded on the basis in his decision that the only employee organisation falling for consideration under s 187(5)(a) was the CFMEU, but it was at the least unclear in the absence of any clarification by the CFMEU that the declarations of Mr Cvetanoski and Mr Dunbar were founded on that same premise. That further rendered untenable reliance on their expressions of opinion in relation to s 187(5)(a).

[57] Second, the Commissioner at [7]–[8] made reference to the Cvetanoski email as constituting 'evidence' relevant to his consideration under s 187(5)(a). However, apart from noting the AWU's concession regarding the reference to JH in the Cvetanoski email, the Commissioner made no finding that the categories of employees described in the email were 'the employees who will be covered by the agreement' for the purpose of his s 187(5)(a) consideration, nor did he undertake any analysis of whether a majority of these employees fell within the scope of the CFMEU's eligibility rule.

[58] Third, the Commissioner at [9]–[10] placed reliance upon the CFMEU's Classification analysis to found the conclusion that the CFMEU has eligibility 'to represent the vast majority of occupations covered by the Agreement'. However, that conclusion misconceives the statutory test in s 187(5)(a), which concerns eligibility in respect of a majority of the employees that will be covered by the relevant agreement in relation to work to be performed under the agreement. That, as earlier stated, necessitates a predictive assessment concerning the likely composition of the workforce to be employed within the scope of the relevant agreement. There is no necessary concordance between the majority to which s 187(5)(a) refers and a majority of the occupations to be covered by the Agreement.[21] In this case, there was no evidence that Hawthorne would need to engage employees under the Agreement to perform work in most of the occupations specified in the Construction Worker/Labourer classifications in Appendix B of the Agreement, and such evidence as was provided by the Cvetanoski email demonstrated that there would not be employees engaged in most of the occupations for which the CFMEU claimed coverage. For example, of the 74 different occupations specified in the eight CW levels in the Construction Worker/Labourer classifications, the CFMEU claimed coverage of 54 of these. However, at least 32 of these occupations are for the operation of cranes or various items of heavy machinery or plant, in circumstances where the Cvetanoski email discloses at best the foreshadowed operation of a single excavator operator. Thus, the Commissioner's finding in [9] simply did not bear upon satisfaction of the statutory criterion in s 187(5)(a).

[59] In any event, the Classification analysis upon which the Commissioner relied was, even on its own terms, substantially flawed. It did not take into account the nine Plumbing and Mechanical Services classifications in Appendix B, which patently do not fall within the scope of the CFMEU's eligibility rule. Further, in respect of a number of the occupations in the Construction Worker/Labourer classifications, the CFMEU's claim of coverage in its Classification is simply incorrect. To give just three examples:

(a) There is no reference in rule 2(E) to 'General Labourers' (CW1) falling within the CFMEU's eligibility. As earlier discussed, the CFMEU has general coverage of non-tradesperson workers, including labourers, under rule 2(B), but this coverage is confined to the building sector.

(b) The CFMEU does not have eligibility for a 'Paving Stringliner' (CW2) under rule 2(A)(A)(3)(i).

(c) The CFMEU does not have eligibility for a 'Ticketed Dogman' (CW3) under rule 2(E) because its eligibility in relation to a Dogman is, under rule 2(E)(b) confined to the building sector.

[60] Further, for reasons given later in this decision, the CFMEU claims of eligibility under rule 2(A)(A)(3)(i) for occupations such as 'Concrete Gang' and 'Concrete Float Hand' (CW2), 'Form Work Labourer', 'Shotcreter', and 'Shotcrete Crew' (CW2), and 'Concrete Finisher' and 'Concrete Paving Spreader' (CW4) are (outside of the building sector) also incorrect.

[61] The Commissioner's decision does not disclose that he relied upon any other material before him in reaching a state of satisfaction as to the s 187(5)(a) criterion, and we read his reference to the 'totality of the evidence from the CFMEU and the employer'[22] as meaning the documents referred to in his decision, namely the declarations made by Mr Cvetanoski and Mr Dunbar, the Cvetanoski email and the CFMEU's Classification analysis. For the reasons set out above, we do not consider that the manner in which the Commissioner relied upon this material could reasonably give rise to satisfaction that the s 187(5)(a) approval requirement was met.

Analysis of the Cvetanoski email

[62] Although the Commissioner did not engage in any analysis of the Cvetanoski email, there remains the question of whether the email constituted evidence upon which a state of satisfaction might reasonably have been reached that the s 187(5)(a) criterion was met. The CFMEU submitted in the appeal that, notwithstanding that the Commissioner made no express finding to this effect, the Cvetanoski email demonstrated that a majority of the employees who would be employed under the Agreement were eligible to be members of the CFMEU. Although not stated to be such, this submission may be characterised as a notice of contention that the Commissioner's decision should be affirmed on grounds other than those stated in the decision.

[63] There is much about the Cvetanoski email that is problematic. The email was tendered by the CFMEU but Hawthorne, from which the document originated, never confirmed the accuracy of the information in the document (since it made no submissions at the hearing before the Commissioner). The information in the email is imprecise in three major respects. First,

there is no description of the work that is actually to be performed apart from the subheading 'Track Slab Works & Pavement Works'. Second, it refers in the second, third and fourth bullet points to 'Qualified Tradespersons' without identifying the particular trade(s) involved, making it difficult to analyse whether they fall within the CFMEU's eligibility rule. Third, it is difficult to determine the number of employees involved in order to ascertain whether there is the relevant majority for the purpose of s 187(5)(a). That is because the email does not make clear whether the categories of employees in each bullet point are discrete or overlapping. For example, it is not clear whether the 'Qualified Tradespersons' or the 'Labourer[s]' referred to in the second, third and fourth bullet points are the same or different employees.

[64] The first bullet point refers to a single 'GPS excavator Operator'. On the assumption that this describes the primary purpose of the relevant employee's employment — a point not conceded by the AWU — then such an employee would be eligible to be a member of the CFMEU as an 'excavator driver' under rule 2(E)(a). However, we are not satisfied that any other category of employee described in the Cvetanoski email is demonstrably eligible for membership of the CFMEU.

[65] The CFMEU submitted that the work described in the second and fourth bullet points was 'formwork' for which it had coverage under rule 2(A)(A)(3)(i) of both tradespersons and labourers on the basis of *Jennings*. 'Formwork' describes the process of creating a temporary mould into which wet concrete is poured, with the mould staying in place until the concrete dries and sets. Once this occurs, the mould is removed or 'stripped'. In the context of the Project, we infer from the Cvetanoski email that the formwork involved is for the purpose of laying concrete slabs into which rails are to be set. We observe however at the outset it is not clear that 'formwork' is anywhere near a complete description of the work described in the second bullet point of the Cvetanoski email given that there is no material which explains what work, equipment or skills are involved in 'placement of mesh and Setting Up Rail'.

[66] In any event, we do not consider that *Jennings* supports the CFMEU's blanket claim of coverage of formwork in the civil construction sector. *Jennings* concerned a demarcation dispute in 1984 between the BWIU and the BLF concerning the performance of work of 'erecting supports or frames for steel formwork' at a high-rise building project in Perth. The conclusions reached by Commissioner Coleman in his decision were as follows:[23]

> I have now examined the material and evidence submitted and I have come to the conclusion that the work of setting out, erecting and preparing steel scaffolding used for the support of formwork is the work of both carpenters and builders labourers, with neither class of workers having exclusive rights.
>
> Both constitutionally and within the respective awards both classes of employees are eligible to perform certain work connected with steel scaffolding used in formwork construction.
>
> In precise terms I set out the procedure which I believe each group is entitled to perform on the work involved.
>
> 1. The reception, collection and movement of the steel tubular materials for use in the fabrication of supports for formwork, is the function of builders labourers.
>
> 2. The setting out, plumbing and levelling of frames used for the support of formwork is the function of carpenters.

> 3. The erection of the frames used for the support of formwork is the function of builders labourers.
>
> 4. The work performed on tubular steel scaffolding used to fabricate frames for the support of formwork should be carried out by a composite team of carpenters and builders labourers and when required under the provisions of the Construction Safety Act and its Regulations, scaffolders.
>
> 5. The proportion of carpenters and builders labourers and/or scaffolders forming the composite team shall in the first instance be decided by the employer, based on the nature and volume of the work to be performed.
>
> This decision has been based on the practices that pertain in most of the industry throughout Australia, including Western Australia, where by agreement, award prescription and arrangement, the work on steel scaffolding and frames used as support for formwork is carried out by composite teams of carpenters and joiners and builders labourers and scaffolders.
>
> While it is acknowledged that this matter of demarcation arose as a result of a dispute at the SEC Wellington Street site and only that builder, namely Jennings Industries Limited was present at the hearing, inspections and evidence were taken from sites and witnesses representing a broad spectre of the building industry in Perth. To that extent I would say to the parties that this decision being based on those practices in the industry should be adopted for general use by builders and the Unions concerned.

[67] It is apparent that the Commissioner's decision was not concerned with formwork generally, but with one specific aspect of work connected with formwork, namely 'the work of setting out, erecting and preparing steel scaffolding used for the support of formwork'. The Commissioner did not decide the matter by reference to the eligibility rules of the BWIU or the BLF — although he said that, constitutionally, both had eligibility in respect of 'certain work connected with steel scaffolding used in formwork construction' — but rather, his decision was 'based on the practices that pertain in most of the industry throughout Australia'.

[68] Insofar as *Jennings* concerned builders' labourers, it is important to reiterate that the dispute the subject of that decision was concerned with a building project. As earlier explained, rule 2(B) of the CFMEU's eligibility rule, which reflects the BLF's coverage of builders' labourers at the time of its deregistration, is confined to the building sector and does not extend to civil construction (except in respect of certain types of buildings on civil and mechanical engineering projects). *Jennings* therefore cannot be read as providing any support for the proposition that the CFMEU has eligibility in respect of formwork labourers in civil construction not associated with building work and, to the extent that the Commissioner considered otherwise (at [10]), he was in error. Rule 2(A)(A)(3)(i) does not contain any reference to formwork labourers, and to the extent that the CFMEU's Classification analysis asserts that a 'Form Work Labourer' (CW3) performing work under the Agreement would be eligible to join the CFMEU under rule 2(A)(A)(3)(i), it is wrong. Therefore, to the extent that the second and fourth bullet points of the Cvetanoski email refer to labourers engaged in formwork, there is no basis to conclude that such workers would be eligible to join the CFMEU.

[69] Nor did *Jennings* state as a general proposition that any trade-qualified workers engaged in formwork were entitled to be represented by the BWIU, and we note that the Commissioner

at [10] accepted, on the basis of *Jennings*, that the CFMEU had eligibility in respect of formworker tradespersons only 'to the extent they are carpenters…'.

[70] We accept that, under rule 2(A)(A)(3)(i), the CFMEU has eligibility with respect to carpenters generally, including those working in civil construction. We do not accept the AWU's submission that the initial reference to 'carpenters or joiners (including foremen and sub-foremen)' in rule 2(A)(A)(3)(i) is to be read as confined to the building sector, with the more confined and qualified reference to carpenters and joiners which follows delineating the CFMEU's scope of coverage in civil construction. There is no textual basis for 'carpenters or joiners (including foremen and sub-foremen)' to be read in the confined way proposed by the AWU, and a historical analysis of rule 2(A)(A)(3)(i) demonstrates that there is no basis to imply any restriction to the building sector. As earlier stated, rule 2(A)(A)(3)(i) has its origin in the eligibility rule of the BWIU. The BWIU was registered as an organisation in 1962,[24] but had enjoyed an earlier period of registration from 1911 until its deregistration in 1948. For most of this earlier period, it was named the Amalgamated Society of Carpenters & Joiners of Australia, with the name change to the BWIU occurring shortly before its deregistration. Upon its reregistration, the BWIU's eligibility rule (rule 2) relevantly provided:

> The Union shall consist of an unlimited number of persons whether male or female employed or usually employed as carpenters or joiners, including ship carpenters or joiners, or …

[71] The BWIU's industry rule (rule 3) provided that the industries in connection with which the union was formed included the 'carpentry, joinery, ship carpentry [and] ship joinery industries'. Thus, upon reregistration, there is no doubt that the BWIU had unrestricted coverage of carpenters.

[72] In 1966, approval was granted[25] for a variation to, relevantly, that part of the BWIU's eligibility rule concerning carpenters and joiners as it was at that time to add the underlined words below: [26]

> The Union shall consist of an unlimited number of persons whether male or female employed or usually employed or qualified to be and desirous of being employed as carpenters or joiners <u>(including foremen and sub-foremen and carpenters or joiners employed in the States of New South Wales, Tasmania and Western Australia or in the Australian Capital Territory on bridges, wharves, jetties or piers or employed in the State of Victoria on bridges, wharves, jetties or piers which are wholly or substantially built of concrete and in respect of which the performance of formwork requires the exercise of a substantial amount of the knowledge and skill of a tradesman carpenter, or employed in one of the said States or in the State of Queensland or the said Territory on dams)</u>, ship carpenters or joiners…
>
> (underlining added)

[73] The BWIU's rationale for this variation, which was objected to by the AWU, was somewhat convoluted. As recorded in the decision approving the variation, the BWIU said:[27]

> Counsel for the applicant submitted that for some considerable time there has been a series of issues arising between the applicant and the objector in the State of Queensland as to the performance of form work on various types of dams, which are either completely constructed in concrete or are earth or rock filled with a concrete spillway to a concrete outlet. The practice in Queensland is that carpenters are employed on preliminary production work on the dam site, such as the provision of workshop accommodation, amenities blocks etc. <u>Following this, two</u>

sets of events appear to occur, i.e. in some cases the whole of the concrete form work for the erection of the dam is done by members of the applicant under the terms of the Building Trades (State) Award whilst in other cases where a combination of steel forms and timber forms are used the steel forms are erected by employees known as 'form setters' whose conditions of employment are governed by a series of individual agreements made between the Queensland branch of the objector and the particular employer concerned. The purpose of the present application and the desire of the applicant to specifically include in its conditions of eligibility for membership a reference to the employment of its members in the States of New South Wales, Tasmania, Western Australia, Victoria, Queensland and the Australian Capital Territory on dams is to cater for the formation of a Western Australian Branch where there exists a State registered union which makes specific reference in its rules to carpenters employed on bridges, wharves, jetties etc., and as it is the desire of the applicant to have the constitution of its Western Australian Branch spelt out in identical terms to the constitution of the organi[s]ation the convenient course appeared to be an application to seek to alter the conditions of eligibility for membership of the organi[s]ation. Having reached the point of seeking to alter its rules for the purpose of covering primarily the position in Western Australia it was considered desirable to make specific reference (inter alia) to carpenters or joiners employed on bridges etc. and dams in the State of Queensland, for the reason that there could be some danger in the future of the interpretation of the words 'carpenters or joiners' being read down to exclude the type of work which it is now sought to cover and for this reason it is thought necessary that specific reference should be made to the coverage sought in respect of the State of Queensland; thus the desire to insert in the presently registered conditions of eligibility the proposed words referred to earlier herein. The suggested amendment will therefore make it quite clear that carpenters employed on bridges, wharves, jetties and piers in the State of Queensland are not covered by the conditions of eligibility for membership of the applicant, thus preserving the rights of the applicant and objector as they at present exist in that State; whilst the inclusion of the word 'dams' will emphasise that the applicant is entitled to have as members carpenters employed thereon in the said State; this being precisely the current situation i.e. both the applicant and the objector are by virtue of their registered rules entitled to cover the relevant membership of persons employed on dams.

(underlining added)

[74] The AWU, in objecting to the variation, submitted:[28]

The representative of the objector submitted that the existing constitution of the applicant is wide enough to cover carpenters and joiners wherever employed and objection is taken to the inclusion of the words 'carpenters or joiners on dams in Queensland', as once these words appear in the conditions of eligibility for membership of the applicant there would be nothing to prevent some future official or advocate claiming that such words were inserted for a purpose. If the word 'carpenters' applies to a carpenter wherever he may be employed, then there must be some specific purpose for the applicant's desire to have the words 'on dams' spelled out, and to do so could only be a means of laying the foundations for further industrial disputes.

(underlining added)

[75] In approving the variation, the Deputy Industrial Registrar said:[29]

From the submissions of the parties it is apparent that carpenters and joiners, as distinct from employees known as 'form framers' and 'form setters' are employed on dams in the State of Queensland. In so far as this work is concerned both the applicant and the objector have indicated that a demarcation or division in the work associated thereto has extended over many years between the two types of employees and that the employment of 'carpenters' members of

> the applicant or 'form framers' or 'form setters' members of the objector thereon has been and still is the prerogative of the employer concerned.
>
> Whilst it may be true to say that the present conditions of eligibility for membership of the applicant, which covers, inter alia, persons employed or usually employed or qualified to be and desirous of being employed as carpenters or joiners, gives coverage to carpenters or joiners wherever employed, it is my view that the applicant has presented good and cogent reasons for wishing to extend the provisions of its rules to give clarity to the present situation in the State of Queensland by including a reference to this work in its eligibility for membership. As it is not the wish of the applicant to add or detract from existing practices it is not seeking to give any wider field of employment to carpenters or joiners; thus the reference in the transcript by Counsel for the applicant to the principle it was prepared to apply to the employment of persons on dams in the State of Queensland. I am also of the opinion that the material placed before me on behalf of the objector cannot be said to constitute circumstances which would make it undesirable for me to refuse the application in the form now sought by the applicant…
>
> (underlining added)

[76] It may be seen that the Deputy Industrial Registrar's decision involved an acceptance of the AWU's submission that the BWIU already had coverage of carpenters and joiners wherever employed, with the words added to the rule intended, in respect of Queensland, to preserve an existing demarcation with the AWU. That the words added to the rule were enclosed in parentheses and commenced with the words 'including' makes clear that the variation to the rule were words of inclusion and were not intended to narrow the BWIU's existing wide scope of eligibility with respect to carpenters and joiners. However, in the course of subsequent variations, an error crept into the drafting of the eligibility rule in that the parentheses became misplaced. A 1969 decision[30] concerning a further application by the BWIU to vary its eligibility rule shows the first stage of the error: the opening parenthesis is missing altogether, and the closing parenthesis has been placed immediately after '…foremen and sub-foremen'. A 1975 decision[31] concerning a further rules alteration has placed the parentheses around 'including foremen and sub-foremen', as rule 2(A)(A)(3)(i) currently does. There is no indication in the 1969 and 1975 decisions that the relocation of the parentheses was intended. The perpetuation of this error has left the eligibility rule in a somewhat confusing form, but we consider nonetheless that it is clear that the CFMEU has at all times had eligibility with respect to carpenters wherever they are employed (assuming that carpentry is the principal purpose of their employment).

[77] However, the 1966 decision referred to above points to the flaw in the CFMEU's claim that, by virtue of its coverage of carpenters under rule 2(A)(A)(3)(i), it thereby has coverage of all other workers, including trade-qualified workers, engaged in formwork. As that decision explains, formwork involving steel forms may be carried out by workers other than carpenters. Even where timber forms are used, this does not necessarily require a trade-qualified carpenter. The evidence of Mr Maxwell demonstrates that, at least until 2020, a person could commence and proceed to obtain a trade qualification (Certificate III) in Formwork/Falsework as a 'specialist field of work' that was separate from the trade qualification for carpenters and joiners. It does not follow that, because the two qualifications have some overlapping competencies, a trade-qualified formworker can be equated to a carpenter. Clearly, a formworker is a narrower and more specialist trade than that of a carpenter. This can clearly be seen in the competencies for the respective qualifications, which are annexed to Mr Maxwell's statement. For example, the previous carpentry qualification, as might be expected, included the following core units of competency:

- Construct and erect wall frames
- Construct ceiling frames
- Erect roof trusses
- Construct pitched roofs
- Construct eaves
- Install windows and doors
- Install exterior cladding
- Install lining, panelling and moulding.

[78] None of the above was a unit of competency for the formwork qualification. The qualification also contained elective units specific to carpentry which were not available under the formwork qualification.

[79] The availability until recently of the formwork trade qualification presumably means that there remain significant numbers of formworkers 'in the field' who hold this qualification and are not trade-qualified carpenters. Likewise, there are no doubt qualified carpenters performing formwork. It is only the latter category who, we consider, fall within rule 2(A)(A)(3)(i) of the CFMEU's eligibility rule. There is nothing in rule 2(A)(A)(3)(i) which indicates coverage of trade-qualified formworkers who are not carpenters.

[80] The second and fourth bullet points in the Cvetanoski email refer to 'Tradespersons' that will be engaged in formwork, but the document does not indicate that all or any of these persons will necessarily be carpenters. In this respect, it reflects the Construction Worker/Labourer classifications in the Agreement, which contain no reference specifically to the job function of carpenter but, at CW5, refers (somewhat tautologically) to a 'Trade Qualified Tradesperson'. For the reasons we have stated, there is no basis to assume that the tradespersons engaged in formwork to which the Cvetanoski email refers are carpenters, and thus the email cannot be relied upon to ground a finding that these employees will be eligible to be members of the CFMEU. The Dunbar email, which refers to these employees as carpenters, appears merely to reflect Mr Dunbar's interpretation of the Cvetanoski email, or perhaps his perspective that carpenters and formworkers are indistinguishable, and we note that no reliance was placed on the email by the CFMEU in the appeal.

[81] The third bullet point in the Cvetanoski email refers to '2 Concrete Finishers, 4 x Concrete Labouring Crew made up of Qualified Tradespersons and Labourers' — apparently six employees in total. It appears that the work performed by these employees consists of pouring, levelling and finishing wet concrete to form concrete slabs or pavements although, again, the material does not clearly articulate this. The CFMEU claims that employees performing this work are eligible to be members under rule 2(A)(A)(3)(i) on the basis of the words:

> …stonemasons, marble masons, polishers, machinists, sawyers and all other persons engaged in the dressing and preparation and/or erection of stone, marble or slate also those engaged in the preparation and/or erection of terrazzo or similar compositions…

[82] The CFMEU referred to the decisions in *Rescrete* and *Enco Precast* as being supportive of this proposition.

[83] We do not accept this submission. In *Rescrete*, a Full Court of the Federal Court rejected an application for judicial review of decisions (by a single member and then a Full Bench of the Australian Industrial Relations Commission) finding that the CFMEU had eligibility with respect to at least some of the employees engaged by the Rescrete business at two manufacturing facilities in New South Wales such as to permit an industrial dispute to arise between the CFMEU and Rescrete. These facilities produced precast concrete products for use in building projects, including hollowcore wall panels and floor planks. The questions which arose in the matter were, first, whether the products produced by the Rescrete business were similar in composition to terrazzo and, second, whether the relevant employees were 'engaged in the preparation' of the products. As to both questions, the Court proceeded on the basis that it was for Rescrete to demonstrate affirmatively that the AIRC lacked jurisdiction to find the existence of an industrial dispute, including to establish what the relevant facts were.[32]

[84] As to the first question, the Court (per O'Connor and Moore JJ, Beaumont J agreeing) said:[33]

> … The first contentious element is that the employee was engaged in work associated with a material that was or had a similar composition to terrazzo. It is relatively plain that the words 'similar compositions' was intended to extend the class to employees who, while not engaged in the preparation and/or erection of terrazzo, were engaged in the preparation and/or erection of material that was composed of elements with similar characteristics as the elements of terrazzo. In the present case, it is necessary to consider the elements that make up the products made by Rescrete and that make up terrazzo.
>
> The products made by Rescrete are a mixture of sand, cement, water and aggregate. Terrazzo is a mixture of sand, cement, water and stone particles. Having regard only to these matters, they are plainly similar in composition and counsel for Rescrete did not submit otherwise. The point of distinction relied upon by counsel for Rescrete was that terrazzo does not, and the Rescrete products do, contain steel reinforcing which can be stressed. The addition of stressed steel results in a product which is load bearing. However there is no evidence establishing, one way or the other, whether terrazzo has been or is manufactured with these features. It may be that terrazzo does not, nor ever has, contained steel or at least steel that has been stressed. Equally, however, it is possible that terrazzo used for panelling contained some steel designed to give the product structural integrity and may, in some circumstances, be load bearing. However, given the paucity of evidence on what terrazzo is, this Court is not able to answer these questions in the way we are invited to by Rescrete. It has failed to demonstrate that terrazzo and the products manufactured by Rescrete are not of a similar composition.

[85] The *ratio* of the above passage is that Rescrete had failed to discharge its burden of demonstrating that the concrete products manufactured were not of the same composition as terrazzo. While the Court considered that a basic consideration of the compositional elements of Rescrete's products and terrazzo disclosed a similarity in composition, we do not consider that the above passage stands as authority for the proposition that *any* form of concrete used in any context is of similar composition to terrazzo. The Court at least reserved the possibility that the use of steel reinforcing might make a compositional difference, with the evidence before it not disclosing whether terrazzo is ever composed using steel reinforcing.

[86] For ourselves, the notion that terrazzo, a decorative composition used in building floors and walls, is 'similar' to the concrete used to form slabs in a civil construction project appears

to be somewhat counter-intuitive. We would have thought that an analysis of similarity or otherwise of composition might take into account not just the constituent elements of composition but also the quantities or proportions of their use. However, there is insufficient evidence before us to permit us to form any conclusion as to this issue.

[87] The real distinction between this case and the facts of *Rescrete* lies in the Court's consideration of the second question identified above. As to this question, the Court said: [34]

> The word 'preparation' is defined in the *Macquarie Dictionary* as, relevantly:
>
> 'The act of preparing'
>
> The word 'prepare' (and its derivatives) is relevantly defined as:
>
> 'To manufacture, compound or compose'
>
> The definition of 'preparation' in the *Shorter Oxford Dictionary* is relevantly:
>
> 'The action or special process of putting something into proper condition for use; dressing and serving up (of food); composition, manufacture (of a chemical, medicinal or other substance)'
>
> It is to be recalled that it appeared to be common ground that terrazzo is a mixture of elements that is created at the site where it is to remain as part of a building or structure or created as a panel which is installed into a building or structure. It is consistent with the ordinary meaning of 'preparation' for it to be treated as a reference to the process of mixing the constituent elements of terrazzo to create the material which either remained on site or was taken to a site and installed or, to use the language of the rule, 'erected'. For similar reasons the word 'preparation' would, consistent with its ordinary meaning, comprehend the mixing of the elements constituting the material of similar composition to create the material that was installed or erected. Neither the language of the contentious clause nor the context in which it appears, including the remainder of subpar (i), suggest it should be given some limited meaning. Indeed it is a settled principle of construction of eligibility rules of registered organisations that they should not be construed narrowly. The proper approach was described by Mason, Brennan and Dawson JJ in *Re Union of Postal Clerks and Telegraphists; Ex parte Australian Telephone and Phonogram Officers' Association* (1986) 66 ALR 227 at 235:
>
> > The general rule of construction is that eligibility provisions should be construed liberally rather than narrowly or technically (*R v Cohen; Ex parte Motor Accidents Insurance Board* (1979) 141 CLR 577 at 581, 587).
>
> In our view, the word 'preparation' comprehends the processes of manufacture undertaken by Rescrete employees at both the Riverstone and Mulgrave sites.

[88] Workers involved in pouring, levelling and finishing wet concrete do not 'prepare' it in the sense discussed in *Rescrete*. That is a function which is undertaken, usually offsite, in a concrete batching plant. Nor can they be said to 'erect' it. In *Rescrete*, the Court equated 'erecting' something with installing it, implying in the building context the placement of a prefabricated or pre-prepared component. This is consistent with the context provided by the use, in the same part of rule 2(A)(A)(3)(i), of 'erection' in connection with stone, marble or slate. This is plainly not applicable to pouring wet concrete for a slab. The relevant ordinary meanings of 'erect' are 'to build; construct; raise: *to erect a house*' or 'to raise and set in an upright or perpendicular position: *to erect a telegraph pole*'.[35] Neither meaning is apt to describe the functions of pouring and finishing wet concrete.

[89] The decision in *Enco Precast* does not take the matter any further: like *Rescrete*, it concerned the manufacture of precast concrete building components, and the Court declined to reconsider the reasoning in *Rescrete*.

[90] Accordingly, the employees referred to the Cvetanoski email as '2 Concrete Finishers, 4 x Concrete Labouring Crew made up of Qualified Tradespersons and Labourers' are not, insofar as this is read as describing the primary purpose of the employee's employment, eligible to be members of the CFMEU. It also follows that, insofar as the CFMEU's Classification analysis asserted that, on a civil construction project not involving the construction of any building, it had eligibility under rule 2(A)(A)(3)(i) for 'Concrete Gang' and 'Concrete Float Hand' (CW2) and 'Concrete Finisher' and 'Concrete Paving Spreader' (CW4), it was wrong. The same is likely to apply to 'shotcreting' functions, which involve another method of pouring or applying concrete which has already been 'prepared'. In the Classification analysis, this includes 'Shotcreter' and 'Shotcrete Crew' (CW3) and 'Shotcrete Placing Machine, Paver' (CW5).

[91] For these reasons, the Cvetanoski email provides no reasonable basis for a finding that the majority of employees to be engaged by Hawthorne on the project under the Agreement would be eligible to be members of the CFMEU.

Conclusion

[92] The Commissioner erred in approving the Agreement. Applying the *House v The King* standard of appellate review, it was not reasonably available for the Commissioner to reach a state of satisfaction, on the material before him, that the requirement for approval in s 187(5)(a) of the FW Act was met. Alternatively, if the correctness standard of appellate review applies, the Commissioner's conclusion that the s 187(5)(a) requirement was satisfied was in error. Accordingly, the appeal is upheld, and the decision approving the Agreement is quashed.

Rehearing

[93] As at the completion of the hearing, neither the CFMEU nor Hawthorne had sought the admission of any further evidence in the appeal which might have permitted a state of satisfaction to be reached regarding the s 187(5)(a) requirement. Accordingly, having regard to our analysis of the material that was before the Commissioner at first instance, there is no basis upon which, upon a rehearing of the matter, we could find that the s 187(5)(a) requirement was satisfied. However, it is necessary to consider whether we should have regard to the Dunbar letter and the Hawthorne email.

[94] Section 607(2) of the FW Act provides that, in an appeal, the Commission may admit further evidence and take into account any other information or evidence. This power is discretionary in nature. The usual practice is that a party seeking the admission of further evidence in an appeal must, prior to the hearing of the appeal, make an application for the admission of the evidence and, in doing so, provide or at least identify the further evidence it wishes to adduce. The following principles are usually applied to the determination of any such application: (1) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the hearing at first instance; (2) the evidence must be such that there must be a high degree of probability that there would be a different outcome; and (3) the evidence must be credible.[36]

[95] In this case, there has been no application by the CFMEU or Hawthorne for the admission of further evidence in the appeal. It is not clear whether the CFMEU's legal

representative, who was identified in its Form F53 notice of representation and appeared for the CFMEU with permission at the hearing, has even been made aware by the CFMEU of the Dunbar letter. In his letter, Mr Dunbar acknowledges that the CFMEU had only been given leave to provide a note on a specified issue and was otherwise 'constrained' as to what it could put before the Commission, but then went ahead and volunteered his additional 'information' anyway. As earlier stated, Hawthorne informed the Commission that it did not want to be heard in the appeal and did not appear at the hearing of the appeal and, in that context, has given no explanation for sending the Hawthorne email almost a fortnight after the hearing.

[96] The conduct we have described is irregular and inappropriate, and constitutes a sufficient basis by itself for us not to admit or have regard to the Dunbar letter or the Hawthorne email. In any event, had there been a proper application to admit this material in the appeal, we would not grant this application for the following reasons:

(1) It is not clear whether information of the type stated in the Dunbar letter and the Hawthorne email could have been provided to the Commissioner at first instance. The premise of the information is that Hawthorne had commenced work on the Project under the Agreement and has engaged employees for that purpose. However, there is nothing before us which indicates when this work commenced such as to permit an assessment about whether the information could have been provided at an earlier stage.

(2) It cannot be said that the information gives rise to a 'high probability' that we should decide that the s 187(5)(a) requirement was satisfied. In particular, as to five of the nine identified employees who are referred to as 'trades people', the Dunbar letter continues to treat carpenters and formworkers as indistinguishable for the purpose of rule 2(A)(A)(3)(i), and does not actually identify the trade qualification, if any, of these workers. This makes it impossible to determine whether they are eligible to be members of the CFMEU. Further, it is not clear whether the Dunbar letter describes the composition of Hawthorne's workforce on an ongoing basis or merely at a particular point in time.

(3) The information, in the form and circumstances in which it has been provided, has insufficient credibility. It has not been provided in a sworn or affirmed document. Neither the CFMEU nor Hawthorne has suggested that there should be a further hearing at which Mr Dunbar or Mr Cvetanoski should give sworn/affirmed evidence, so it is not capable of being tested. If this occurred, there would be a range of issues that would need to be explored, including ascertaining the actual trade qualifications, if any, of the 'carpenter/form workers', testing what the primary purpose of each employee's employment is, and examining the circumstances in which Mr Cvetanoski came to write the Hawthorne email.

[97] There being no material on which we could reasonably be satisfied that the s 187(5)(a) requirement is met, the application for approval of the Agreement must be dismissed.

Other matters

[98] Although it was not raised by the AWU in its appeal and was therefore not the subject of any submissions, there appears to us to be another possible reason why the Agreement is incapable of approval under the FW Act. We have earlier referred to s 182(3). It provides:

> *Greenfields agreement*
>
> (3) A greenfields agreement is ***made*** when it has been signed by each employer and each relevant employee organisation that the agreement is expressed to cover (which need not be all of the relevant employee organisations for the agreement).

[99] The expression 'relevant employee organisation' is defined in s 12 as follows:

> '**relevant employee organisation'**, in relation to a greenfields agreement, means an employee organisation that is entitled to represent the industrial interests of one or more of the employees who will be covered by the agreement, in relation to work to be performed under the agreement.

[100] On the basis of its entitlement to represent the industrial interests of employees in the Plumbing and Mechanical Services classifications in the Agreement, and in the absence of clear evidence that no employees falling within those classifications would be employed, it appears likely that the CEPU is a 'relevant employee organisation' in relation to the Agreement. The CEPU is also an organisation that the Agreement is expressed to cover by virtue of clause 1.1.3 and the signature page. However, as earlier explained, the CEPU never signed the Agreement. In order for a greenfields agreement to be 'made', s 182(3) in plain terms requires *each* relevant employee organisation it is expressed to cover — that is, all of them — to have signed the agreement. It would seem to follow, therefore, that the CEPU's failure to sign the Agreement may have had the consequence that the Agreement was never 'made' for the purpose of the FW Act.

[101] Section 172(1) makes it apparent that an enterprise agreement (including a greenfields agreement) only comes into existence when it is 'made' in accordance with Part 2-4 (in which s 182(3) is located). Under s 185(1), the capacity to apply for approval of an enterprise agreement only arises when an enterprise agreement has been 'made'. The Commission's capacity to approve an agreement under s 186(1) only arises if a valid application for approval of the agreement has been made. Consequently, the Agreement may never have become an enterprise agreement for the purpose of the FW Act that could validly be the subject of an application for approval or capable of approval by the Commission.

[102] We do not decide the appeal on this basis since it was not the subject of argument. It is sufficient to say that the additional matter we have identified may constitute, independent of s 187(5)(a), a potentially insuperable barrier to the approval of the Agreement.

[103] We have also become aware of the existence of another enterprise agreement applying to Hawthorne, namely the *Hawthorne Civil Pty Ltd Enterprise Agreement 2021*.[37] This agreement took effect on 20 December 2021 and it remains in effect (notwithstanding that its nominal expiry date is 30 September 2025). This agreement, by clause 2, applies to Hawthorne 'and to its employees engaged in civil construction works' and, by clause 4, has the purpose of

'provid[ing] comprehensively the wages and conditions of employment for the work performed herein'. The classifications prescribed by this agreement in clause 6.1 are:

- New Entrant (less than 3 months' experience).
- Experienced Concrete/Construction Worker.
- Multiskilled Steel Fixer/Formsetter/Concrete Finisher (can operate mobile cranes of up to 25 tonnes).

[104] By virtue of s 58(2) of the FW Act, this agreement, and not the Agreement (if validly approved) would appear to have applied to Hawthorne's employees employed on the Project until 30 September 2025. We note that the classification structure in this agreement would seem to put an entirely different complexion on the question of the work functions of Hawthorne's employees on the Project and their eligibility to be members of the CFMEU. However, since this was not raised by any party's submissions in the appeal (or at first instance), it is not possible to say anything more about it.

Orders

[105] We make the following orders:

(1) Permission to appeal is granted.

(2) The appeal is upheld.

(3) The decision under appeal ([2025] FWCA 2640) is quashed.

(4) The application for approval of the *Hawthorne Civil Pty Ltd Gold Coast Light Rail Stage 3 Project Agreement* (AG2025/1800) is dismissed.

PRESIDENT

Appearances:

J Murdoch KC, with *T Spence*, counsel, for The Australian Workers' Union.
H Clift, counsel, instructed by *E Dalgleish*, for the Construction, Forestry and Maritime Employees Union.

Hearing details:

2025.

Sydney (in person):
17 October.

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[1] [2025] FWCA 2640.

[2] [1984] CthArbRp 375, 294 CAR 552, Print F6746.

[3] Transcript, 7 October 2025 PN44.

[4] Ibid PN46.

[5] [2025] FWCA 2640 [4]–[5].

[6] (1936) 55 CLR 499, 404–405.

[7] (1998) 86 IR 269.

[8] [2021] ICQ 15.

[9] See *Fraser v JFM Civil Contracting Pty Ltd* [2020] FWCFB 4866, 300 IR 122 [21]–[24] and the authorities referred to there.

[10] [2022] FWCFB 190.

[11] *O'Connor v Setka* [2020] FCAFC 195 [79].

[12] See *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30, 264 CLR 541 [39]–[50]; *Moore (a pseudonym) v The King* [2024] HCA 30 [15].

[13] *Re John Holland Queensland Pty Ltd* [2022] FWC 1524 [318].

[14] *Regional Express Holdings Limited v Australian Federation of Air Pilots* [2017] HCA 55, 262 CLR 456 [45].

[15] *O'Connor v Setka* [2020] FCAFC 195 [25].

[16] See *Rescrete v Jones* (1998) 86 IR 269, 279.

[17] See *The Building Workers' Industrial Union of Australia* [1987] AIRC 51, Print G6593; *Re Building Workers' Industrial Union of Australia* [1990] AIRC 597, 35 IR 404; Print J3133; *R v Moore and Ors, Ex parte Federated Ironworkers Association of Australia and Ors* (1990) 34 IR 400.

[18] Macquarie Online Dictionary.

[19] *Construction, Forestry, Maritime, Mining and Energy Union v DuluxGroup (Australia) Pty Ltd* [2022] FCAFC 101 [33]–[47].

[20] Ibid [27], [39].

[21] *The Australian Workers' Union v Killarnee Civil & Concrete Contractors Pty Ltd, ITF The Thompson Family Trust and another* [2011] FWAFB 4349, 212 IR 153 [46]–[47].

[22] [2025] FWCA 2640 [11].

[23] [1984] CthArbRp 375, Print F6746 294 CAR 552, 552–553.

[24] [1962] CthArbRp 342, 100 CAR 822.

[25] *Building Workers' Industrial Union of Australia* [1966] CthArbRp 829, 116 CAR 843.

[26] Ibid 844.

[27] Ibid 845–846.

[28] Ibid 846–847.

[29] Ibid 847–848.

[30] *Building Workers' Industrial Union of Australia* [1969] CthArbRp 248, 127 CAR 1503, 1505.

[31] *Building Workers' Industrial Union of Australia* [1975] CthArbRp 1120, 173 CAR 720, 722.

[32] (1998) 86 IR 269, 277.

[33] Ibid 279.

[34] Ibid 280–281.

[35] Macquarie Online Dictionary.

[36] See e.g. *Peter John Chambers & Jennifer O'Brien v Broadway Homes Pty Ltd* [2022] FWCFB 86 [7], applying the principles stated in *Akins v National Australia Bank* (1994) NSWLR 155, 160.

[37] AE514259.