FEDERAL COURT OF AUSTRALIA

Construction, Forestry, Mining and Energy Union v One Key Workforce Pty Ltd [2017] FCA 1266

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| File number: |  |
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| Judge: | **FLICK J** |
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| Date of judgment: | 8 November 2017 |
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| Catchwords: | **INDUSTRIAL LAW** – enterprise agreements – review of approval of enterprise agreement by Fair Work Commission – where agreement voted on by the three employees employed at the time agreement was made –where agreement covers employees under 11 modern awards – pre-approval steps – whether Commission failed to take all reasonable steps to explain the agreement – whether agreement genuinely agreed to by the employees covered by the agreement – jurisdictional error – no agreement susceptible of approval under s 186 of the *Fair Work Act 2009* (Cth)**PRACTICE AND PROCEDURE** – delay – where *Originating Application* filed over twelve months after decision of the Commission – where adequate explanation provided for the delay – where discretion not exercised to refuse relief on the basis of delay  |
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| Legislation: | *Fair Work Act 2009* (Cth) ss 3, 53, 171, 172, 173, 174, 176, 180, 185, 186, 187, 188, 193, 417*Federal Court of Australia Act 1976* (Cth) s 16*Workplace Relations Act* *1996* (Cth)ss 170LT, 170XA, 327*Fair Work Regulations* *2009* (Cth) reg 2.06A  |
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| Cases cited: | *Anderson v Director-General of the Department of Environmental and Climate Change* [2008] NSWCA 337, (2008) 251 ALR 633*Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd* [2015] FCAFC 123, (2015) 235 FCR 305*Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107*Commissioner of Taxation v Pham* [2013] FCA 579, (2013) 134 ALD 534*Commonwealth Bank of Australia v Finance Sector Union of Australia* [2007] FCAFC 18, (2007) 157 FCR 329*Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* [1999] FCA 847, (1999) 93 FCR 317*Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd* [2015] FCAFC 16, (2015) 228 FCR 297*Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd* [2011] FCAFC 91, (2011) 194 FCR 269*Construction, Forestry, Mining and Energy Union v Wagstaff Piling Pty Ltd* [2012] FCAFC 87, (2012) 203 FCR 371*Cook v Australian Postal Corporation* [2017] FCA 509*John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] FCA 286, (2014) 241 IR 439*Maritime Union of Australia v MMA Offshore Logistics Pty Ltd* [2017] FWCFB 660, (2017) 263 IR 81*Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30, (2001) 206 CLR 323*Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36, (2012) 246 CLR 379*Re KCL Industries Pty Ltd* [2016] FWCFB 3048, (2016) 257 IR 266*Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30, (2003) 198 ALR 59*Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449*Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union (No 2)* [2016] FCA 2, (2016) 259 IR 164*Toms v Harbour City Ferries Pty Ltd* [2015] FCAFC 35, (2015) 229 FCR 537*Toyota Motor Corporation Australia Ltd v Marmara* [2014] FCAFC 84, (2014) 222 FCR 152*United Firefighters Union of Australia v Country Fire Authority* [2014] FCA 17, (2014) 218 FCR 210*United Voice v MSS Security Pty Ltd* [2016] FCAFC 124, (2016) 153 ALD 200  |
|  |  |
| Date of hearing: | 12 and 13 July 2017 |
|  |  |
| Date of last submissions: | 24 July 2017 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 168 |
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| Counsel for the Applicant: | Ms C Howell |
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| Solicitor for the Applicant: | Slater & Gordon |
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| Counsel for the First Respondent: | Mr H J Dixon SC with Mr A B Gotting |
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| Solicitor for the First Respondent: | McCullough Robertson Lawyers |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice, save as to costs |

ORDERS

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|  | NSD 2058 of 2016 |
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| BETWEEN: | CONSTRUCTION, FORESTRY, MINING AND ENERGY UNIONApplicant |
| AND: | ONE KEY WORKFORCE PTY LTD (ACN 605 016 206)First RespondentFAIR WORK COMMISSIONSecond Respondent |

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| JUDGE: | FLICK J |
| DATE OF ORDER: | 8 NOVEMBER 2017 |

THE COURT ORDERS THAT:

1. The parties are to bring in *Short Minutes of Orders* to give effect to these reasons within fourteen days.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

1. The First Respondent to the present proceeding, One Key Workforce Pty Ltd (“One Key Workforce”), is part of a group of companies which together operate a business known as One Key Resources. One Key Workforce was previously known as RECS (Qld) Pty Ltd.
2. One Key Workforce is, *inter alia*, a labour hire business which “*on-hires*” its employees to clients in a range of industries including the black coal mining industry.
3. Between March and August 2015 One Key Workforce recruited three persons as employees, Messrs Kevan O’Brien, Reuben Raymond and Vernon Marfell. In August 2015 there was initiated a process whereby each of these three employees were invited to vote on a proposed *Enterprise Agreement*. On 25 August 2015 each of the three employees responded to an email request for a vote and each responded “*yes*”, which was a vote in favour of the proposed *Enterprise Agreement*.
4. The proposed *Enterprise Agreement* was then submitted to the Fair Work Commission for approval. After inquiries were made by the Commissioner as to (*inter alia*) whether the proposed *Enterprise Agreement* contained terms which were less beneficial than the terms in the relevant awards, the Commissioner granted approval on 30 October 2015. The agreement as approved became known as the *RECS (Qld) Pty Ltd Enterprise Agreement 2015* (the “*Agreement*”). There was no application for leave to appeal from that decision pursuant to s 604 of the *Fair Work Act 2009* (Cth) (the “*Fair Work Act*”).
5. On 28 November 2017 an *Originating Application* was filed in this Court seeking relief under s 39B of the *Judiciary Act* *1903* (Cth). The Applicant, the Construction, Forestry, Mining and Energy Union (the “CFMEU”) relevantly seeks an order declaring that the *RECS (Qld) Pty Ltd Agreement 2015* is “*void and of no effect*” or, in the alternative, an order in the nature of *certiorari* quashing the approval of the Commission. A writ in the nature of *mandamus* directed to the Commission is also sought, albeit in the further alternative.
6. The evidential basis upon which the proceeding was to be resolved took, perhaps, an unexpected turn. It was Counsel for the CFMEU that read parts of the following affidavits which had been filed on behalf of One Key Workforce, namely the affidavits of:
* Ms Petrina Ind, Executive Assistant to the Managing Director of One Key Resources, affirmed 3 March 2017; and
* Mr Grant Wechsel, Managing Director of One Key Resources, affirmed 14 March 2017.

Counsel for the CFMEU also read the affidavits of:

* Mr Andrew Vickers, General Secretary of the Mining and Energy Division and Vice President of the CFMEU, affirmed 4 July 2017; and
* Mr Michael Weise, an organising and training coordinator of the CFMEU, affirmed 20 January 2017.

Ms Ind gave oral evidence and was cross-examined by Counsel for One Key Workforce. Mr Wechsel did not give oral evidence.

1. It is concluded that the approval of the *Agreement* should be quashed and a declaration granted that the *Agreement* is void and of no effect. The *Agreement*, being initially an agreement covering three employees may well have been an enforceable private agreement as between the employer and those employees but was not an agreement susceptible of approval by the Fair Work Commission under s 186 of the *Fair Work Act*.
2. Rejected is the underlying submission advanced on behalf of One Key Workforce that the power of the Commission to approve an agreement depended merely upon the existence of a genuine agreement between an employer and employees. On behalf of One Key Workforce, the underlying submission was that it mattered not that the *Agreement*, once approved by the Commission, was intended to be the platform whereby a large number of other employees otherwise covered by 11 awards were thereafter to be employed – and were in fact employed.
3. It is the rejection of that underlying submission, with respect, which leads to the *Agreement* in the present case being declared void and of no effect.
4. Relief should not be refused by reason of what was sought to be characterised by One Key Workforce as “*delay*” in the bringing of the present *Application*.

# THE TERMS OF THE AGREEMENT

1. The terms of the *Agreement* which attracted particular attention were the following.
2. The *Agreement* starts with a notation that it is to be “*read together with an undertaking given by the employer*”. That undertaking included an undertaking not to enforce cl 9.4 of the *Agreement* and an undertaking that cl 12.3 of the *Agreement* was to be read subject to cll 22.3 and 23.3 of the *Road Transport and Distribution Award 2010*.
3. Subject to that notation, the parties to the *Agreement* are set forth as follows in cl 2:

**2. PARTIES**

2.1. The parties to this Agreement are:

(a) the Company; and

(b) all Employees whose employment would, but for the operation of this Agreement, be covered by one of the following Awards:

a. Building and Construction General On-Site Award 2010;

b. Mining Industry Awards 2010;

c. Black Coal Mining Industry Award 2010;

d. Manufacturing and Associated Industries and Occupations Award 2010;

e. Road Transport (Long Distance Operations) Award 2010;

f. Road Transport and Distribution Award 2010;

g. Hydrocarbons Industry (Upstream) Award 2010;

h. Clerks – Private Sector Award 2010;

i. Hospitality Industry (General) Award 2010;

j. Oil Refining and Manufacturing Award 2010; or

k. Maritime Offshore Oil and Gas Award 2010.

Clause 4.5 provides that “*Company*” means “*RECS (QLD) PTY LTD ACN: 605 016 206*”.

1. Clause 3 provides for the application of the *Agreement*, including cl 3.1(b) providing that it applies to “*all Employees whose employment would, but for the operation of this Agreement, be covered by the terms of an Award*”. The term “*Award*” is defined by cl 4.3 to mean “*the relevant modern award made by the Fair Work Commission (or its predecessor) (from the list in clause 2.1(b)) which, but for the operation of this Agreement, would have applied to the Employee during an Assignment*”.
2. Clause 6 provides as follows:

**6. POLICIES AND PROCEDURES**

6.1. While the Company’s policies and procedures do not form part of this Agreement, Employees will comply with any policies and procedures that the Company may implement.

6.2. To the extent that the contents of policies or procedures refer to obligations on the Company, they are guides only and are not contractual terms, conditions or representations on which Employees may rely.

6.3. Employees shall also comply with any specific Client policies and procedures applicable to their Assignment.

1. Clause 7 provides as follows:

**7. LAWFUL DIRECTIONS**

7.1. Employees must follow all lawful directions given by the Employee’s Leading Hand/Supervisor, or any other person nominated by the Company or Client. Should an Employee not be able to perform the assigned task for any reason whatsoever, it is an Employee’s duty to inform their Leading Hand/Supervisor or other appropriate person immediately.

7.2. Refusal to comply with any lawful direction may result in disciplinary action, which may include the termination of an Employee’s employment.

1. Clause 9 provides in part as follows:

**9. CONTRACT OF EMPLOYMENT**

9.1. Employees shall be engaged on an Assignment as full time, part time or casual.

9.2. Full time and part time Employees can be engaged on a permanent, fixed term, maximum term or fixed task basis.

9.3. A casual employee is one who is engaged and paid as such.

…

1. Clause 11 provides as follows:

**11. CASUAL CONVERSION**

11.1. If an Award contains a provision that requires or allows the conversion of casual employees to permanent employees, those provisions will have no effect.

11.2. To compensate an Employee for the loss of any such casual conversion rights, an additional casual loading of 1% of the hourly base rate of pay in the relevant Award will be paid from the date that the casual conversion right (if any) would have applied but for this Agreement and is paid on ordinary hours only. The Company may however absorb such additional casual loading payable under this clause in any over Agreement payment that may be being paid to an employee.

1. Clause 12 addresses “*Hours of Work*” and cl 12.3 provides as follows:

12.3. The maximum number of ordinary hours that an Employee can work on any one day (or shift) is 12 hours.

1. Clause 13 addresses “*Remuneration*” and cl 13.5 provides as follows:

13.5. In addition to the hourly base rate of pay in the relevant Award, an Employee will receive a **BOOT Allowance** to ensure that they are always better off than they would be under the Award. The **BOOT Allowance** is 0.1% of the hourly base rate of pay in the relevant Award and is paid on ordinary hours only.

“*BOOT*” is a reference to the “*better off overall test*”.

# THE STATUTORY REGIME

1. Those provisions of the *Fair Work Act* which are of immediate relevance to the present dispute are within a narrow compass.
2. Section 3 sets forth at the outset the “*Object of this Act*” as follows:

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

(a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia’s future economic prosperity and take into account Australia’s international labour obligations; and

(b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and

(c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and

(d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and

(e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and

(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and

(g) acknowledging the special circumstances of small and medium-sized businesses.

1. Chapter 2 of the Act addresses “*Terms and conditions of employment*”. That Chapter contains a number of Parts, including Pt 2-4 which addresses “*Enterprise agreements*”.
2. The “*Objects*” of Pt  2-4 are set forth as follows in s 171:

The objects of this Part are:

(a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and

(b) to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements, including through:

(i) making bargaining orders; and

(ii) dealing with disputes where the bargaining representatives request assistance; and

(iii) ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay.

1. Division 2 within Pt 2-4 provides that employers and employees may make enterprise agreements. Division 3 provides for “*Bargaining and representation during bargaining*”. Within Div 3, s 173 provides for the giving of a “*Notice of employee representational rights*”. Section 173(1) provides as follows:

An employer that will be covered by a proposed enterprise agreement that is not a greenfields agreement must take all reasonable steps to give notice of the right to be represented by a bargaining representative to each employee who:

(a) will be covered by the agreement; and

(b) is employed at the notification time for the agreement.

Section 174 provides for the content and form of such a notice.

1. Division 4 provides for the “*Approval of enterprise agreements*”. In subdiv A to Div 4, which deals with pre-approval steps and applications for approval, s 180(5) provides as follows:

The employer must take all reasonable steps to ensure that:

(a) the terms of the agreement, and the effect of those terms, are explained to the relevant employees; and

(b) the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of the relevant employees.

Section 185 provides that a bargaining representative must apply for the Fair Work Commission’s approval of an enterprise agreement. Section 185(2) provides as follows:

The application must be accompanied by:

(a) a signed copy of the agreement; and

(b) any declarations that are required by the procedural rules to accompany the application.

Regulation 2.06A of the *Fair Work Regulations* *2009* (Cth) supplements this requirement as follows:

**Bargaining representative must apply for FWC approval of an enterprise agreement—requirements for signing agreement**

(1) For subsection 185(5) of the Act, this regulation prescribes the requirements for the signing of an enterprise agreement.

(2) For paragraph 185(2)(a) of the Act, a copy of an enterprise agreement is a signed copy only if:

(a) it is signed by:

(i) the employer covered by the agreement; and

(ii) at least 1 representative of the employees covered by the agreement; and

(b) it includes:

(i) the full name and address of each person who signs the agreement; and

(ii) an explanation of the person’s authority to sign the agreement.

1. In subdiv B, which deals with the Fair Work Commission’s approval of enterprise agreements, s 186 sets forth what it describes as the “*general requirements*” to be satisfied where the Commission is called upon to approve an agreement. That section provides in part as follows:

**When the FWC must approve an enterprise agreement—general requirements**

*Basic rule*

1. If an application for the approval of an enterprise agreement is made under subsection 182(4) or section 185, the FWC must approve the agreement under this section if the requirements set out in this section and section 187 are met.

*Requirements relating to the safety net etc.*

(2) The FWC must be satisfied that:

(a) if the agreement is not a greenfields agreement—the agreement has been genuinely agreed to by the employees covered by the agreement; and

(b) if the agreement is a multi-enterprise agreement:

(i) the agreement has been genuinely agreed to by each employer covered by the agreement; and

(ii) no person coerced, or threatened to coerce, any of the employers to make the agreement; and

(c) the terms of the agreement do not contravene section 55 (which deals with the interaction between the National Employment Standards and enterprise agreements etc.); and

(d) the agreement passes the better off overall test.

The phrase “*genuinely agreed*” as employed in s 186(2)(a) is defined in s 188.

1. Section 187 sets forth “*additional requirements*” that must be met before the Commission approves an enterprise agreement. That section provides in relevant part as follows:

**When the FWC must approve an enterprise agreement—additional requirements**

*Additional requirements*

(1) This section sets out additional requirements that must be met before the FWC approves an enterprise agreement under section 186.

*Requirement that approval not be inconsistent with good faith bargaining etc.*

(2) The FWC must be satisfied that approving the agreement would not be inconsistent with or undermine good faith bargaining by one or more bargaining representatives for a proposed enterprise agreement, or an enterprise agreement, in relation to which a scope order is in operation.

*Requirement relating to notice of variation of agreement*

(3) If a bargaining representative is required to vary the agreement as referred to in subsection 184(2), the FWC must be satisfied that the bargaining representative has complied with that subsection and subsection 184(3) (which deals with giving notice of the variation).

*Requirements relating to particular kinds of employees*

(4) The FWC must be satisfied as referred to in any provisions of Subdivision E of this Division that apply in relation to the agreement.

1. Section 188 sets forth provisions as to when employees have “*genuinely agreed*” to an enterprise agreement. That section provides as follows:

**When employees have genuinely agreed to an enterprise agreement**

An enterprise agreement has been ***genuinely agreed*** to by the employees covered by the agreement if the FWC is satisfied that:

(a) the employer, or each of the employers, covered by the agreement complied with the following provisions in relation to the agreement:

(i) subsections 180(2), (3) and (5) (which deal with pre-approval steps);

(ii) subsection 181(2) (which requires that employees not be requested to approve an enterprise agreement until 21 days after the last notice of employee representational rights is given); and

(b) the agreement was made in accordance with whichever of subsection 182(1) or (2) applies (those subsections deal with the making of different kinds of enterprise agreements by employee vote); and

(c) there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees.

1. Subdivision C of Div 4 deals with the “*better off overall test*” (the “BOOT”). Section 193, being the sole provision within that subdivision, provides in relevant part as follows:

**Passing the better off overall test**

*When a non-greenfields agreement passes the better off overall test*

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

*FWC must disregard individual flexibility arrangement*

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

…

*Award covered employee*

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

(a) is covered by the agreement; and

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

(i) is in operation; and

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

(iii) covers his or her employer.

*Prospective award covered employee*

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

(a) would be covered by the agreement; and

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

(i) is in operation; and

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

(iii) covers the employer.

*Test time*

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

*FWC may assume employee better off overall in certain circumstances*

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

1. At least three things are apparent from these provisions: first, an object of the *Fair Work Act* is “*to provide a simple, flexible and fair framework that enables collective bargaining in good faith*” (s 171(a)); second, there is a statutory mandate that there be an opportunity for “*bargaining and representation during bargaining*” (Pt 2-4 Div 3); and third, that the Commission is required to reach a state of satisfaction that there has been “*genuine*” agreement (s 186(2)).
2. Of present concern is the application of these provisions to a factual situation where agreement is reached with a limited number of employees as to the terms and conditions of employment but where the number of employees increases dramatically immediately after approval by the Commission. Within this context, it is necessary to consider (*inter alia*) the central importance to the regulatory regime that:
* there be agreement as to the terms and conditions being proposed; and
* there be consideration given to the employees expressing agreement.

It is also necessary to fully recognise:

* the role played by the Commission as emphasised by the legislative mandate that in respect to some matters it is the Commission that must reach a state of “*satisfaction*” and not this Court.

### Terms and conditions of employment – a central pillar of the regulatory regime

1. As to the first of these matters, the manner in which “*terms and conditions of employment*” are agreed has been described not surprisingly as a “*central pillar of the regulatory regime established*” by the *Fair Work Act*: *Toyota Motor Corporation Australia Ltd v Marmara* [2014] FCAFC 84 at [14], (2014) 222 FCR 152 at 158 per Jessup, Tracey and Perram JJ.
2. It necessarily follows that the “*terms and conditions*” the subject of agreement must be known to the parties reaching agreement: *Commonwealth Bank of Australia v Finance Sector Union of Australia* [2007] FCAFC 18, (2007) 157 FCR 329. The Commission, it was there concluded, could not certify an agreement if the overall terms and conditions of employment were not known because they were susceptible to alteration by later agreement between the employer and individual employees. When considering the “*no-disadvantage test*” previously imposed by s 170XA of the *Workplace Relations Act* *1996* (Cth) (the “*Workplace Relations Act*”), Branson J concluded (at 360 to 361):

[172] In my view, the plain intent of s 170XA is that the Commission must give consideration to, and form a view on, whether the agreement, if certified, would result, on balance, in a reduction in the overall terms and conditions of employment of the employees under the industrial instruments and law to which s 170XA(2) refers. The statutory requirement for the Commission to compare the overall terms and conditions of employment of the employees in relevant respects if the agreement were certified and if the agreement were not certified reveals that the Commission must be placed in a position where it can make the necessary comparison. It cannot make that comparison if the overall terms and conditions of employment of the employees, if the agreement is certified, cannot be known because they may be fixed by later agreements between the employer and individual employees. The Commission is not authorised to delegate to the parties to an agreement its responsibility under s 170LT to determine whether the agreement satisfies the no-disadvantage test (see the second paragraph of cl 12).

[173] The above considerations assist a proper understanding of the requirements of s 170LI of the Act that before an application may be made to the Commission for certification “there must be an agreement, in writing, about matters pertaining to the relationship” between the employer and persons whose employment is subject to the agreement.

[174] An agreement about a matter pertaining to that relationship which may at any time cease to bind some or all of those whose employment is subject to the agreement because they have entered into inconsistent individual agreements which prevail over that agreement is not, in my view, an agreement in writing about that matter within the meaning of s 170LI. It is, at best, a provisional agreement about that matter linked to an agreement that the parties, or some of them, may agree something else. The manner in which a certified agreement may be varied is controlled by s 170MD of the Act. Section 170MD does not contemplate a variation that binds individual employees only. It does not contemplate a variation which does not require the Commission’s approval.

[175] The appellants’ reliance on s 170NHA of the Act was misplaced. Section 170NHA was concerned to preserve the validity of certain agreements certified by the Commission prior to the judgment of the High Court in *Electrolux Home Products Pty Ltd v Australian Workers’ Union* (2004) 221 CLR 309. In that case the High Court held that an agreement purportedly certified which dealt with a matter which was not a permitted matter was not validly certified. As the primary judge rightly concluded, the reason that the CommSec agreement could not be certified extended well beyond the inclusion in it of a matter that was not a permitted matter (see [171]–[173] above). Additionally, it was no part of the Commission’s function to remake the CommSec Agreement of which cl 12 was an important aspect.

[176] For the above reasons the primary judge rightly concluded that the Commission was not authorised to certify the CommSec Agreement; it was not an agreement of the kind required by s 170LI of the Act before an application for certification could be made to the Commission. Submissions founded on the assumption that each agreement entered into under cl 12 of the CommSec Agreement constitutes a purported variation of a certified agreement need not, for this reason, be further considered.

Section 170XA(1) provided that an “*agreement passes the no-disadvantage test if it does not disadvantage employees in relation to their terms and conditions of employment*”. The ultimate disposition of the appeal turned upon a division of opinion between Branson and Marshall JJ as to whether the quantum of the penalty imposed was “*manifestly excessive*”. To dispose of the appeal, the remaining member of the Court (Spender J) who was the “*senior Judge*” invoked s 16 of the *Federal Court of Australia Act 1976* (Cth) and agreed with Branson J that the penalty imposed by the primary Judge was “*manifestly excessive*” and should be reduced: [2007] FCAFC 18 at [17] to [19], (2007) 157 FCR 329 at 333 to 334.

1. “*No … difficulty arises*” where the terms of an agreement “*cannot be … undermined or changed*”: *United Firefighters Union of Australia v Country Fire Authority* [2014] FCA 17 at [248], (2014) 218 FCR 210 at 265 per Murphy J.

### A selection of employees and the subversion of the legislative scheme – authenticity?

1. As to the second of the matters identified, this Court can carefully scrutinise the category of employees who have expressed their agreement. It may do so to ensure that an agreement which has been approved by a limited number of employees is an agreement which has “*authenticity and … moral authority*”. Within a narrow compass, this Court may do so to ensure the “*fairness*” of the approval process.
2. Albeit with reference to the *Workplace Relations Act*, it has been concluded that the legislative concern there previously expressed in s 170LT(6) that a “*valid majority of workers employed at the time whose employment would be subject to the agreement must have genuinely made the agreement*” was directed to “*a concern with the authenticity and … the moral authority of the agreement*” and “*a concern for fairness and efficacy in agreement-making*”: *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* [1999] FCA 847 at [126] to [127], (1999) 93 FCR 317 at 357 per Wilcox and Madgwick JJ (“*CFMEU v AIRC*”). On the facts there presented, as at 21 December 1998 a mining company employed 22 employees, none of whom was involved in the operation of the mine. On that day they were given “*notices of intention to make an agreement*”. On 6 January 1999 the agreement was approved by the employees, and on the following day an application was made to the Commission. In concluding that the agreement was not an agreement of the type contemplated by Pt VIB of the Act and that there was, accordingly, no valid application for certification before the Commission, Wilcox and Madgwick JJ formulated the question to be resolved of present relevance as follows (at 356):

[121] The question is, therefore, whether an agreement regulating terms and conditions of employment in a proposed single business, made with employees who may, in the future, be employed in that business but are not yet so employed, qualifies as an agreement that may be certified under the Act. In our view, the preferable conclusion, as a matter of both textual and purposive interpretation of the Act, is that it does not.

In answering that question, their Honours reasoned (at 357):

[126] Section 170LT(6) requires that a “valid majority of persons employed at the time whose employment would be subject to the agreement must have *genuinely* made the agreement”. This plainly betokens a concern with the authenticity and, as it were, the moral authority of the agreement. It is perfectly understandable — indeed, one might reasonably think, plainly necessary — this be so. The principal object of the Act as a whole, as set out in s 3, is “to provide a framework for cooperative workplace relations” by, among other things:

“(d) providing the means:

(i) for wages and conditions of employment to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level upon a foundation of minimum standards; and

(ii) to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment; and

(e) providing a framework of rights and responsibilities for employers and employees, and their organisations, which supports *fair and effective* agreement-making and ensures that they abide by awards and agreements applying to them.” (Emphasis added.)

There can hardly be fair agreement-making between employer and employees about wages and employment conditions in a workplace (a mine is a good example) before both sets of parties have actual experience of the work and its place of performance. Without that, cooperative workplace relations are unlikely to be achieved. An agreement prematurely made is unlikely to be effective; measuring effectiveness in this context by such matters as durability, aptness and comprehensiveness. Established “safety net” standards are less likely to be respected and maintained, because the range of conditions in relation to which such standards exist may not have been fully comprehended.

[127] In short, the Act clearly indicates a concern for fairness and efficacy in agreement-making, as well as flexibility. The subject matter of the Act makes it understandable Parliament had such concerns. A consideration of those concerns supports the interpretation we consider preferable on more narrow grounds.

[128] It follows that the agreement submitted to the Commission in January 1999, and certified by Senior Deputy President Harrison on 1 February 1999, was not an agreement of the type contemplated by Pt VIB of the Act. There was no valid application for certification before the Commission. The certification order made by Senior Deputy President Harrison was ineffective. No certified agreement came into existence as a result of the proceedings before her.

1. Again with reference to the *Workplace Relations Act*, it has further been concluded that an employer may not select the employees called upon to vote in respect to an agreement by reference to some “*arbitrary criterion*”: *Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd* [2011] FCAFC 91 at [39], (2011) 194 FCR 269 at 281 per Gray, Lander and Katzmann JJ (“*Pilbara Iron Company*”). To permit such a course would be to “*subvert*” the legislative scheme: [2011] FCAFC 91 at [38], (2011) 194 FCR at 280 per Gray, Lander and Katzmann JJ. An agreement was there sought to be entered into with 10 new employees (and which would apply to them and to future employees) but not with existing employees. The question for resolution was whether an agreement with a group of employees selected solely by reference to when their employment commenced satisfied the requirements then imposed by s 327 of the *Workplace Relations Act*. Section 327 provided as follows:

An employer may make an agreement (an ***employee collective agreement***) in writing with persons employed at the time in a single business (or part of a single business) of the employer whose employment will, or would but for the operation of an [individual transitional employment agreement] that has passed its nominal expiry date, be subject to the agreement.

Justices Gray, Lander and Katzmann concluded that the phrase “*part of a single business*” required that the “*part*” must be “*a recognisable section, segment or constituent of the business*”, identifiable by reference to factors other than the employees themselves or the date that they acquired that characteristic: [2011] FCAFC 91 at [45], (2011) 194 FCR at 282 to 283. In declaring that the agreement did not come into effect as a workplace agreement, their Honours observed (at 280 to 282):

[38] It is possible to discern in Div 2 of Pt 8 of the Workplace Relations Act something of an underlying purpose, when the legislative history is taken into account. [Australian Workplace Agreements] were replaced by [individual transitional employment agreements], which could have only a limited life. As the primary judge said at [6] of his reasons for judgment, “An emphasis on collective negotiation of terms and conditions of employment was re-introduced into the [*Workplace Relations Act*]”. If the underlying purpose of the legislative scheme that included s 327 of the Workplace Relations Act is to reduce the emphasis on individual negotiation, and to increase the emphasis on collective negotiation, this might assist in the interpretation of s 327. If it were possible for an employer to choose any employees it wishes, and to designate them as the employees in part of its single business with whom it wishes to make a collective agreement, the underlying purpose of promoting collective negotiation might be subverted. The proposition can be tested this way. Instead of entering into an agreement with a group of employees chosen by reference to their date of commencement of work, an employer could use other criteria. Thus, an employer wishing to negotiate for terms and conditions of employment more favourable to it, and less favourable to employees, could choose to enter into an agreement only with those employees who were prepared to accept the employer’s proposal. If the resulting agreement bound employees who came to work for the employer at a later date (as the [Pilbara Iron Enterprise Agreement] is intended to do), over time an employer could downgrade terms and conditions of employment without any real opportunity for its relevant workforce at the time of entry into the agreement to raise objection to this. An employer whose proposed agreement is rejected by a majority of a group of employees could simply select as a new group the minority who would have approved the agreement and impose the employer’s choice of terms and conditions on subsequent employees. The group selected could be as small as two employees. Indeed, if the principle found in s 23(b) of the Acts Interpretation Act that, in the absence of a contrary intention, the plural includes the singular, were to be regarded as applicable, the employer could select a group consisting of one employee. In any of these ways, a construction of s 327 of the Workplace Relations Act that permitted arbitrary selection of the group of employees with whom an agreement was to be made would be contrary to the underlying purpose of the legislation that brought the Workplace Relations Act into the form it was at the time of the events the subject of this case.

[39] It is no answer to these contentions to say, as the primary judge did at [31] of his reasons for judgment, that a union collective agreement could be entered into in respect of a very small number of employees. So also could s 327 result in an agreement applicable only to a very small number of employees, if there were only a small number of employees employed in a part of a single business whose work would be subject to that agreement. The issue is not one of numbers, but of composition of the group. The question is whether the employees concerned can be selected by reference to some arbitrary criterion and then, having been selected, labelled as the part of a single business to which the agreement is to relate.

…

[41] Some slight guidance as to the meaning of s 327 might be found in s 340(2), which provides for the approval of an employee collective agreement or union collective agreement. In substance, all of the persons employed at the time whose employment will be subject to the agreement must have a reasonable opportunity to decide whether they want to approve the agreement. There must then be a manifestation of that decision, either by a vote or by some other means, and a majority of those persons must decide that they want to approve the agreement. This provision demonstrates the intended collective nature of the agreement. It makes clear that, even though there might be employees who do not approve the agreement, their wishes can be overridden by a majority approval. The dissenters will also be bound by the agreement. In the event that there was majority disapproval of a proposed agreement, to construe s 327 as allowing the employer the option of going ahead with the proposed agreement only with the minority who approved it would make nonsense of the process contemplated by s 340(2).

1. This concern for the “*collective*” nature of agreements, and the need for “*fairness and efficacy*”, it is respectfully concluded, is equally applicable to Pt 2-4 of the *Fair Work Act*. An “*agreement*” which does not meet such minimal standards falls short of an “*agreement*” which is capable of approval by the Commission pursuant to s 186.
2. There is no difficulty in a small number of employees voting in favour of an enterprise agreement which has the potential to “*cover*” (*Fair Work Act* s 53) a large number of future employees: *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd* [2015] FCAFC 16 at [34] to [41], (2015) 228 FCR 297 at 306 to 307 (“*John Holland*”). Buchanan J there, however, recognised that there is “*potential for manipulation of the agreement-making procedures*”: [2015] FCAFC 16 at [33], (2015) 228 FCR 297 at 305 to 306. His Honour there observed:

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

It was there concluded (*inter alia*) that “*the group of employees covered by the agreement*” as referred to in s 186(3) of the *Fair Work Act* was a reference “*to the whole class of employees to whom the agreement might in the future apply, rather than the group of employees which actually voted on whether to make the agreement*”: [2015] FCAFC 16 at [2], (2015) 228 FCR at 299 per Besanko J. See also: [2015] FCAFC 16 at [36], (2015) 228 FCR at 306 per Buchanan J. Barker J agreed with Buchanan J.

### Genuine agreement etc & the satisfaction of the Commission

1. Also of general importance when approvals of the present kind by the Commission are sought to be challenged is the correct identification of both:
* the relevant “*pre-approval steps*” set forth in subdiv A to Div 4 of Pt 2-4, being ss 180 to 185A; and
* those requirements concerning approval by the Fair Work Commission set forth in subdiv B to Div 4 of Pt 2-4, being ss 186 to 192.
1. The “*pre-approval* *steps*” set forth in ss 180 to 185A are expressed in terms which require compliance. Section 180(5), for example, provides that an employer “*must take all reasonable steps*” to ensure that “*the terms of the agreement, and the effect of those terms, are explained to the relevant employees*”. Within subdiv B different statutory language is employed. Section 186(2), for example, provides that the Commission “*must be satisfied*” of the general requirements there set forth. Section 187(2) similarly provides that the Commission “*must be satisfied*” of the matters there set forth. When employees have “*genuinely agreed*” to an enterprise agreement is also set forth in s 188 in terms of whether the Commission “*is satisfied*” of the matters there set forth.
2. In challenging decisions of the Fair Work Commission, the nature of the task entrusted by the Commonwealth legislature to the Commission must necessarily be recognised at the outset.
3. The “*value judgment*” entrusted to the Commission was emphasised by Buchanan J in *John Holland*. The Commission at first instance had there approved an enterprise agreement and was satisfied that the three employees who voted for the agreement had been fairly chosen. The agreement was expressed to apply to ten different job classification bands and to all employees in Western Australia “*performing* *building or civil construction work*”. At the time, the three employees were the only employees covered by the agreement who were employed at the time the agreement was made. A Full Bench set aside the approval. It did so because it was not possible to identify with any certainty the group of employees to be covered by the agreement and, accordingly, not possible to be satisfied that the group had been fairly chosen. The Full Bench further concluded that the group could not have been fairly chosen because the approval process denied employees who would be covered by the agreement (other than the three employees) the opportunity to bargain and that the enterprise agreement thereby undermined collective bargaining in a manner not compatible with Pt 2-4. The primary Judge concluded that the Full Bench had fallen into jurisdictional error: *John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] FCA 286, (2014) 241 IR 439. The union unsuccessfully appealed.
4. In emphasising the “*value judgment*” entrusted to the Commission and the limited scope for judicial review for jurisdictional error, Buchanan J in *John Holland* observed (at 312):

[60] The task of the [Fair Work Commission] involved a value judgment based on its “satisfaction” or lack of satisfaction about specified matters. The ultimate assessment of whether the choice of group was fair involved a very broad judgment. That judgment was committed to the [Fair Work Commission]. The [Fair Work Commission] would commit jurisdictional error if it misunderstood, or failed to exercise, its jurisdiction (*Public Service Association (SA) v Federated Clerks’ Union of Australia, (SA Branch)* (1991) 173 CLR 132).

[61] In the case of the Full Bench, it would commit jurisdictional error if it failed to apply itself correctly to the particular task of deciding the appeal (*Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [31]). That task also involves proceeding from a correct appreciation of the legislative scheme.

After giving “*full weight to the independent discretion*” of the Commission, his Honour nevertheless concluded that jurisdictional error had been exposed: [2015] FCAFC 16 at [62], (2015) 228 FCR at 312. That error was exposed by reason of “*a misconstruction and misapplication of the statutory principles*”: [2015] FCAFC 16 at [63], (2015) 228 FCR at 312. Further, error was exposed because it was “*far from clear how the Full Bench was able to conclude that an agreement made with three employees could ‘undermine’ collective bargaining*”: [2015] FCAFC 16 at [67], (2015) 228 FCR at 313. In reaching this latter conclusion, his Honour reasoned as follows (at 313):

[71] It has not been suggested that it was impermissible for three employees to be asked to make an agreement or vote to do so. The [*Fair Work Act*] permits such an agreement to be made and requires that it be approved if the statutory tests are met. Unless the proposed agreement failed to meet a relevant statutory test there could be no basis for introducing a further, more general, requirement of the kind adopted by the Full Bench.

[72] In my respectful view, the criticism expressed by the Full Bench in [30] and [34] of its decision which I set out earlier was misplaced. The “employees” to whom the Full Bench referred were future employees. It was not to the point that an agreement was made before some employees were engaged: that was a feature of the process. It would be the inevitable result also of any greenfields agreement when no employee covered by the agreement would have an opportunity to vote to accept its terms. Ironically, in a sense, the agreement did provide the possibility of collective bargaining on a site by site or project by project basis but the Full Bench appeared to think this a disabling rather than meritorious feature.

1. The nature of the factual evaluative task entrusted to the Commission when called upon to form a state of “*satisfaction*” as to whether the employees have “*genuinely agreed*” has also been the subject of consideration by the Full Bench of the Fair Work Commission: *Maritime Union of Australia v MMA Offshore Logistics Pty Ltd* [2017] FWCFB 660, (2017) 263 IR 81. The Full Bench there observed in respect to s 188 as follows (at 112):

[76] Section 188(c) is expressed in the negative — that is, the Commission must be satisfied that there are “no other reasonable grounds” for believing that the agreement was not genuinely agreed. The material before the Commissioner did not disclose any reasonable ground for this belief, nor as already explained did the MUA submit that any such reasonable ground existed. In those circumstances, we consider that it was open for the Commissioner to conclude that the s 186(2)(a) requirement was satisfied. That MMAOL intended to use the MMAOL Agreement to operate in an industry sector in which it had not previously operated, that bargaining might not have been “robust or rigorous”, and that MMAOL did not call the employees who voted to approve their agreement or their bargaining representatives to give evidence, were not factors alone or in combination capable of allowing the inference to be drawn that there was no genuine agreement. Accordingly there was no error on the part of the Commissioner in not specifically adverting to these matters in his consideration of the s 186(2)(a) requirement. Nor were these matters of a nature that required the Commissioner to engage in a further course of inquiry in respect of that requirement.

The Full Bench ultimately concluded by reference to the facts in that case in part as follows (at 114):

[84] In any event, we consider that the material that was before the Deputy President was sufficient to enable her to reach a state of satisfaction concerning the “genuinely agreed” requirement. This material included statutory declarations in support of the approval application made by Mr Darren McCormick, DOF’s General Manager, and by three of the employees who voted to approve the DOF Agreement. Having perused this material, we are ourselves satisfied that the s 186(2)(a) requirement was met. In the face of this material there was no requirement for the Deputy President to take into account the matters referred in the MUA’s appeal ground 1(b) or to embark upon any further course of inquiry. The appeal ground is rejected.

1. The phrase “*genuinely agreed*” was also considered by the Full Bench of the Fair Work Commission in *Re KCL Industries Pty Ltd* [2016] FWCFB 3048, (2016) 257 IR 266. In doing so, it was there said (at 276 to 277):

[24] The “genuinely agreed” requirement has its origin in the scheme for the making and certification of collective agreements under the *Workplace Relations Act 1996* (Cth). Section 170LT(6) of that Act (as it was prior to the amendments effected by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth)) provided, as a requirement in order for an agreement with employees to be certified, that “a valid majority of persons employed at the time whose employment would be subject to the agreement must have genuinely made the agreement”.In *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission (Gordonstone)* [[1999] FCA 847 at [126], (1999) 93 FCR 317 at 357] the Federal Court Full Court said that s 170LT(6) “plainly betokens a concern with the authenticity and, as it were, the moral authority of the agreement”. An example of the application of *Gordonstone* under the *Workplace Relations Act* was *Re* *Grocon Pty Ltd Enterprise Agreement (Vic)* [(2003) 127 IR 13], in which it was held that an agreement had not been genuinely agreed because the employees’ consent was not informed and they were not advised of the consequences of their vote.

(Footnotes omitted.)

# VOTING UPON THE AGREEMENT & THE APPROVAL BY THE COMMISSION

1. It is primarily the application of these statutory provisions and these principles that divided the parties to the present proceeding.
2. Ms Ind gave evidence as to the manner in which One Key Workforce informed Messrs O’Brien, Raymond and Marfell about the *Agreement* and how those employees came to vote upon the *Agreement*.
3. Mr Weise gave evidence as to the manner in which the Commission approved the *Agreement*.
4. Each of these two matters needs to be more fully explored.

### The vote upon the Agreement

1. Ms Ind set forth in broad terms the corporate structure of One Key Workforce. There was some uncertainty as to which entity she was referring to when she used the abbreviation “*One Key Resources*”. But that matters not.
2. By way of overview, Ms Ind explained that she is employed by One Key Resources (Mining) Pty Ltd, a company that forms part of the One Key Resources Group of companies which has, since its founding in 2010, operated as a business known as “*One Key Resources*”. The Managing Director of One Key Resources is Mr Grant Wechsel.
3. Ms Ind was asked by Mr Wechsel in around July 2015 to perform the role of Recruitment Manager for RECS (Qld) Pty Ltd (“RECS”) which was then being established. RECS was “*intended to be utilised for the purpose of operating a specialist labour hire business as part of One Key Resources*”.
4. Her involvement from the “*commencement of bargaining with the employees through to approval of the Agreement*” was to ensure “*that all of the steps required under the Fair Work Act 2009 (Cth) were carried out properly and in accordance with relevant requirements*”.
5. Throughout that period Ms Ind explained that RECS employed three employees, namely Messrs O’Brien, Raymond and Marfell. The positions occupied by each of these employees were as follows:
* Mr Kevan O’Brien: Mr O’Brien commenced employment with RECS in June 2015 in the position of Specialised Machine Operator/Trainer Assessor in the coal mining industry and was placed with HSE Mining to work on the pre-stripping contract with BHP Billiton Mitsubishi Alliance at the Peak Downs black coal mine;
* Mr Reuben Raymond: Mr Raymond commenced employment with RECS in about late May 2015 in the position of Labourer and was placed with BMD Constructions at the Tiger Brennan Drive duplication construction project in Darwin. Following that placement, he was placed with BMD Urban to work on the Breezes Muirhead construction project in Darwin in early June 2015; and
* Mr Vernon Marfell: Mr Marfell commenced employment with RECS in late April 2015 in the position of Site Trainer/Assessor in the coal mining industry and was placed with Whitehaven Coal at Maules Creek, in regional New South Wales.

These employees were the only employees engaged by RECS prior to the approval of the *Agreement* by the Commission on 30 October 2015.

1. The process whereby the agreement of Messrs O’Brien, Raymond and Marfell was sought commenced on 24 July 2015. Ms Ind could not explain why these three employees were chosen, other than that she was told by Mr Wechsel to employ them under the *Agreement*.
2. Whatever may have been the reason for their selection, the fact is that on 24 July 2015 Ms Ind emailed to each of these employees a *Notice of Employee Representational Rights*. That *Notice* (*inter alia*) stated that the *Agreement* was to cover employees covered by 11 awards, which were separately identified. The *Notice* also set forth a brief explanation as to what an “*enterprise agreement*” is; the right of an employee to appoint a bargaining representative; and what to do if the employee has questions, which included setting out the details of the “*Fair Work Commission* *Infoline*”.
3. This was described by Ms Ind as the “*commencement of bargaining*”.
4. On 7 August 2015 Ms Ind sent a further email to each of the three employees attaching a copy of the *Agreement* and each of the 11 awards listed in that *Agreement*. She did not then send “*any RECS policies and procedures … because RECS was in the early stages of its formation and development, and did not yet have any policies and procedures in place*”.
5. On 17 August 2015 Ms Ind emailed the three employees and advised that the vote upon the *Agreement* would take place on 25 August 2015. The email stated that the vote would take place on that day and that voting would commence at 9.00am and be open until 5.00pm. After those emails were sent, Ms Ind then telephoned each of the three employees “*to confirm that they had received the email and verbally explained the process of that*” and also “*went through the actual agreement*”. Each telephone call occupied some 15 to 20 minutes. In explaining the process and going through the agreement, Ms Ind had in front of her at the time on her computer screen “*the actual agreement … which* [*she*] *was reading from*”. She had “*near on the exact* [*same*] *conversation*” with Messrs O’Brien, Raymond and Marfell. During her re-examination by counsel for the Applicant it emerged that Ms Ind did little more than read from her computer screen the terms of the *Agreement*. That re-examination proceeded as follows:

Ms Ind, just staying with the telephone conversations you had with the employees on the 17th …?—Yes.

… you say that you spent in – I think, in the order of it would work as around about 15 minutes in talking. And you said in your evidence in cross-examination that you had paid particular attention to certain clauses in that conversation?—Yes. That’s correct.

Those conversations. Now, in those conversations, did you do anything more than read out the clauses to the employees?—Just read out the clauses to the employees.

Right. And when you were speaking to Mr O’Brien and Mr [Marfell], did you speak to them both about the casual conversion clause?—I believe I would have, yes.

So is it your recollection that you read out that clause to them amongst others?—Yes.

You were aware that the Black Coal Mining Industry Award applied to those employees?—Yes. And the building and construction to Reuben.

We’re just talking about O’Brien…?—Sorry.

… and Marfell at the moment?—Yes. I was.

And were you aware at the time that the awards in question didn’t have a casual conversion clause – the Black Coal Mining Industry Award?—The Black – pardon, sorry, can you rephrase that.

Were you aware at that time that the Black Coal Mining Industry Award didn’t have a casual conversion clause?—No.

No. So that wasn’t something you discussed …?—I …

… with the employees?—… thought it was in there.

I see. Were you aware at the – I withdraw that. Now, you say you went through the agreement. Did you go through the award with the employees?—No. I didn’t go through the award.

Did you give any explanation in particular of how clause 12 would interact with the provisions in the award found at clauses 22, 23 and 24?—I read the – just off the award.

I’m sorry?—Sorry, I read off the agreement.

Yes. So the answer to my question is no, you didn’t explore that issue with the employees?—I – no, I just read off the agreement.

1. On 25 August 2015 a further email was sent to each of the three employees that Ms Ind described as a “*comprehensive email that explained the terms of the Agreement and the effect of those terms on the Employees*”. Those emails were sent to each employee between 2.53pm and 2.55pm. The relevant text of each email was as follows (without alteration):

I am about to send you an email asking you to vote on the RECS (QLD) Pty Ltd Enterprise Agreement 2015 (**Agreement**).

If the vote is successful and the Agreement commences operation, your current terms and conditions of employment will not change, however they will be underpinned by the Agreement.

The Agreement will apply if your employment is covered by one of the following Awards:

1. Building and Construction General On-Site Award 2010;

2. Mining Industry Award 2010;

3. Black Coal Mining Industry Award 2010;

4. Manufacturing and Associated Industries and Occupations Award 2010;

5. Road Transport (Long Distance Operations) Award 2010;

6. Road Transport (Long Distance Operations) Award 2010;

7. Hydrocarbons Industry (Upstream) Award 2010;

8. Clerks – Private Sector Award 2010;

9. Hospitality Industry (General) Award 2010;

10. Oil Refining and Manufacturing Award 2010; or

11. Maritime Offshore Oil and Gas Award 2010.

The Agreement will effectively incorporate the terms of the relevant Award which would otherwise apply to your particular role. This means that, the relevant Award which would otherwise apply to your role should be read as being part of the Agreement. However, if the Agreement deals with a matter, the Agreement will prevail over the Award to the extent of any inconsistency.

The Agreement will apply for four years.

The base remuneration under the Agreement will be the relevant Award rate plus 0.1% (called a BOOT Allowance). This guarantees that no one paid under the Agreement can ever receive a base hourly rate which is less than 0.1% more than the relevant Award base hourly rate. The Agreement also guarantees that employees will not receive, on an overall basis, less than the relevant Award plus the 0.1% BOOT Allowance.

The Agreement also contains clauses about:

(a) our policies and procedures and those of our clients applicable to your assignment;

(b) lawful directions given by your superiors;

(c) your obligations in relation to safety and health;

(d) your contract of employment (whether it is full-time, part-time, casual, etc.) and the fact that no employment relationship exists between you and our client;

(e) your method of engagement being on an assignment basis;

(f) the 1% casual conversation allowance;

(g) hours of work – referring back to the relevant Award which would otherwise apply to your particular assignment and guaranteeing that the maximum ordinary hours of work are 12 per day (or shift);

(h) superannuation, including our default find;

(i) your obligations on termination of employment, including deductions and returning property;

(j) individual flexibility (relying on the model clause in the Fair Work Regulations);

(k) a dispute resolution procedure;

(l) a consultation procedure; and

(m) employees not pursuing any further claims during the term of the Agreement.

I will call you shortly to discuss the Agreement and answer any question you may have.

Ms Ind also telephoned or spoke with each employee and “*ensured that* [*she allowed*] *sufficient time … to fully explain the terms of the Agreement and answer any questions they had*”. In cross-examination, she explained that the process she followed with each employee was to “*go over*” the terms of the email. No questions were asked by any of the three employees.

1. At 3.05pm on 25 August 2015 a further email was forwarded to each employee advising each that they could now vote on the *Agreement*. The email stated that the vote could be made simply by replying to that email either “*YES*” or “*NO*”. Each employee voted “*Yes*”. Mr Marfell was the first to respond at 3.09pm; Mr Raymond was next at 3.32pm; and Mr O’Brien responded at 4.06pm.
2. Mr Weise added to the explanation provided by Ms Ind as to the nature of the business undertaken by One Key Workforce by explaining that in August 2015 “*the One Key Resources Group acquired the labour hire company known as Pegasus Mining Personnel Pty Ltd*”. That company had, until that time, provided a“*significant number of employees to coal mine operators to perform work at coal mines in NSW*”.
3. It was accepted by Ms Ind that when she “*looked … as of most recently*” there were 1,118 black coal casual employees employed by One Key Workforce, but that the figure fluctuated.

### The approval by the Commission

1. The application for approval of the Agreement and the process of inquiry undertaken by the Commission was explained by Mr Weise.
2. According to Mr Weise, RECS changed its name to One Key Workforce Pty Ltd in November 2015.
3. It was in September 2015 that an application for approval of the *Agreement* was lodged with the Fair Work Commission. The application was accompanied by an *F17 – Employer’s Statutory Declaration*.
4. Without being exhaustive, there thereafter followed an exchange of emails between the Commission and the lawyers representing the employer.
5. Part of that exchange was an email sent by a member of the Member Support Research Team within the Fair Work Commission on 18 September 2015. That email stated, in part, as follows (without alteration):

Upon preliminary review of the Commission has raised the following concern.

**Better off Overall Test**

The Commissioner is not satisfied that the Agreement satisfies the better off overall test. It is noted at Clause 13.5 of the Agreement, employees are to receive the rates of pay as set out in the Incorporated Awards, plus an additional 1% BOOT allowance.

The Commissioner is concerned that the rates of pay are not high enough to adequately compensate employees given the onerous obligations the agreement puts on employees, for example the OHS requirements in Clause 8.

Furthermore, the Commissioner is not satisfied that the Agreement was genuinely agreed to. The Agreement nominates several Awards, and given that the Agreement only covers 3 employees, the commissioner is concerned that scope of the Agreement is too broad and could not have been genuinely agreed to by the 3 employees.

Additionally, for the Agreement to have been genuinely agreed to, the Commissioner needs to be satisfied all employees received copies of or had access to all of the Modern Awards listed in the Agreement, and that they had the ability to understand such.

You may wish to provide further information as to how employees satisfy the better off overall test, or provide an undertaking to satisfy the Commissioners concern.

If an undertaking is to be provided, please ensure that it is:

* provided in a form that can be published with the Agreement (for example, as a standalone document separate to any response given to these preliminary findings); and
* signed in accordance with the *Fair Work Regulations 2009*, in particular, regulation 2.07, which states: *“For subsection 190(5) of the Act, an undertaking relating to an enterprise agreement must be signed by each employer who gives the undertaking.”*

Please provide the above requested undertaking by close of business Tuesday 22 September 2015.

1. Part of the exchange also included a letter sent to the Commission on 30 September 2015 by the legal representatives of One Key Workforce. That email provided a detailed response. It addressed at the outset the better off overall test under the following headings:
* “*BOOT*”
* “*Clause 8.1*”
* “*Clause 8.2*”
* “*Clause 8.3*”
* “*Remaining concerns about BOOT*”

The letter went on to address the “*Scope of the Agreement*” as follows:

**Scope of the Agreement**

11. You indicated that the Commissioner is concerned that the scope of the Agreement is too broad and could not have been genuinely agreed to by the three employees. In saying this, you mention that the Agreement nominates serval Awards and covers only three employees.

12. The law in relation to whether an agreement can be made with a small number of Employees yet cover classifications other than those in which the small number of Employees are employed is now settled.

The letter continued on to address in paragraphs [13] to [17] the decision of the Full Court in *John Holland* [2015] FCAFC 16, (2015) 228 FCR 297 and a number of decisions of the Commission. The letter thereafter concluded as follows (without alteration):

18. This line of case supports my client’s submission that the Agreement should not be rejected because it was voted by three employees but has a potentially broader application than just those three employees. The three employees who voted on the Agreement are the applicant’s only blue collar employees. The scope of the Agreement represents the proposed scope of employees that my client will employ. As such, the Agreement will apply to all of my client’s ‘blue collar’ workforce.

19. There is no suggestion that the employees could not understand the Awards that define the scope of the Agreement or the Agreement’s interaction with those Awards. As such, there is nothing to suggest that their agreement was other than genuine.

1. A further email was sent by the Commission on 13 October 2015 which stated in part as follows (without alteration):

I write in relation to the above matter and refer to your email dated 30 September 2015 and the email from my colleague dated 18 September 2015.

Commissioner Roe notes your response, however, has raised the following issues that could be potentially disadvantageous on employees, noting that the agreement incorporates the Awards listed in clause 2.1(b).

**Operation of clause 9.2 and 12.5 conjunctively:**

Clause 9.1 provides that employees shall be engaged on assignment as either a full time, part time or casual employee.

Further, clause 9.2 provides that full time or part time employees can be engaged on a permanent, fixed term, maximum term or fixed task basis.

Clause 12.5 provides that when an employee is on assignment the client can change a nominated shift pattern or roster cycle. Each time a cycle is changed an employee’s assignment will be taken to end.

The Commissioner is concerned that clause 12.5 is inconsistent with the employment categories under the agreement.

**Clause 11 Casual Conversion**

Clause 11 removes an employee’s right to casual conversion, where it is an entitlement under any of the Modern awards listed in clause 2.1(b).

The removal of the right to casual conversion is compensated by an additional loading of 1%.

The Commissioner is not satisfied that the additional 1% is sufficient compensation for the removal of the right to casual conversion.

**Clause 12.3 Maximum Hours of Work**

Clause 12.3 of the agreement provides that an employee can work a maximum of 12 hours per day.

The Commissioner notes that the incorporated awards provide numerous different mechanisms of setting the maximum working hours for employees.

Thus, the Commissioner is concerned with clause 12.3 providing that all employees can be required to work a maximum of 12 hours on any day, irrespective of which award would cover the work that they are performing.

**Clause 9.4: Abandonment of employment**

Clause 9.4 provides that where an employee is absent from work for a continuous period exceeding two working days, employment is deemed to be abandoned.

The Commissioner notes that the abandonment of employment is possible at common law. Further in relation to the incorporated awards under the agreement, it is available under only the Manufacturing and Associated Industries and Occupations Award 2010.

The Commissioner is concerned that this clause does not provide the opportunity for employees to explain their absence. This restricts an employee’s opportunity to prevent their employment being considered abandoned by the employer.

The Commissioner also notes that the Manufacturing and Associated Industries and Occupations Award 2010 requires an employee to be absent for a period exceeding three working days to activate the abandonment provisions.

**Clause 6: Policies and Procedures**

Clause 6 requires employees to comply with specific client policies and procedures applicable to their assignment of work.

The Commissioner is concerned that the terms of employment can thus be changed to incorporate provisions that could not be assessed by the Fair Work Commission, whilst the agreement is being considered for approval.

The Commissioner is willing to consider any undertakings in relation to any of the above matters or any of the matters previously raised in correspondence.

Alternatively, you may wish to provide submissions in relation to the additional matters raised.

If you do wish to provide any undertakings please do so in a written and *signed* format and return it via email to the address provided below. Any undertakings should be signed by the employer. Furthermore, the Commissioner asks that you seek the views of all bargaining representation, if any, regarding any proposed undertakings. Any objections to the proposed undertakings should be raised with the Commission prior to the approval of the agreement.

The Commissioner has asked that you provide any undertakings or submissions by close of business on Friday, 16 October 2015.

That email provoked a response by the solicitors acting for One Key Workforce on 16 October 2015. That response was a letter which addressed in such detail as was then thought appropriate the matters canvassed in the email from the Commission under the headings:

* “*Operation of clauses 9.2 and 12.5 conjunctively*”
* “*Clause 11 – casual conversion*”
* “*Clause 12.3 – maximum hours of work*”
* “*Clause 9.4 – abandonment of employment*”
* “*Clause 6 – policies and procedures*”

Also forwarded to the Commission on 16 October 2015 was an undertaking that RECS would “*not apply clause 9.4 of the RECS (Qld) Pty Ltd Enterprise Agreement 2015 as a term of the Agreement”* and that cl 12.3 of the *Agreement* would *“be read subject to clauses 22.3 and 23.3 of the Road Transport and Distribution Award 2010*”.

1. The application for approval of the *Agreement* was thereafter the subject of a hearing before a Commissioner on 26 October 2015.
2. On 30 October 2015 the application was approved.
3. The Commissioner’s reasons for decision addressed (*inter alia*) a consideration of compliance with s 180(5) of the Act: [2015] FWCA 7516 at [9]. In doing so, the task being undertaken was the task of satisfying itself as to whether “*the agreement has been genuinely agreed*” (s 186(2)(a)). An aspect of that task required to be undertaken by reason of s 188(a) was to satisfy itself that there had been compliance with (*inter alia*) s 180(5). The Commissioner’s reasons in this regard provide as follows:

[9] Section 180(5) of the Act requires that all reasonable steps must be taken by the employer to explain the terms of the agreement and the effect of those terms. It is quite common for the Fair Work Commission to identify terms which it believes may disadvantage employees in circumstances where the employer has failed to identify these matters in the F17 Statutory Declaration and in the information provided to employees. In this case the employer failed to identify a number of matters which disadvantage employees. Where these matters are minor it does not necessarily mean that Section 180(5) has not been complied with. The requirement is about “reasonable steps”. Where the matters are more significant the Fair Work Commission might not be satisfied that Section 180(5) has been met and as a consequence the requirement for genuine agreement in Section 188 may not be met and this will prevent the Agreement being approved. In the circumstances of this case I am satisfied, on a fine balance, that reasonable steps were taken to explain the terms of the agreement and the effect of those terms.

1. The Commissioner thereafter set forth in his reasons for decision “*some of the matters in the Agreement which disadvantage employees when compared to the Awards or some of the Awards*”: [2015] FWCA 7516 at [11]. The matters addressed were cll 6, 7, 8, 9.2, 9.4 and 12.3. The Commissioner expressed his conclusion that “*0.1% per hour* [*was not*] *sufficient compensation for these matters*”: [2015] FWCA 7516 at [12]. Following the hearing, the Commissioner noted, undertakings were provided. The Commission concluded as follows:

[14] I am not satisfied that the additional 1% is sufficient compensation for the removal of the right to casual conversion in Awards. I accept the submission of the employer that there have been a number of agreements approved by the Fair Work Commission which contain this provision. The substitution of non-monetary entitlements for monetary entitlements is often a difficult matter to judge. Casual conversion offers employees the opportunity for job security and access to paid leave. Employees may value these matters differently. There will be differential issues for employees. For example, those with a disability or with particular family circumstances will be likely to gain greater benefit from increased job security and access to paid leave. For the purpose of the BOOT it may not be appropriate to see all casual employees as a single class in this particular circumstance. I note that the F17 Statutory Declaration reveals that two of the three current employees who will be covered by the Agreement are casuals. One of the employees is an Aboriginal or Torres Strait Islander. Job security is likely to be a particularly valuable consideration for employees of indigenous background.

[15] The employer submitted that the *Fair Work Act 2009* provides regular casual employees with protection from unfair dismissal and this reduces the importance of the casual conversion clause. I am satisfied that casual employees in the labour hire industry are not guaranteed any particular number of hours of work and therefore their income is precarious. Casual conversion offers those employees the opportunity for guaranteed 38 hours of work and pay per week if full time or regular guaranteed hours if part time. This is a major potential advantage to some casual employees.

[16] I provided the employer with the opportunity to make submissions about these matters either in the lead up to the hearing or at the hearing. I considered those submissions.

[17] Following the hearing the employer provided an undertaking that the exclusion of the casual conversion provisions of the Awards would not apply (Clause 11).

[18] I am satisfied that the undertakings will ensure that the Agreement meets the BOOT.

[19] I am satisfied that the undertakings do not result in financial disadvantage to employees. Given the scope of the concerns in this matter and the limited number of matters contained in the Agreement apart from the Award incorporation, I was concerned that the undertakings might represent a substantial change to the Agreement. However, on balance I am satisfied that they do not result in a substantial change to the Agreement.

[20] I am satisfied that each of the requirements of ss.186, 187 and 188 of the Act as are relevant to this application for approval have been met.

1. The reasons provided self-evidently address in considerable detail the manner in which the Commissioner reached the state of satisfaction expressed.

# THE GROUNDS UPON WHICH RELIEF IS SOUGHT

1. The written *Outline of Submissions* filed on behalf of the CFMEU separately outlined the grounds upon which it sought declaratory relief as opposed to relief in the nature of *certiorari* and *mandamus*.
2. With respect to the claim for declaratory relief, the grounds relied upon by the CFMEU were identified as being:
* an inability for the *Agreement* to satisfy the BOOT as described in s 193 of the *Fair Work Act* in that employees were not “*better off overall*” under the *Agreement* than under the relevant modern award;
* non-compliance with s 180(5) of the *Fair Work Act* in that “*all reasonable steps*” were not taken to explain the terms of the proposed *Agreement*, and the effect of those terms, to employees;
* the absence of a “*genuine agreement*” and/or that the *Agreement* put forward for approval was a “*sham*”;
* the impermissible incorporation by reference of unknown policies and procedures into the *Agreement*; and
* the failure to satisfy the requirements imposed by s 185(2)(a) of the *Fair Work Act* for the signing of the *Agreement*.
1. The grounds of review relied upon in support of the application for prerogative relief were also summarised in the written *Outline of Submissions* filed on behalf of the CFMEU. These grounds, it may be noted, substantially overlapped with the grounds upon which declaratory relief was sought. Nevertheless, and without alteration, the grounds relied upon in support of a submission that the approval granted by the Commissioner was vitiated by jurisdictional error were relevantly expressed in those *Submissions* as follows:
* “*error in applying the BOOT*”;
* “*error in assessing* All Reasonable Steps *under s. 180(5), and* Genuine Agreement *within meaning of s. 186(2)(a) and s. 188(a)(i)*”;
* “*errors in assessing whether employees genuinely agreed to Agreement within meaning of 186(2)(a) and 188(c)*”;
* “*errors in approving Agreement where unknown terms were incorporated through reference to policies and procedures*”;
* “*error in wrong identification of employees covered by Agreement*”; and
* “*error in approving agreement where requirements of s. 185(2)(a) of the FW Act for signing of an agreement were not met*”.

Albeit not expressed in terms of “*jurisdictional error*”, Counsel for the CFMEU submitted that that was the manner in which each of these “*errors*” was to be approached. In very summary form, it was further submitted that the “*jurisdictional error*” relied upon could be either characterised as:

* failure to take into account relevant considerations; or
* legal unreasonableness.
1. The relevant considerations which it was submitted had not been taken into account were identified as the failure to take into account when considering the BOOT (s 193) the “*detriments*” to be found in cll 6.1, 7, 8.1.2, 8.1.3, 9.1, 9.3, 9.6, 12.1 and 12.4. Of “*particular importance*”, it was submitted on behalf of the Applicant, were cll 9.1 and 9.3 which deal with casual employment. The importance was said to arise from the fact that it was an “*historical feature*” of the *Black Coal Mining Industry Award* *2010* that casual employment of production and engineering employees was not permitted.
2. More careful scrutiny, it was submitted, should be given to the “*detriments*” when the “*benefits*” were marginal. The only “*benefit*” which was conferred by the *Agreement*, it was submitted, was “*an over award payment of $0.80 – 1.00 per week*”.
3. The failure to take into account these detriments, it was submitted on behalf of the CFMEU, was demonstrated by:
* the absence of any of these matters being addressed in any meaningful way in the evidence presented to the Commission; and
* the absence of any meaningful reference to these matters in the reasons for decision of the Commission.
1. No submission was advanced on behalf of the CFMEU that when presenting the proposed *Agreement* to the Commission for approval that there was any intent or purpose sought to be pursued by One Key Workforce to mislead the Commission. In particular, no submission was advanced that One Key Workforce deliberately or intentionally set out to conceal from the Commission any discrepancy between the rights conferred by any one or other of the 11 *Awards* and the rights conferred by the proposed *Agreement*.
2. The consequence of approving the *Agreement* may well have been a diminution of rights – but that was a consequence which was not envisaged at the time the application for approval was made. That consequence was a consequence not foreseen by either One Key Workforce or by the Commission.
3. The submission advanced was that the proposed *Agreement* was a “*sham*” because One Key Workforce intended to “*lock in*” the *Agreement* with a marginal benefit to the employees of “*an over award payment of $0.80 – 1.00 per week*” over the safety net (cl 13.5) with three employees but with the intent of increasing the number of employees over the four year life of the *Agreement.*  This, so that argument ran, had the intended effect of preventing future employees from exercising any right to initiate a genuine bargaining process. The foreclosure of that right followed from s 417 of the *Fair Work Act*, which prohibits organising or engaging in industrial action before the nominal expiry date of an enterprise agreement.
4. That intent, being an intent to foreclose the right of future employees who would be covered by the *Agreement* to engage in a genuine bargaining process, it was accepted, fell short of an intent on the part of One Key Workforce to deprive employees of existing award conditions.

# THE NEED FOR AN AGREEMENT

1. It is concluded that the “*approval*” of the *Agreement* pursuant to s 186 of the *Fair Work Act* miscarried.
2. This conclusion is reached for either of two principal but separate reasons, namely:
* that the employer failed to “*take all reasonable steps to ensure that … the terms of the agreement, and the effect of those terms,* [*were*] *explained to the relevant employees*”, being the three existing employees (i.e., Messrs O’Brien, Raymond and Marfell) (s 180(5)) and/or
* that there was never an “*agreement … genuinely agreed to by the employees covered by the agreement*” (s 186(2)(a)).

This conclusion is reached notwithstanding the fact that it is the Commission – and not this Court – that must be “*satisfied*” that:

* “*the employer … complied with … subsections 180(2) … and (5) (which deal with pre-approval steps)*” (s 188(a)(i)); and
* “*the agreement has been genuinely agreed to by the employees covered by the agreement*” (s 186(2)(a)).
1. In reaching this conclusion it should nevertheless be recognised at the outset that a considerable degree of diffidence has been experienced in setting aside the decision of the Commission lest it be perceived that this Court has impermissibly intruded into the tasks entrusted by the Legislature to the Commission. Notwithstanding that diffidence, it has ultimately been concluded that the Commission fell into jurisdictional error.
2. Expressed differently, it is concluded that the proposed *Agreement* for which approval was sought was not an “*agreement*” within the meaning of and for the purposes of ss 186 or 187 of the *Fair Work Act*. A failure to comply with a “[*p*]re*-approval requirement*”, in this case the failure to “*take all reasonable steps*” for the purposes of s 180(5), precluded the proposed *Agreement* from being an agreement susceptible of subsequent approval by the Commission. And a failure to take the necessary steps to secure the agreement of those “*employees covered by the agreement*” (s 186(2)(a)) – be it genuine agreement or otherwise – again precluded the proposed *Agreement* from being an agreement in respect to which the Commission need reach any state of satisfaction.
3. Such reasoning, with respect, does no disservice to the value judgment entrusted to the Commission by sections such as ss 186(2) or 188 which entrust to the Commission and not this Court the task of reaching a requisite state of “*satisfaction*”. The power of approval conferred by s 186(1) is conditioned not by reference to whether the Commission is “*satisfied*” that there is an “*agreement*”; before that power can be exercised, there must be in fact and law an “*agreement*” which satisfies the meaning of that term as employed in sections such as ss 171, 172 and 176.
4. Each of these generally expressed reasons should be expanded upon.

### All reasonable steps – s 180(5)

1. The conclusion that “*all reasonable steps*” have not been undertaken centres upon s 180(5) of the *Fair Work Act*.
2. Section 180 is one of the “*pre-approval steps*” set forth in subdiv A of Div 4 to Pt 2-4. It is a section characterised by its own internal structure such that:
* the employer is required to “*take all reasonable steps*”;
* the “*employees*” to which s 180 refers are those “*employed at the time who will be covered by the agreement*”. These are the “*relevant employees*”;
* the reasonable steps “*must*” be undertaken;
* “*all reasonable steps*” must be undertaken; and
* such steps are directed to “*ensur*[*ing*] *that … the terms, and the effect of those terms, are explained*” and explained in “*an appropriate manner taking into account the particular circumstances and needs of the relevant employees*”.

At least one relevant aspect of these provisions is that:

* an employer does not fall short of compliance with the requirements imposed merely because an employee does not understand the explanation provided – the requirement is one which only imposes on the employer an obligation to take “*all reasonable steps*”.
1. But two further aspects of s 180 should be noted, namely:
* section 180(5)(a) is drafted in terms of requiring an employer to take all reasonable steps to ensure that the terms of an agreement have been “*explained to the relevant employees*”. And “*relevant employees*” is itself defined in s 180(2)(a) as being “*the employees … employed at the time who will be covered by the agreement*”. That category of employees is a much more confined category that the more expansive category of employees “*who will be covered by the agreement*”; and
* the task entrusted to the Commission in reaching a state of satisfaction in respect to s 180(5) is not the task of ensuring that an employer has in fact taken all reasonable steps to ensure that “*relevant employees*” have been adequately informed but rather the more confined task of reaching a state of satisfaction as to whether “*the agreement has been genuinely agreed to by the employees covered by the agreement*” (ss 186(2)(a) and 188(a)(i)).

There is an obvious difference in the language employed in s 180(5)(a) to that employed in s 186(2)(a). Section 180(5)(a) is confined to taking all reasonable steps to explain the terms of the agreement and the effect of those terms to the employees who are on hand and to whom an explanation can be given.

1. On the facts of the present case it is concluded for the purposes of s 180(5) that there has been a manifest failure on the part of the employer to “*take all reasonable steps*” to ensure that:
* “*the terms of the agreement*”; and
* “*the effect of those terms*” were “*explained to*” Messrs O’Brien, Raymond and Marfell.

It is further concluded for the purposes of s 188 that the Commission when reaching its state of “*satisfaction*” as to whether the employer had“*complied*” with s 180(5) committed jurisdictional error by reason of:

* focussing its attention upon the extent to which the employer had advised the Commission as to the steps it had taken to comply with s 180(5) and in failing to give any considerations to the steps in fact taken by the employer to comply.

Alternatively, further jurisdictional error is exposed in the decision of the Commission to “*approve*” the agreement in circumstances where:

* section 180(5) has not in fact been satisfied.

Section 180(5) is not a section which is expressed in terms of whether the Commission is “*satisfied*” that “*all reasonable steps*” have been taken. That subsection is expressed as a statement of objective fact as to that which must occur before approval is sought. If “*all reasonable* *steps*” have not in fact been taken, the Commission lacks power to “*approve*” the agreement. A statement of “*satisfaction*” on the part of the Commission as to compliance with s 180(5) cannot conceal from scrutiny by this Court the adequacy of the steps in fact taken.

1. The former jurisdictional error into which the Commission fell, with respect, was occasioned by the manner in which the application for approval was presented by the employer.
2. In support of its application for approval to the Commission, One Key Workforce addressed this “*procedural step*” in its application as follows:



1. The Commission addressed this part of the approval process in its reasons for decision at para [9] (extracted above).
2. The difficulty confronting the Commission was that it proceeded upon the factual basis presented in the application for approval, the “*F17 Statutory Declaration*”. Before this Court the manner in which the employer sought to comply with s 180(5) was more fully explored.
3. Notwithstanding the statement made by One Key Workforce in its application to the Commission, the “*steps*” taken by it to “*ensure that … the terms of the agreement, and the effect of those terms,* [*were*] *explained to the relevant employees*” were neither “*reasonable*”steps nor “*all*” the reasonable steps that should have been taken to “*ensure*” that Messrs O’Brien, Raymond and Marfell were provided with an adequate explanation of the *Agreement*.
4. The steps taken were much more fully explained and exposed to scrutiny in this Court than the exposition provided to the Commission. The steps taken were the following:
* the forwarding of a copy of the *Agreement* and the 11 modern awards referred to in cl 2.1(b) to the employees on 7 August 2015;
* a series of telephone calls between Ms Ind and Messrs O’Brien, Raymond and Marfell also on 17 August 2015;
* an email sent on 25 August 2015 that, according to the characterisation of Ms Ind, “*explained the terms of the Agreement and the effect of those terms on the Employees*”; and
* a face-to-face meeting with Mr O’Brien “*a day or so before the Voting Day*” when Mr O’Brien happened to be in the office.

None of these steps, either individually or cumulatively, satisfied the requirements imposed by s 180(5). The series of telephone calls between Ms Ind and each of the three then employees on 17 August 2015 were, with respect, no more than a formality. Ms Ind, as she accepted, did little more than read to each of those employees parts of the text of the *Agreement*. The emails on 25 August 2015 added no further explanation. The requirement imposed by s 180(5) to “*take all reasonable steps to ensure that … the terms of the agreement, and the effect of those terms, are explained*” is an important obligation imposed upon an employer to ensure that employees are as fully informed as practicable. The requirement is not a mere formality. Whatever steps may be necessary will depend upon the facts and circumstances of each particular case; but those steps are not satisfied by a person reading – without explanation – the terms of an agreement to an employee.

1. The text of what Ms Ind characterised as the “*Explanatory Email*” (the 25 August 2015 email), with respect, had the following failings:
* there was little in the nature of an explanation as to the “*terms*” of the *Agreement* and was more in the nature of a listing of the terms that were to be found in the *Agreement*; and
* there was even less of an explanation as to “*the effect of those terms*”.

If reference is made to (for example) a clause of the *Agreemen*t which attracted some attention during oral submissions, namely cl 6, the *Explanatory Email*:

* merely stated that the Agreement “*contain*[*ed*] *clauses about … our policies and procedures and those of our clients applicable to your assignment*”;
* explained nothing as to what cl 6 provided for; and
* certainly said nothing as to the “*effect*” of cl 6.

The same criticisms could also be directed at, and by way of only further example:

* cl 2.1(b); and
* the reference to “*the following Awards*”.
1. Such an explanation, by itself, fell short of constituting “*reasonable steps*” for the purposes of s 180(5). Even if a contrary characterisation of the email were open, such an explanation certainly fell well short of taking “*all*” reasonable steps. Although the email may have been lengthier, further steps could have been taken to:
* expressly identify by reference to particular clauses, those provisions of the *Agreement* which had particular application to Messrs O’Brien, Raymond and Marfell – such express references would have at least put those employees of notice of the particular clauses of the *Agreement* to which they could give greater attention; and
* expressly identify the particular award which covered each of Messrs O’Brien, Raymond and Marfell and identify particular provisions in those awards that varied from (or did not vary from) the terms in the *Agreement*.

One of the things which was missing from the explanation provided was any guidance being provided to Messrs O’Brien, Raymond and Marfell as to the manner in which the *Agreement* affected their personal interests.

1. The extent of the “*steps*” taken by One Key Workforce took on no different complexion when reference is made to either the telephone conversations on 17 August 2015 or those on 25 August 2015 which Ms Ind characterised as “*sufficient time on the phone to fully explain the terms of the Agreement and answer any questions they had*”. During her oral evidence, she explained what she actually did during each of the phone calls on 17 August 2015. It was during those conversations that she “[*j*]*ust read out the clauses*”.
2. With reference to the conversations on 25 August 2015, and using the conversation with Mr Marfell as an example, the course of the conversation was explained as follows:

Yes. And did you call him?—Yes, I did.

And what did you tell him?—I firstly confirmed that he had received my email which I just literally sent and he confirmed that yes, he did.

That’s the email with the attachment of the document you earlier described?—Yes, the explanation email.

Right. And then?—So then I asked him if he had read it, which he responded to yes, that he just read it. Asked him if he understood it. The conversation – I do know that I did read over that email with him. I can’t remember, obviously, the exact wording of it, but every conversation I had was did you receive the email, do you understand, do you have any questions.

All right. So that was with Mr Marfell?—Yes.

Did you have a conversation with Mr – sorry, when you asked him that question or those questions, in what way did Mr Marfell respond?—Yes, he received the email. Yes, he understood. No, he had no questions.

The conversations with the other employees followed much the same course. The face-to-face meeting with Mr O’Brien a few days earlier took no different course.

1. The response provided to the Commission in para 2.6 of the *F17 Statutory Declaration* was misleading to the extent that it asserted on behalf of One Key Workforce that the “*terms of the Agreement and the effect of the terms were explained to the relevant employees*” by means of either the 25 August 2015 email or during the“*telephone conversations*”.
2. Such reasons as were provided by the Commissioner at para [9] of his reasons for decision expose jurisdictional error. Little, if any, consideration was given to what were the “*steps*” in fact taken by the employer or the adequacy of those steps. Such consideration as was given was more directed to the subject-matter of the information communicated rather than to the content of the information communicated or the effectiveness of the communication of that information or (for that matter) what was not communicated.
3. Separate from that source of jurisdictional error is the further conclusion that there must in fact be compliance with s 180(5) before the power of the Commission to “*approve*” the agreement arises. Although the Commission must form a state of “*satisfaction*” for the purposes of s 188(a)(i) of the *Fair Work Act* as to whether an employer has “*complied with*” s 180(5), its statement of having reached that state of “*satisfaction*” cannot transform a manifestly inadequate explanation process into one which complies with s 180(5). That factual inquiry, on this alternative basis, remains a matter that this Court can examine.
4. On this alternative basis, it is further concluded that the approval process entrusted to the Commission miscarried.

### Employees who will be covered

1. The second of the two principal reasons expressed at the outset as to the decision of the Commission being vitiated by jurisdictional error was that there never has been an “*agreement … genuinely agreed to by the employees covered by the agreement*” (s 186(2)(a)).
2. The background facts are within a limited compass.
3. The three employees who voted on 25 August 2015 were then the only employees of One Key Workforce, namely Messrs O’Brien, Raymond and Marfell. The positions occupied by each of these employees stand in stark contrast to those employees covered by at least some of the *Awards* listed in cl 2.1(b) of the *Agreement*. Those *Awards* cover employees extending well beyond mining and construction, and reach into such diverse areas as:
* road transport;
* clerks; and
* the hospitality industry.
1. There is, of course, no difficulty with a small number of employees entering into an agreement which has the potential to “*cover*” a vast number of future employees: cf. *John Holland*. And there was, moreover, on the facts of the present case, no evidential basis for concluding that One Key Workforce had applied some “*arbitrary criterion*” in the selection of employees (cf. *Pilbara Iron Company*) or had not “*fairly chosen*” the three employees (cf. *John Holland*). The three employees who voted were the only employees at the time. Nor is there a difficulty in the fact that the approval by the Commission of such an agreement may well proceed in circumstances where future employees may thereby be precluded from taking “*industrial action*” during the currency of the *Agreement*, namely a period of four years: cf. *Fair Work Act* s 417.
2. But considerable difficulty is expressed in respect to the prospect that three employees with a very confined employment experience (and covered by a limited number of *Awards*) could approve an agreement that would “*cover*” employees falling within such a diverse range of *Awards* as those set forth in cl 2.1(b) of the *Agreement*. Such an agreement would lack “*authenticity*” and “*moral authority*” (cf. *CFMEU v AIRC*).
3. This concern and this alternative reason for setting aside the approval granted by the Commission, it is expressly acknowledged, more immediately confronts the difficulty of this being a matter entrusted to the Commission to reach a state of “*satisfaction*”.
4. Section 186(2)(a), it is accepted, provides that it is the Commission that “*must be satisfied that … the agreement has been genuinely agreed to by the employees covered by the agreement*”. That phrase is deliberately wider in ambit than the definition of “*relevant employees*” in s 180(2), namely “*the employees … employed at the time who will be covered by the agreement*”. And s 186(2)(d) similarly provides that the Commission “*must be satisfied that … the agreement passes the better off overall test*”. Both provisions are directed to ensuring that the Commission gives genuine consideration to the ability of the employees who in fact vote to reach an agreement having the coverage for which approval is sought.
5. With specific reference to s 186(2)(d), Bromberg J in *Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union (No 2)* [2016] FCA 2, (2016) 259 IR 164 at 188 has summarised the task required to be undertaken as follows:

[70] The Commission must be satisfied that the agreement passes the better off overall test … (s 186(2)(d), though see also s 189). That will be the case where the Commission is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, would be better off overall if the agreement, rather than the relevant modern award, applied to the employee (s 193(1)). In so assessing, individual flexibility arrangements are to be disregarded (s 193(2)). While the “test time” is the time for application of the approval of the agreement (s 193(6)), the Commission is clearly required to engage in a forward-looking analysis, in that the question is whether the relevant employees “would be” better off if covered by the agreement rather than the modern award. That is a question that cannot sensibly be answered without assessing the likely position of agreement-covered employees, over the course of the enterprise agreement’s term.

In again emphasising the importance of the task entrusted by the Commonwealth legislature to the Commission, and the nature of that task, his Honour outlined further matters in respect to which the Commission had to form a state of “*satisfaction*” and continued (at 190):

[74] As is, I think, evident from the foregoing, the Commission’s role in relation to the scrutiny of agreements as at the time of approval is immense. The legislature has invested in the Commission great responsibility in ensuring that the process of making the agreement has been satisfactory and that its content complies with the detailed requirements of the Act. In some cases that process of assessment is fairly formulaic or straightforward (e.g., whether there is a nominal expiry date not later than 4 years after the day of approval). In many cases, however, the process of assessment calls for value judgment: would the employees be better off overall?; were “reasonable steps” taken in relation to the provision of information to employees?; was the explanation of the agreement appropriate, taking into account the circumstances and needs of employees?; is the effect of a term “discriminatory,” and if so to what extent?; were the employees “reasonably chosen”?; are there any reasons for doubting the genuineness of agreement?; do any terms permit contravention of (e.g.) the freedom of association provisions?; how do the arrangements for shiftworkers and pieceworkers compare with applicable awards?

[75] These are difficult questions, upon which reasonable minds might sometimes (perhaps often) differ. The legislature’s intent was evidently that they be dealt with — for the benefit of employees and employers both — by independent specialists and experts, through the process of Commission scrutiny. …

1. The Commissioner, not surprisingly given his expertise in the area, was very much alive to the fact that the three named employees were the only employees giving their agreement. The issue was thus expressly raised in the Commissioner’s email forwarded on 18 September 2015. The view was then expressed that the Commissioner was not “*satisfied that the Agreement was genuinely agreed to*”. The concern was there also expressed that “*the Agreement only covers 3 employees*” and that “*the Agreement is too broad and could not have been genuinely agreed to by the 3 employees*”. The response provided on behalf of One Key Workforce was as set forth in the letter dated 30 September 2015.
2. It must thus necessarily be acknowledged that prior to making his decision the Commissioner had directed his attention to whether the *Agreement* for which approval had been sought had been “*genuinely agreed to by the employees covered by the agreement*”. But other than expressing a state of satisfaction that “*the requirements of ss.186, 187 and 188 of the Act as are relevant to this application for approval have been met*”, the question as to whether there had been genuine agreement was not further addressed in the Commissioner’s reasons for granting approval.
3. The exposure of jurisdictional error in the approval process of the Commissioner in this respect has its origins in the employer’s letter dated 30 September 2015. That letter canvassed in considerable detail the authorities in support of a proposition (*inter alia*) that three employees may “*be asked to make an agreement or vote to do so even though it may potentially apply to a much larger* [*number*] *of employees once approved*”. So much for present purposes may be accepted. But that which the letter did not address were such considerations as:
* the ability or appropriateness of Messrs O’Brien, Raymond and Marfell (with their particular employment backgrounds) being called upon to agree to terms and conditions covering employees in such other diverse areas of employment as road transport, clerking or the hospitality industry; or
* such factual differences as may have existed (and presumably did exist) between the areas of employment represented by Messrs O’Brien, Raymond and Marfell and those pertaining to road transport, clerking or the hospitality industry and whether such factual differences precluded the *Agreement* being agreed to by only three employees with their limited employment background.

Assistance with respect to these and other issues was presumably the assistance which the Commissioner was seeking from those representing the employer but which was not forthcoming.

1. It was the failure to give any – or any adequate or proper – consideration to such matters which vitiated the decision of the Commissioner to approve the *Agreement* and which exposed the jurisdictional error in his decision. The simple fact, moreover, was that there was no material before the Commissioner, and no assistance provided to him, which could support a conclusion that the agreement had been “*genuinely agreed to by the employees covered by the agreement*”, being those employees covered by the many and diverse *Awards* listed in cl 2.1(b) of the *Agreement* as opposed to the more limited agreement of Messrs O’Brien, Raymond and Marfell.
2. It is concluded that One Key Workforce unquestionably secured consent to the *Agreement* in August 2015 with the intent that that *Agreement* would thereafter cover other employees and thereby preclude a genuine bargaining process or any “*industrial action*” throughout the duration of the *Agreement*. So much follows from:
* the request made by Mr Wechsel of Ms Ind in around July 2015 to perform the role of Recruitment Manager for RECS which, according to Ms Ind, “*was then being established*” and “*was intended to be utilised for the purpose of operating a specialist labour hire business*”.
* the acquisition in August 2015, according to Mr Weise, by the One Key Resources Group of a labour hire company known as Pegasus Mining Personnel Pty Ltd which had previously provided a significant number of employees to coal mine operators to perform work at coal mines in New South Wales;
* the chronological sequence whereby notice was first given to Messrs O’Brien, Raymond and Marfell in July 2015 and the vote upon the *Agreement* in August 2015;
* the fact that by December 2015, again according to Mr Weise, One Key Resources Group was providing labour to a number of mines; and
* the fact that by January 2017 One Key Resources Group were providing over 1,000 workers to mines in Queensland and New South Wales.

There is, in addition:

* no explanation as to why Messrs O’Brien, Raymond and Marfell were the only employees of One Key Workforce prior to the approval of the *Agreement* by the Commission on 30 October 2015.

Although the hearing proceeded whereby Counsel for the CFMEU read parts of the affidavits of Ms Ind and Mr Wechsel, any suggestion that it was the CFMEU that bore the onus of setting forth the objectives or purposes sought to be pursued by Mr Wechsel on behalf of One Key Workforce is rejected. It would be unrealistic, with respect, to conclude that because it was the CFMEU which read parts of Mr Wechsel’s affidavit that he thereafter became the CFMEU’s witness such that he could have been called by the CFMEU – if necessary, by way of a subpoena – and thereafter exposed to cross-examination by the very legal team that his company had chosen to represent the companies’ interests.

1. It is not without significance to note that the prospect of the legislative regime being subverted if untrammelled power is reserved unto an employer to enter into an agreement with some employees and thereby secure an agreement which covers other employees has previously been relied upon as a basis upon which an agreement may be set aside: *Pilbara Iron Company* [2011] FCAFC 91 at [38], (2011) 194 FCR 269 at 280 to 281 per Gray, Lander and Katzmann JJ.
2. It is unnecessary for present purposes to conclude that the agreement for which approval was being sought was either an agreement which, if approved, would subvert the legislative regime or was a “*sham*”. It is sufficient to conclude that the agreement which was the subject of approval by Messrs O’Brien, Raymond and Marfell was not one which was susceptible of approval. No conclusion was open that an agreement having the coverage envisaged by cl 2.1(b) of the present *Agreement* could be “*genuinely*” agreed to by three employees having the limited employment experience of Messrs O’Brien, Raymond and Marfell.

# THE BALANCE OF THE ERRORS ALLEGED

1. It has been concluded that the Commissioner committed jurisdictional error for either of the two principal reasons identified.
2. Of present concern is the further and separate question as to whether the Commissioner’s reasons for decision expose further “*error*” and the separate question as to whether any such errors can properly be characterised as “*jurisdictional error*”.
3. Albeit unnecessary to decide, it is perhaps prudent to note that difficulty would have been experienced by the CFMEU in establishing jurisdictional error of the kind outlined in its written *Outline of Submissions* and as developed orally – greater difficulty being potentially confronted in respect to some of its arguments and less difficulty in respect to other arguments.
4. Other than in respect to the two jurisdictional errors identified, the difficulties to be confronted by the CFMEU in advancing the balance of its submissions would have been threefold, namely:
* any such further and separate errors as were relied upon were potentially largely errors within jurisdiction;
* any such further and separate errors as were relied upon were (again) matters entrusted to the “*satisfaction*” of the Commission; and/or
* any such further errors as were relied upon were in large part a challenge not to any legal error that may have been committed by the Commissioner but rather a challenge to the factual conclusions reached by the Commissioner.

Albeit unnecessary to decide, each of these matters should be briefly addressed.

### Errors within jurisdiction

1. If attention is focussed upon each of the remaining arguments relied upon by the CFMEU to establish jurisdictional error, an initial difficulty is that each of these remaining matters which it was submitted were not taken into account by the Commissioner were matters in fact addressed and resolved (at least in part) by the Commissioner.
2. Any remaining such errors would also have confronted the submission advanced on behalf of One Key Workforce that any such errors were errors within jurisdiction.
3. The distinction between jurisdictional error and error within jurisdiction is notoriously difficult of application. A useful exposition, however, is that provided as follows by McHugh, Gummow and Hayne JJ in *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30, (2001) 206 CLR 323 at 351:

[82] It is necessary, however, to understand what is meant by “jurisdictional error” under the general law and the consequences that follow from a decision-maker making such an error. As was said in *Craig v South Australia* [(1995) 184 CLR 163 at 179], if an administrative tribunal (like the Tribunal)

“falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal’s exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it”.

“Jurisdictional error” can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it. …

(Footnotes omitted)

As explained by Buchanan J in *Toms v Harbour City Ferries Pty Ltd* [2015] FCAFC 35, (2015) 229 FCR 537 at 551:

[59] … The task on judicial review is not simply to assess whether an administrative tribunal was right or wrong in its conclusions, or whether it made errors in its analysis. The task is not to correct perceived errors made *within* jurisdiction. The task is to examine whether the tribunal misconceived its role or otherwise failed to exercise its jurisdiction so that its decision should not be seen as a true exercise of the power committed to it at all.

Chief Justice Allsop and Siopis J agreed with Buchanan J. Katzmann J in *Cook v Australian Postal Corporation* [2017] FCA 509 at [62] has also relied upon the statement of principle as expressed by Buchanan J. “*Not every error, or even every error of law, constitutes jurisdictional error*”: *Construction, Forestry, Mining and Energy Union v Wagstaff Piling Pty Ltd* [2012] FCAFC 87 at [69], (2012) 203 FCR 371 at 387 per Flick J; *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd* [2015] FCAFC 123 at [65], (2015) 235 FCR 305 at 331 per Dowsett, Tracey and Katzmann JJ.

1. Each of the remaining matters relied upon by the CFMEU was addressed by the Commission with the benefit of the input of One Key Workforce.
2. In particular (but without being exhaustive):
* the Commissioner in the email sent on 18 September 2015 expressed an initial “*concern*” and then stated that he was “*not satisfied that the Agreement satisfies the better off overall test*”. That “*concern*” was addressed in the response provided on behalf of One Key Workforce on 30 September 2015. Given the attention given to the application of the BOOT, and the opportunity extended to One Key Workforce to address the “*concern*” expressed by the Commission and the opportunity to make its own submissions, no conclusion could be reached that no consideration at all was given to the application of this test.

The consideration given to this issue extended to (*inter alia*) a consideration of:

* the concern of the Commissioner that “*the rates of pay are not high enough to adequately compensate employees*”; and
* the application of cll 8.1, 8.2 and 8.3.

The question as to whether the BOOT test had been satisfied was also addressed in the reasons for decision of the Commissioner.

1. One particular aspect of this argument advanced on behalf of the CFMEU should nevertheless be specifically mentioned. This aspect centred upon cll 9 and 11 of the *Agreement.* This part of the CFMEU’s submission may well have experienced less difficulty than the argument more generally expressed that the Commission had failed to properly consider the BOOT test.
2. Clause 9.1 of the *Agreement* provides that employees are to be engaged “*as full time, part time or casual*”. Clause 9.3 provides that a “*casual employee is one who is engaged and paid as such*”. The substantial merit in this aspect of the CFMEU’s argument was that an historical feature of the *Black Coal Mining Industry Award 2010* is that casual employment of production and engineering employees is not permitted.
3. Clause 11.1 of the *Agreement* provided that if “*an Award contains a provision that requires or allows the conversion of casual employees to permanent employees, those provisions will have no effect*”. But most modern awards, including most of the awards covered by the *Agreement*, it was submitted on behalf of the CFMEU, make provision for long-term casual employees to seek “*conversion*” to permanent employment – a right denied by cl 11.1. The desirability, if not the necessity, to consider this change between the awards and the *Agreement* and the detriment thereby suffered by employees, so it was submitted, only assumed greater relevance when reference was made to the expressed concern of the Commissioner as to the loss of the right to convert being not adequately compensated by a 1% loading. This clause was, of course, the subject of an undertaking given to the Commission by One Key Workforce that it would not apply as a term of the agreement.
4. But whether any error that may have been committed by the Commissioner in his consideration of the detriment flowing from cll 9 and 11 of the *Agreement* may have been an error beyond jurisdiction is a matter which may presently be raised but not resolved. Left to one side is whether the Commission failed to consider any particular detriment to those employed in the black coal mining industry who, under the *Black Coal Mining Industry Award 2010* cannot be employed as casuals and so have no casual conversion rights under the *Award*. It is also unnecessary to resolve whether it was sufficient for the Commissioner to have taken into account generally expressed concerns in applying the BOOT or whether a failure to take into account a specific aspect or consideration when applying that test would vitiate the approval decision. That which was the “*relevant consideration*” which was required to be taken into account was (on one view) the BOOT itself. An aspect of that test or particular evidence, such as the manner in which cll 9 and 11 operated in fact, may have fallen short of a mandatory relevant consideration. Although the Commission must reach a state of satisfaction as to whether an enterprise agreement “*passes the better off overall test*” (s 193(1)), considerable care must be taken to ensure that the Commission’s statement of satisfaction is not impermissibly impugned for a failure to consider each and every aspect of that test, irrespective of any assessment being made as to the relative importance of any aspect of the test argued to have been overlooked.
5. Active consideration was also given to the fact that the *Agreement* as voted upon included cl 6 and the prospect that unknown “*policies and procedures*” could be later introduced and implemented by One Key Workforce which employees covered by the *Agreement* would be required to comply with. In an email sent on behalf of the Commissioner on 13 October 2015, cl 6 was expressly referred to and the concern of the Commissioner recorded that “*the terms of employment can thus be changed to incorporate provisions that could not be assessed by the Fair Work Commission*”. This issue was responded to by the legal representatives for One Key Workforce in a letter sent on 16 October 2015.
6. The Commission also foreshadowed in its 18 September 2015 email its concern as to whether:
* “*all employees received copies of or had access to all of the Modern Awards listed in the Agreement, and that they had the ability to understand such*”.
1. This exchange of correspondence and the exchange of submissions going to many of the matters now sought to be relied upon on behalf of the CFMEU secured the input, as the Commission considered necessary, of One Key Workforce.
2. The opportunity to advance all such submissions as were considered appropriate was further extended to One Key Workforce during the course of the oral hearing held by the Commissioner on 26 October 2015.
3. The reasons for decision also record the state of satisfaction of the Commissioner in respect to “*each of the requirements of ss.186, 187 and 188 of the Act*”: [2015] FWCA 7516 at [20].
4. Any submission that the Commissioner did not take into account the remaining matters raised by the CFMEU would have had to encounter the obstacle arising from the consideration in fact given by the Commissioner to these remaining issues.
5. This conclusion would have been reached not simply by reason of the fact that each of the identified matters has been referred to in one email or another or in the reasons for decision of the Commissioner but more so because of the fact that each of the identified matters was addressed in some detail and given active consideration. Mere reference or advertence, of course, to a particular consideration does not necessarily have the consequence that it was in fact taken into account by a decision-maker: *Commissioner of Taxation v Pham* [2013] FCA 579 at [39], (2013) 134 ALD 534 at 544 per Katzmann J. What is required is that a court undertaking judicial review be in a position whereby it can form a view that a particular consideration was given active and genuine consideration: cf. *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107 at [29] to [47] per Griffiths, White and Bromwich JJ. Mere “*lip service*” would not suffice: cf. *Anderson v Director-General of the Department of Environmental and Climate Change* [2008] NSWCA 337 at [58], (2008) 251 ALR 633 at 651 per Tobias JA (Spigelman CJ and Macfarlan JA agreeing).
6. But, again, such musings need not be further pursued or resolved.
7. Two final arguments advanced on behalf of the CFMEU should also be briefly mentioned.
8. First, it was submitted that the *Agreement* was a “*sham*” and, accordingly, not an agreement susceptible of approval. The *Agreement*, it was submitted, was a “*sham*” as that term was employed as follows by Lockhart J in *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449 at 454:

A “sham” is therefore, for the purposes of Australian law, something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true, but something made in imitation of something else or made to appear to be something which it is not. It is something which is false or deceptive.

This argument, had it been necessary to resolve it, would have been rejected. Although the information submitted for approval to the Commission lacked sufficient detail with respect to such matters as the employees to be covered by the agreement, and to that extent led the Commissioner into error, it could in no sense be described as a “*spurious imitation*” or as a “*counterfeit*” or as “*a disguise or a false front*”. The fact that the One Key Workforce may have held back in employing further people before the process of securing the approval of the Commission was complete and let the application for approval go forward with a limited workforce is not sufficient of itself to characterise the *Agreement* for which approval was sought as a “*sham*”.

1. Second, it was submitted on behalf of the CFMEU that the *Agreement* for which approval was sought was not an effective agreement because it was not signed as required by s 185(2)(a) of the *Fair Work Act* and reg 2.06A(2)(b)(ii) of the *Fair Work Regulations*. The *Agreement* for which approval was sought had been signed by Mr O’Brien. But what was missing, according to the CFMEU, was any explanation as to Mr O’Brien’s “*authority*” to sign the *Agreement* as required by reg 2.06A(2)(b)(ii). There was, however, an explanation. During her evidence there was thus the following exchange between Ms Ind and Counsel for One Key Workforce in relation to a series of conversations between the three employees after the vote had been taken on 25 August 2016:

I called Mr Vernon Marfell and asked him if he would be – I asked if he would authorise Mr Kevan O’Brien to sign the agreement on his behalf because Kevan was based in Brisbane and he could make it to the office.

And what was his response?—“Yes. That’s fine.”

Right?—Didn’t have an issue.

And then did you make a call to Mr Raymond?—Yes. That’s correct.

And what did you tell him?—I asked if it would be okay if Kevan O’Brien would sign the agreement on his behalf and if he authorised that, which he said, “Yes. That’s fine,” and I explained that Kevan is based in Brisbane, his home, so it’s easier for him to get to the office.

And then did you have a conversation with Mr O’Brien following those two conversations?—Yes, of course.

And what did you tell Mr O’Brien?—We asked Mr – sorry. I actually asked Mr O’Brien first if he would be okay on signing the agreement on behalf of the other two employees.

Was that before you called them?—Yes. Sorry. That was before I actually called the other two employees.

Right?—And he said, “That’s fine,” and I said, “Because you live in Brisbane.”

So after you – I beg your pardon. After you called them, did you then have a conversation with Mr O’Brien?—To sign the agreement?

Yes?—Yes. I then spoke to Kevan and said, “Would you be able to sign the agreement – to come into the office and sign the agreement. Reuben and Vern have both said that’s fine for you to sign on their behalf.”

No failure to comply with s 185(2)(a) or reg 2.06A(2)(b)(ii) is thus apparent. Even had there been no “*explanation*”, that would not have stripped the Commission of the jurisdiction or power to approve the *Agreement* pursuant to s 186(1) of the *Fair Work Act*. This argument advanced on behalf of the CFMEU would, accordingly, have been rejected.

### The Commission’s state of satisfaction

1. A further difficulty which would have been confronted by the CFMEU in respect to its remaining arguments arises because the “*pre-approval steps*” set forth in (*inter alia*) ss 180, 181 and 185 in subdiv A of Div 4 stand in contrast to those provisions set forth in ss 186, 188 and 189 within subdiv B of Div 4 and in contrast to s 193 within subdiv C of Div 4 of Part 2-4 of the *Fair Work Act*.
2. The latter provisions are all characterised as matters in respect to which the Legislature has provided that the Commission is to be “*satisfied*.”
3. Whatever the merit (for example) of the argument in respect to the Commission’s consideration of the BOOT and (in particular) its consideration of cl 9 – which permits casual employment in the black coal mining industry where such employment was previously not permitted – that argument would have had to confront the terms of both s 186(2)(d) and s 193. Whether an agreement “*passes the better off overall test*” is a matter entrusted by those provisions to the Commission to form a state of “*satisfaction*”. Jurisdictional error may nevertheless be demonstrated where the Commission does not carry out the comparison required: e.g. *United Voice v MSS Security Pty Ltd* [2016] FCAFC 124 at [13] to [14], (2016) 153 ALD 200 at 202 to 203 per Rares, Collier and Rangiah JJ.
4. It must be recognised that a statutory requirement that the Commission must be “*satisfied*” confers upon the Commission a “*broad judgment*”: cf. *John Holland* [2015] FCAFC 16 at [60], (2015) 228 FCR 297 at 312 per Buchanan J. So much is consistent with the comparable manner in which that term has been construed and applied in other statutory contexts: cf *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 at [43], (2012) 246 CLR 379 at 401 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
5. Other than in respect to the two principal arguments identified, any further argument founded upon a claim that the Commission erred in reaching its expressed state of “*satisfaction*” would inevitably have to confront this potential obstacle to success.

### Factual error v legal error

1. A final difficulty which the CFMEU would have had to surmount in respect to this part of its argument would be the conclusion that such errors as were sought to be advanced were directed more to dissatisfaction with the manner in which the Commission reached its findings of fact rather than being directed to clearly identifiable errors of law.
2. Judicial review, it is well recognised, be it in the context of determining jurisdictional or other error, is not directed to the reviewing Court forming its own assessment as to the factual merits of a claim: *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30 at [114], (2003) 198 ALR 59 at 84 per Kirby J.

# DELAY

1. The final matter to be resolved is whether relief should be refused by reason of the delay on the part of the CFMEU in seeking relief.
2. In very summary form, any question of delay is to be resolved in light of the very broad chronology where:
* the decision of the Commission sought to be reviewed was made on 30 October 2015; and
* the *Originating Application* was filed in this Court on 28 November 2016.

To this brief chronology, Counsel for One Key Workforce also referred to:

* an email sent to Mr Andrew Thomas at the CFMEU on 11 January 2016 with the subject“*FW: OneKey new agreement*” and which stated “*Happy New Year comrade, didn’t see you guys appeal this one mate?*” Mr Thomas was an industrial officer employed by the CFMEU. The email was received from Mr Howard Powell, the National Employee Relations Manager of the WorkPac Group, a large labour hire contractor that operates in the coal mining industry; and
* the fact that Mr Thomas sent an email to Mr Vickers on 19 January 2016 concerning the email that Mr Thomas had received from Mr Powell and attaching the *Agreement*.

Of significance is the extent of the delay between the decision of the Commissioner in October 2015 and the filing of the *Originating Application* in November 2016. Also of significance is the delay between when the CFMEU was given at least some notice of the *Agreement* in January 2016and the filing of the *Originating Application* in November 2016.

1. Any question of delay must also be considered in the factual context where:
* the *Agreement* as approved by the Commission on 30 October 2015 runs for a period of four years;
* the *Agreement* as approved by three employees – if not set aside – “*covers*” employees otherwise covered by 11 Modern Awards and “*covers*” over 1,000 employees employed by One Key Workforce subsequent to October 2015. Ms Ind said at the date of hearing that when she had last checked, One Key Workforce employed 1,118 casual employees in the black coal mining industry alone.

Not to be ignored, of course, is the fact that:

* those employees who are now “*covered*” by the *Agreement* have been employed presumably with full knowledge of the terms and conditions set forth in the *Agreement*.
1. Within this context, it is respectfully considered that:
* the number of employees whose terms and conditions would otherwise be “*covered*” by the terms of the *Agreement,* and the need for future certainty as to their terms and conditions, is a consideration to be given some considerable weight; and
* an adequate explanation has been provided on behalf of the CFMEU as to why it only commenced the present proceeding over twelve months after the Commission’s decision was made.
1. The delay on the part of the CFMEU, it is concluded, should be considered as being only from late May/early June 2016 rather than either October 2015 or January 2016. Although Mr Thomas was aware of the “*OneKey new agreement*” as from 11 January 2016, it was not until late May/early June 2016 that the relevance of the *Agreement* to the CFMEU emerged as an issue that needed to be addressed. Mr Thomas’ email to Mr Vickers on 19 January 2016 explained in part the reason why “*alarm bells*” were not ringing at that time as follows:

Recently I received a copy of an enterprise agreement known as the RECS (QLD) Pty Ltd, which was approved by the FWC on 30 October 2015. A copy of the agreement is attached.

The agreement was sent by the National Employee Relations Manager for WorkPac, Howard Powell, who I knew some years ago when he worked for the State Rail Authority of NSW and I was with the RTBU. Powell is cranky that we objected to WorkPac’s application for approval of its Traineeship and Mining Services Agreement 2015 (presumably he is now more cranky given the agreement was not approved and WorkPac came in for some criticism from the FWC). Powell also whinged about the One Key Agreement and was critical that we did not appear in the approval of that agreement (despite being informed that it is difficult to appear in an approval process of which you are unaware). He sent me this agreement, whilst noting that we did not appeal it. I have not bothered to reply – he can whinge on his own. Of course, one can pose the same question to them – as a party aggrieved, why didn’t WorkPac appeal?

The RECS (QLD) Agreement was categorised by the FWC as being in the “Building, metal and civil construction industries”. Further this company does not have a history of involvement in coal mining nor does it appear, from my inquiries, that anyone in the Qld District is aware of it.

The FWC web site posts a list of agreements seeking approval on a daily basis and, in doing so, names the applicant, the title of the agreement and the industry category. We regularly peruse the web site to identify agreements of interest and, if necessary, to initiate inquiries and/or action.

However, where an applicant who is unknown to us files an agreement for approval and the FWC categorises the agreement as operating in the building, metal and civil construction industries, it is hardly likely to attract our attention. And this is what happened with this agreement.

The 19 January 2016 email thereafter set forth some of the provisions of the *Agreement* as approved by the Commission, including a reference to “*the Boot Allowance*” being “*$0.023 cents per hour*”.

1. Although the text of the 19 January 2016 email contained considerable detail, the fact was that it was not until late May/early June 2016 that the CFMEU became aware that some of its members were covered by the *Agreement*. This emerged from the following exchange between Counsel for the CFMEU and Mr Vickers during the hearing as follows:

Did you, at any stage, come to understand that RECS had some relationship to the One Key Resources Group?—I did. I can’t recall when it was, but we certainly – the issue of labour hire and what was occurring in the industry – in the black coal mining industry with labour hire became the topic of discussion at a series of central executive meetings of our division, the central executive being myself and the general president and the district presidents respectively from Queensland, the northern New South Wales mining and energy and the south-western district in New South Wales so a five-person central executive. And through – towards the end of the first quarter, the beginning of the second quarter in 2016, each executive meeting got at least a report on what was occurring with labour hire and the extension of labour hire.

At what point did you become aware that the CFMEU had members who were covered by that RECS agreement?—I think probably at our late May or early June executive meeting. I think Mr Jordan, the northern district president, raised it.

Mr Vickers was then taken to the text of the 19 January 2016 email and the exchange continued as follows:

When you read this email, do you recall reading the third paragraph?—Yes.

What was the significance of that paragraph in your mind?—There were two things about it. Firstly, Mr Thomas advises that the RECS agreement was categorised by the FWC – I assumed that meant on their website – as building, metal and civil construction industries, which is one of the reasons it wouldn’t have come to the attention of Ms Mitchell, as I explained to Mr Dixon earlier. And Mr Thomas is also advising that, from his inquiries, none of our officials were aware of RECS being involved in the black coal mining industry.

And what was the significance of that in your mind?—Well, quite apart from the fact that we were out of time to lodge an appeal, it didn’t appear as though it was going to have any impact on us because it wasn’t.

1. Although on one view of the facts, the CFMEU could have taken a more active interest in One Key Workforce, the provision of labour hire in the black coal mining industry and the potential impact of the *Agreement* upon its members at an earlier point of time, the fact is that it was not until late May/early June 2016 that the CFMEU became aware that it had members who were impacted by the *Agreement*.
2. Even the period from June 2016 to November 2016 is not an insignificant period of time.
3. It is nevertheless considered that, on balance, the discretion should not be exercised to refuse relief.

# CONCLUSIONS

1. The approval granted by the Commission on 30 October 2015 should be set aside. The *Agreement*, it is concluded, is not an agreement which was susceptible of approval pursuant to s 186 of the *Fair Work Act*.
2. The parties are to bring in *Short Minutes of Orders* to give effect to these reasons within fourteen days.

# THE ORDER OF THE COURT IS:

The parties are to bring in *Short Minutes of Orders* to give effect to these reasons within fourteen days.

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| I certify that the preceding one hundred and sixty-eight (168) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick. |

Associate:

Dated: 8 November 2017