Federal Court of Australia

 Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as The Australian Manufacturing Union (AMWU) v BR & I Pty Ltd [2020] FCA 1498

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| File number: | NSD 1939 of 2019 |
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| Judgment of: | **ABRAHAM J** |
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| Date of judgment: | 16 October 2020 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for discovery under r 7.23 of the *Federal Court Rules 2011* (Cth) – whether reasonable inquiries have been made – whether the documents sought are necessary to decide whether to commence proceedings – where prospective respondent opposes order – **held**: application allowed  |
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| Legislation: | *Federal Court Rules 2011* r 7.23*Fair Work Act 2009* (Cth) ss 545, 539, 45, 183, 186, 186(2)(a), 188*Judiciary Act 1903* (Cth) s 39B |
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| Cases cited: |  *CFMEU v One Key Workforce* [2018] FCAFC 77; (2018) 262 FCR 527*CFMEU v One Key Workforce Pty Ltd* [2017] FCA 1266*Fox v Australian Industrial Relations* *Commission* [2007] FCAFC 150*St George Bank Ltd* v *Rabo Australia Ltd* [2004] FCA 1360; (2004) 211 ALR 147*Hooper v Kirella Pty Ltd* [1999] FCA 1584; (1999) 96 FCR 1*Pfizer Ireland Pharmaceuticals v Samsung Bioepis Au Pty Ltd* [2017] FCAFC 193; (2017) 257 FCR 62*Matrix Film Investment One Pty Limited v Alameda Films LLC* [2006] FCA 591*Glencore International AG v Selwyn Mines Ltd* [2005] FCA 801; (2005) 223 ALR 238*McFarlane as Trustee for the S McFarlane Superannuation Fund v IOOF Holdings Limited* [2018] FCA 692*Optiver Australia Pty Ltd v Tibra Trading Pty Ltd* [2008] FCAFC 133; (2008) 169 FCR 435  |
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| Division: | Fair Work |
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| Registry: | New South Wales |
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| National Practice Area: | Employment and Industrial Relations |
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| Number of paragraphs: | 59 |
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| Date of hearing: | 3 September 2020  |
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| Counsel for the Applicant: | Ms L Saunders |
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| Solicitor for the Applicant: | AMWU |
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| Counsel for the Respondent: | Mr JRM Tracey |
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| Counsel for the Respondent: | KHQ Lawyers |

ORDERS

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|  | NSD 1939 of 2019 |
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| BETWEEN: | AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION KNOWN AS THE AUSTRALIAN MANUFACTURING UNION (AMWU) Applicant |
| AND: | BR & I PTY LTD ACN 610 425 119Respondent |

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| order made by: | ABRAHAM J |
| DATE OF ORDER: | 16 october 2020 |

THE COURT ORDERS THAT:

1. The prospective respondent, BR&I Pty Ltd (BR&I) give discovery to the prospective applicant of all documents recording the explanation by BR&I of the terms of the Agreement (as defined in the reasons) to the employees eligible to vote on it, including but not limited to:
	1. the documents referred to in the Form 17 filed by the prospective respondent;
	2. letters, emails and other correspondence;
	3. speaking notes, notes of meetings and conversations, and minutes.

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

REASONS FOR JUDGMENT

ABRAHAM J:

1. The prospective applicant, the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Union (AMWU) (hereafter referred to as the applicant) seeks preliminary discovery from the prospective respondent, BR&I Pty Ltd (BR&I) (hereafter referred to as the respondent) pursuant to r 7.23 of the *Federal Court Rules 2011* (Cth) (the Rules).
2. The documents sought relate to the steps taken by the respondent in respect of communications with its employees before the *BR&I Pty Ltd Enterprise Agreement 2016* (the Agreement), which came into effect as a result of the decision of the Fair Work Commission (Commission): *Application by BR&I Pty Ltd* [2017] FWCA 1785 (the Decision). The applicant contended that the documents are necessary to it to decide whether to commence proceedings: under s 39B of the *Judiciary Act 1903* (Cth) (Judiciary Act), seeking orders that the Decision be quashed; and under s 539 of the *Fair Work Act 2009* (Cth) (FW Act), alleging contravention of s 45 and seeking orders under s 545 and related sections.
3. In support of the application the applicant relied on three affidavits affirmed by Sean Christopher Howe, solicitor employed by the AMWU, dated 13 November 2019, 27 February 2020 and 3 September 2020.
4. The respondent opposed the order. It relied on the affidavit of Dean Steven Klepac, the Group Employment Counsel at Broadspectrum (Australia) Pty Ltd, sworn 13 March 2020.
5. For the reasons below the application is granted.

**Relevant legal principles**

1. Rule 7.23 of the Rules provides:

**7.23 Discovery from prospective respondent**

(1) A prospective applicant may apply to the Court for an order under subrule (2) if the prospective applicant:

(a) reasonably believes that the prospective applicant may have the right to obtain relief in the Court from a prospective respondent whose description has been ascertained; and

(b) after making reasonable inquiries, does not have sufficient information to decide whether to start a proceeding in the Court to obtain that relief; and

(c) reasonably believes that:

(i) the prospective respondent has or is likely to have or has had or is likely to have had in the prospective respondent’s control documents directly relevant to the question whether the prospective applicant has a right to obtain the relief; and

(ii) inspection of the documents by the prospective applicant would assist in making the decision.

(2) If the Court is satisfied about matters mentioned in subrule (1), the Court may order the prospective respondent to give discovery to the prospective applicant of the documents of the kind mentioned in subparagraph (1)(c)(i).

1. Each of the pre-requisites in r 7.23(1) must be met before the discretion in r 7.23(2) is enlivened: *St George Bank Ltd v Rabo Australia Ltd* [2004] FCA 1360; (2004) 211 ALR 147 (*St George Bank*) at [26(b)], citing *Hooper v Kirella Pty Ltd* [1999] FCA 1584; (1999) 96 FCR 1 at [38]; *Pfizer Ireland Pharmaceuticals v Samsung Bioepis Au Pty Ltd* [2017] FCAFC 193; (2017) 257 FCR 62 (*Pfizer*) at [172].
2. The relevant principles and their application were discussed by the Full Court in *Pfizer.* Allsop CJ described r 7.23 as “a beneficial provision, the purpose of which is to enable a person who believes he, she or it may have a right to seek relief to obtain information to make a responsible decision as to whether to commence proceedings”.
3. His Honour further observed at [8]:

It is important to approach the task with the fundamentals of the rule in mind. There have been a large number of cases now (both at first instance and Full Court) dealing with and explaining the relevant rule. Those authorities should not be utilised to form a complex matrix of sub-rules for the operation and application of a tolerably straightforward provision. Whilst there was no submission that any of these cases was wrongly decided, there does appear to have been a tendency to create an overly abstracted conceptualisation of refined states of mind which, if the words of the rule are not kept in mind, can lead in application to a misstatement of the essence of the rule, focused as it is upon what **may** be the position. The foundation of the application in r 7.23(1)(a) is that an applicant (a person or a corporation) reasonably believes that he, she or it may have a right to relief. The belief therefore must be reasonable (expressed in the active voice that someone reasonably believes) and it is about something that **may be** the case, **not is** the case. It is unhelpful and likely to mislead to use different words such as “suspicion” or “speculation” to re-express the rule. For instance, it is unhelpful to discuss the theoretical difference between “reasonably believing that one **may** have a right to relief” and “suspecting that one **does** have a right to relief” or “suspecting that one may have a right to relief” or “speculating” in these respects. The use of such (different) words and phrases, with subtleties of differences of imprecise meaning, and not found within the rule itself is likely to lead to the proliferation of evidence and of argument, to confusion and to error. One must keep the words of the rule firmly in mind in examining the material that exists in order to come to an evaluation as to whether the relevant person reasonably believes that he or she may have a right to relief. That evaluation may well be one about which reasonable minds may differ [emphasis in original].

1. As to the requirement that an applicant must show a “reasonable belief” that it may have the right to obtain relief from a prospective respondent, a belief will be reasonable if it is founded on considerations or views that are reasonably open, even if they are contested as incorrect by others: *Pfizer* at [69].
2. In *Pfizer*, Perram J at [120]-[121] relevantly stated:

The following propositions about preliminary discovery applications should be accepted:

(i) the prospective applicant must prove that it has a belief that it *may* (not *does*) have a right to relief;

(ii) it must demonstrate that the belief is reasonable, either by reference to material known to the person holding the belief or by other material subsequently placed before the Court;

(iii) the person deposing to the belief need not give evidence of the belief a second time to the extent that additional material is placed before the Court on the issue of the reasonableness of the belief. That belief may be inferred;

(iv) the question of whether the belief is reasonable requires one to ask whether a person apprised of all of the material before the person holding the belief (or subsequently the Court) could reasonably believe that they *may* have a right to obtain relief; and

(v) it is useful to ask whether the material inclines the mind to that proposition but very important to keep at the forefront of the inclining mind the subjunctive nature of the proposition. One may believe that a person may have a case on certain material without one’s mind being in any way inclined to the notion that they do have such a case.

In practice, to defeat a claim for preliminary discovery it will be necessary either to show that the subjectively held belief does not exist or, if it does, that there is no reasonable basis for thinking that there may be (not is) such a case. Showing that some aspect of the material on which the belief is based is contestable, or even arguably wrong, will rarely come close to making good such a contention. Many views may be held with which one disagrees, perhaps even strongly, but this does not make such a view one which is necessarily unreasonably held. Nor will it be an answer to an application for preliminary discovery to say that the belief relied upon may involve a degree of speculation. Where the language of FCR 7.23 relates to a belief that a claim may exist, a degree of speculation is unavoidable. The question is not whether the belief involves some degree of speculation (how could it not?); it is whether the belief resulting from that speculation is a reasonable one. Debate on an application will rarely be advanced, therefore, by observing that speculation is involved.

1. A preliminary discovery application is not a mini-trial: *Pfizer* at [2] and [119]. It is not an answer to an application to say that preliminary discovery is in the nature of a fishing expedition, because that is what such a rule contemplates: *St George Bank* at [26(h)]; *Pfizer* at [109].
2. However, the documents sought cannot exceed those documents which meet the requirement of r 7.23(1)(c)(i). The measure of preliminary discovery is the extent of information that is necessary, but no more than that which is reasonably necessary, in order to overcome the insufficiency of information already possessed by the applicant after it has made all reasonable inquiries to enable it to make a decision as to whether to commence proceedings: *Matrix Film Investment One Pty Limited v Alameda Films LLC* [2006] FCA 591 at [16] citing Lindgren J in *Glencore International AG v Selwyn Mines Ltd* [2005] FCA 801; (2005) 223 ALR 238 at [13]; *McFarlane as Trustee for the S McFarlane Superannuation Fund v IOOF Holdings Limited* [2018] FCA 692 at [68].
3. Even if r 7.23(1) is satisfied the Court retains a discretion to make the order sought. However, there is normally limited scope to refuse the relief sought in those circumstances: *Optiver Australia Pty Ltd v Tibra Trading Pty Ltd* [2008] FCAFC 133; (2008) 169 FCR 435 (*Optiver*) at [45].
4. In this regard, the extent of the documents which may be the subject of an order for preliminary discovery would ordinarily correspond with, and in any event cannot exceed, those documents which meet the requirement of r 7.23(1)(c)(i).

**The evidence**

1. As noted above, to satisfy the criteria in r 7.23 the applicant relied on the evidence of Mr Howe.
2. Mr Howe stated his role is to advise AMWU officials including as to the prospects of success of legal proceedings, with the decision to commence proceedings being made by an official with relevant authority based on that advice. He believes that without that advice a decision cannot be made as to commencing proceedings and that he has not formed a concluded view on the prospects of success on the basis that he does not have sufficient information to do so. He states that the documents sought will assist him in forming that view, and therefore ultimately assist the decision maker.
3. He stated the Agreement was approved on 29 March 2017, annexes a copy thereof and details aspects of its contents, including its coverage. The AMWU gave notice under s 183 of the FW Act that it wanted to be covered by the Agreement. It reaches its nominal expiry date on 28 March 2021.
4. Mr Howe states that he has been informed by Glenn McLaren, an official of the AMWU, that BR&I successfully tendered for a contract to provide maintenance and other services at the Kwinana Refinery operated by BP Refinery (Kwinana) Proprietary Limited in Western Australia, had commenced this work on or around 5 August 2019, employs approximately 21 maintenance and related workers to perform this work, a number of whom are AMWU members (the Kwinana employees) and is applying the terms and conditions of the Agreement to those employees. He was also informed that the pay and conditions under the Agreement are less beneficial than those enjoyed by the AMWU's members who were employed by a previous contractor engaged to provide maintenance and other services under a different enterprise agreement. He states that the workers employed by BR&I work 40 hours per week, in four shifts of ten hours and are not paid any overtime payments for this work. The existence of the Agreement meant that the AMWU could not bargain with BR&I for a new agreement before the project starts, and prevents them from achieving a collectively bargained outcome with BR&I until at least the nominal expiry date, 28 March 2021.
5. Mr Howe also states that he has reviewed the Agreement and that cl 15.5, which deals with abandonment of employment, appears to exclude the National Employment Standards in that it permits BR&I to terminate an employee's employment for “abandonment” with retrospective effect and without notice, which is inconsistent with the requirements of s 117. He states that the AMWU has formed a view that the Agreement was not an agreement susceptible of approval under s 186 of the FW Act, or that the Decision was otherwise made outside power.
6. Mr Howe states that on 3 May 2019, officers of the Western Australian branch of the AMWU requested that the Commission's file regarding the approval of the Agreement be provided, which it was on 7 May 2018. Mr Howe details the contents of the file which included the “Form 17 Employer’s statutory declaration in support of an application for approval of an enterprise agreement (other than a greenfields agreement)” (Form 17) which identifies, inter alia, that only four employees had voted to approve the Agreement, that those employees were based in Darwin, and were employed as trades assistants and boilermakers, and the processes undertaken by BR&I in respect of explaining the terms and conditions of the terms of the Agreement to the employees included the use of documents (including a power-point presentation, tables demonstrating the effect of the Agreement on their overall pay, and drafts of the Agreement). Those documents were not on the Commission's file.
7. Mr Howe also stated that he had spoken with Bryan Wilkins, a former organiser of the AMWU, Lloyd Pumpa, an organiser of the AMWU; and Ross Semmens, a member of the AMWU and an employee who voted on the agreement. He was informed that the Agreement was made with four employees based in a fabrication workshop in Darwin, Northern Territory, and that they all understood that the Agreement would be used to tender for fabrication and maintenance work in and around Darwin. Mr Semmens advised that they were told, and believed, that if they did not approve the Agreement BR&I would close the workshop. None of the persons spoken to had access to copies of the materials provided by BR&I during bargaining. On that basis Mr Howe formed the view that the employees were employed in classifications that would be covered by the *Manufacturing and Associated Industries and Occupations Award 2010* only, but that the Agreement was expressed to cover employees who performed work that would be covered by the *Manufacturing and Associated Industries and Occupations Award 2010*, *Building and Construction General On-site Award 2010* and *Hydrocarbons Industry (Upstream) Award 2010*.
8. Based on this, the AMWU has formed the view that the Commission's file did not disclose a reasonable basis upon which the Commission could have been satisfied that the employees had “genuinely agreed” to the Agreement within the meaning of s 186(2)(a) and s 188 of the FW Act, that there was a reasonably arguable basis to claim that BR&I had not in fact explained the terms of the Agreement to the relevant employees and cl 15.5 contravened s 55(1) and meant that the Commission, contrary to its finding at paragraph [3] of the Decision, could not have been satisfied that s 186(2)(c) of the FW Act had been “met”.
9. The AMWU sought an order requiring production of all documents recording or relating to the explanation by BR&I of the terms of the Agreement to the employees eligible to vote on it, including but not limited to: the documents referred to in the Form 17 filed by BR&I; letters, emails and other correspondence; text messages; and speaking notes, notes of meetings and conversations, and minutes. Mr Howe stated that these records are directly relevant to the issues arising in the potential proceedings, are necessary to enable the AMWU to fully assess its prospects of success in the proceedings, and thus decide whether to commence proceedings and are likely to be within, and only within, the custody and control of BR&I. In answer to a criticism by the respondent, on 30 April 2020 the applicant requested the documents sought from the respondent and no response was provided.
10. The respondent relied on the evidence of Mr Klepac.
11. Mr Klepac states that the business records of the respondent reveal that on 28 March 2017, Mr Zev Costi, employee relations manager, SA/NT/WA for Broadspectrum (Australia) Pty Ltd (including for the respondent) received an email from Member Assist (of the Commission) which was addressed to Mr Lloyd Pumpa (AMWU) which also copied in Mr Cook, Ms Ashley, Mr Elliott and Mr Semmens attaching the F16, Form 17 and the Agreement with undertakings. On that date also Mr Courtney Dixon, executive manager, employee relations for Broadspectrum (Australia) Pty Ltd (including for the respondent) was copied into an email from Ms Barlow, administration support, of the AMWU to the Commission attaching, for filing, a “Form F18 - Statutory Declaration of Employee organisation in relation to an application for approval of the Agreement with the FWC”.
12. Mr Klepac also states that the AMWU did not lodge an application for permission to appeal (and appeal) in the Commission in relation to the decision of Commissioner Lee (the Commissioner) to approve the Agreement. Further, that BR&I has been operating its business on the understanding that the Agreement came into legal force and effect under the FW Act on and from 5 April 2017 and remains in force.
13. As to any inquiries made, Mr Klepac states he is informed that since the lodgement of the application for approval of the Agreement with the Commission there have not been any inquiries made by the applicant of the respondent for the material sought. As referred to at [24] above, the applicant has since made a request for the material sought in April 2020.
14. In relation to the search for documents sought a number of the persons who were potentially engaged in communications with the relevant employees are no longer employed by the respondent, so compliance would require seeking out and contacting those employees in order to ascertain what, if any documents they may have. Further, searching through text messages of the mobile phones of those who would have potentially been engaged in communications with the relevant employees and no longer employed with the respondent, would be an extremely difficult task.

**Submissions**

1. As is apparent from the above, the potential proceedings relate to the validity of the decision of the Commission to approve the Agreement.
2. The applicant referred to the fact that before the Commission may approve an enterprise agreement it must be satisfied that the agreement was “genuinely agreed”: s 186(2), which requires, among other things, the Commission to be satisfied that the employer complied with certain pre-approval steps: s 188(1)(a)(ii). This includes a requirement for the employer to have taken reasonable steps to have explained the terms of the agreement to employees: s 180(5). A decision to approve an agreement without that state of satisfaction is affected by jurisdictional error, and susceptible to being set aside on judicial review, citing *CFMEU v One Key Workforce* [2018] FCAFC 77; (2018) 262 FCR 527 (*One Key*).
3. The applicant contended the Agreement was made in 2017 between the respondent and four of its employees all based in the fabrication workshop in Darwin, although the Agreement is expressed as applying to employees in a range of trades. This became apparent with the Kwinana employees. Based on the evidence the applicant submitted that the Kwinana employees are not paid overtime rates for the work they undertake, and if the decision is quashed and the Agreement is held not to have operated, it is at least arguable that the respondent will have been in contravention of s 45 of the FW Act. The documents sought are said to record the explanation of the terms of the Agreement to the employees, including those referred to in Form 17, filed by the respondent in support of its application for approval of the Agreement. They are documents created and distributed by the respondent. They are not in the possession of the employees.
4. It was submitted that as a consequence the applicant has formed a view that it may have a claim for relief against the respondent under s 39B of the Judiciary Act, seeking orders that the Decision be quashed; and s 539 of the FW Act, alleging contravention of s 45 and seeking orders under s 545 and related sections. It was submitted that considered objectively, the matters disclose a reasonable basis to hold such a belief.
5. The applicant accepted that whether the Commissioner had the requisite satisfaction, it being the relevant jurisdictional fact, was to be decided on the basis of the material before the Commissioner. Based on *One Key* at [111]–[117] the applicant contended that the information in Form 17 was not adequate, and that there is an argument that jurisdictional error may be established. However, the applicant contended that in the circumstances it required the material sought because it was relevant to the prospects of success, as certiorari is a discretionary order. The applicant contended that whether in fact there had not been a proper explanation of the Agreement was relevant to that discretion, relying on an aspect of the primary judge’s decision in *CFMEU v One Key Workforce Pty Ltd* [2017] FCA 1266 (said not to have been affected by the appeal). It was also said to be relevant given the industrial context, that it is necessary to determine if the claim is an appropriate one to bring.
6. The respondent opposes the orders sought. The respondent relied on what had occurred, that the Form 17 was completed which included a declaration that the Agreement was explained to the employees and the manner in which that was done, and that the AMWU filed a “Form 18 – statutory declaration of employee organisation in relation to an application for approval of the Agreement” supporting the approval of the Agreement. The Commission dispensed with a hearing in relation to the application for approval of the Agreement because there was no contradictor. It is apparent therefore that the Commission relied upon the filed statutory declarations as evidencing facts relevant to the statutory approval process.
7. The respondent addressed each basis of potential action, the second being dependent on the first. As the respondent submitted, in relation to the first cause, the applicant would need to establish jurisdictional error, citing inter alia, *Fox v Australian Industrial Relations* *Commission* [2007] FCAFC 150 at [36]. The relevant jurisdictional fact is the Commissioner’s *satisfaction* that the subsection had been complied with: relying on *One Key* at [96] and [103]. Resolution of that issue will not be aided at all by discovery of documents that were never provided to the Commissioner and the only category of documents that could be of apparent relevance are those that were provided to the Commissioner. The second cause of action is contingent on the first, and in any event, it was contended that none of the documents sought could inform the strength or prospects of success of the second potential proceeding as they could have no bearing on proof of non-compliance by the respondent with the manufacturing award, or any modern award. It also submitted that as the only documents relevant are those before the Commissioner, the applicant already has those documents and therefore has sufficient information to make the decision.
8. In relation to the applicant’s submission that determining whether the Agreement was in fact genuinely agreed to is relevant to determining whether prerogative relief may be granted, the respondent contended that the relevant factors the Court would take into account in determining whether to exercise the discretion are failure to exhaust avenues of appeal and delay in bringing the proceedings. In answer to questions during oral submissions, counsel for the respondent contended that this factor was not an established discretionary basis for either granting or refusing relief, although he could not say that the Court may not be open to such an argument. It submitted that if it was relevant to the discretion to refuse prerogative relief, that was not dispositive of this application because regardless the applicant has sufficient information for it to make the decision as to whether to start the proceedings.
9. As to the condition in r 7.23(1)(a), the respondent does not dispute that the evidence relied on by the applicant establishes that condition. As explained in more detail below, it submitted the remaining conditions had not been satisfied by the applicant and in any event, if they have been the Court ought to exercise its discretion to refuse the order sought.
10. On the morning of the hearing the applicant provided to the Court amended orders sought which removed the reference to “or relating to” referred to at [24] above. During the course of the hearing the applicant indicated that it was content for text messages to be removed from the documents sought and that what it sought were documents in the respondent’s control in relation to the explanation of the Agreement, and that if the drafting goes further than that it should be cut back. The respondent indicated that, in those circumstances, it could no longer contend that the order sought was too broad or onerous.

**Consideration**

1. Each condition in r 7.23 must be satisfied.
2. As explained above, the respondent did not challenge the proposition that the applicant had satisfied r 7.23(1)(a), which required it to prove that it has the belief that it may have a right to relief and that that belief is reasonable. On the evidence that approach is understandable. The evidence satisfies that first condition.
3. Rather, at the hearing, the respondent’s submissions focused on rules (b) and (c), and the discretion.
4. In respect to r 7.23(1)(b), the argument was twofold. *First*, the applicant has sufficient information and therefore it was not entitled to the documents sought which, in any event, could not be relevant to the prospective proceedings. It submitted that the evidence reflected “that the prospective applicant, the AMWU, has all the necessary information it needs in order to bring an application for judicial review in the Court”. *Second*, the respondent contended that the applicant cannot satisfy the aspect of reasonable inquires, as a request for the documents had not been made of the respondent at the time the application was filed.
5. As to the first submission, the respondent misconstrues r 7.23(1)(b). The terms of that paragraph are “sufficient information to decide whether to start a proceeding”.
6. In *St George Bank* Hely J at [26] (f) and (g) relevantly observed:

the question posed by sub-paragraph (b) of the rule is not whether the applicant has sufficient information to decide if a*cause of action* is available against the prospective respondent. The question is whether the applicant has sufficient information to make a decision *whether to commence proceedings* in the Court: *Quanta Software* at ALR 543 [33] – [34]; IPR 32 – 33, *Alphapharm* at 24-6. Accordingly, an applicant for preliminary discovery may be entitled to discovery in order to determine what defences are available to the respondent and the possible strength of those defences, or to determine the extent of the respondent’s breach and the likely quantum of any damages award: *CGU Insurance Ltd v Malaysia International Shipping Corp Berhad* (2001) 187 ALR 279 at 285 [21]; *Quanta Software* at ALR 543 [33] – [34]; IPR 32 – 3, *Alphapharm* at 24-6*, Airservices Australia* at FCR 202-3 [5]; ALR 332

whether an applicant has ‘sufficient information’ for the purposes of sub-paragraph (b) also requires an objective assessment to be made: *Minister for Health* at [44]; *Alphapharm* at 23-4, *Hooper* at FCR 12 [40]; ALR 367; IPR 31. The sub-paragraph contemplates that the applicant is lacking a piece (or pieces) of information reasonably necessary to decide whether to commence proceedings; [emphasis in the original]

1. In *Optiver* the Court considered an appeal from an order refusing preliminary discovery under the former O 15A, r 6 of the *Federal Court Rules 1979* (Cth) in a context where the primary judge had imposed a requirement of a “bare pleadable case” so that if a prospective applicant had sufficient material to meet that threshold an order for preliminary discovery was not appropriate: *Optiver* at [3], [21]. The Court observed at [32]:

More importantly, the criterion of a “bare pleadable case” substitutes a quite different test from that which O 15A, r 6(b) prescribes and elides the difference between O 15A, r 6(a) and O 15A, r 6(b), each of which must be satisfied. As the Full Court said in *Hooper v Kirella Pty Ltd* [1999] FCA 1584; (1999) 96 FCR 1 at [40]:

Fifthly, an order may be made in favour of an applicant who already has available evidence establishing a prima facie case for the granting of relief: *Alphapharm Pty Ltd v Eli Lilly Australia Pty Ltd* (unreported, Federal Court, Lindgren J, No 391 of 1996, 24 May 1996), at p 33. But the applicant, after having made all reasonable inquiries, must not have sufficient information to enable a decision to be made whether to commence a proceeding in the Court to obtain relief against the prospective respondent: see par (b). The absence of sufficient information is to be assessed objectively: *Alphapharm* at p 31.

1. And further at [36]:

The concept of a “bare pleadable case” is not only a gloss on the text of the rule but is fundamentally inconsistent with its purpose. The policy behind the rule is that even where there is a reasonable cause to believe that a person may have a right to relief, nevertheless that person may need information to know whether the cost and risk of litigation is worthwhile. As Hely J pointed out in *St George Bank Ltd v Rabo Australia Ltd* [2004] FCA 1360; (2004) 211 ALR 147 at [26], the question does not concern the right to relief but rather “whether to commence proceedings”. Inspection of documents in the possession of the proposed defendant may enable a properly informed decision to be made whether to commence a proceeding to obtain the relief. The “bare pleadable case” approach diverts attention from the true purpose of the rule. A person may have a pleadable case, but still not sufficient information upon which to decide whether to embark upon litigation. We are satisfied that his Honour asked himself the wrong question on this ground and that his conclusion cannot stand. There is ample material upon which this Court can consider the ground for itself.

1. Once the meaning of r 7.23(1)(b) is properly understood it can be accepted that although the applicant accepted that it has the material to consider whether the jurisdictional error has occurred, in the circumstances of this case, the material sought is relevant to assessing the prospects of success of any proceeding. The applicant submitted that the material was relevant to whether the relief sought would be granted. That was said to be particularly so in the industrial context, where the ramifications of commencing the action are significant. As noted above, the respondent submitted in relation to the discretion, inter alia, that the applicant had not appealed the Commission Decision, the delay in bringing the application, and that it sought to have the Agreement apply to its members. Those submissions, in many respects, highlight the importance of the decision as to the prospects of success in this case, for while jurisdictional error may be established, consideration may need to be given as to whether it is an appropriate claim for the AMWU to bring.
2. As to the second submission, as described above, although the applicant obtained the relevant file from the Commission, and made contact with various persons (including one of the employees who voted on the Agreement) to obtain information, it did not request the documents from the respondent before the proceeding was commenced. The respondent, on that basis, in its written submissions contended that reasonable inquiries had not been made. As a consequence, in April 2020 the applicant requested the documents from the respondent. No response has been received, from which it can be inferred that the documents will not be provided without a Court order.
3. The respondent submitted that based on the use of the word “after” in r 7.23(1)(b), the rule should be interpreted as being confined to inquiries made before the application for discovery was filed. It submitted that as a result that later inquiry is irrelevant. Therefore, as at the time of the filing of the application, as that inquiry had not been made, it was submitted that it has not been established that reasonable inquires had been made. This it was said was fatal to the application. It was submitted that even if the respondent was incorrect on this point, the fact that the request had only been made in April 2020, sometime after the proceeding was commenced, meant that it could not satisfy the reasonableness requirement. The respondent also referred to the fact that the scope of the documents sought had been narrowed on the morning of the hearing in support of the submission as to lack of reasonable inquiries having been made.
4. A number of observations may be made. *First*, the reasonable inquires referred to in rule (b) is linked with the concept of insufficient material. *Second*, rule (b) does not require all reasonable inquires to have been made, but rather, that reasonable inquiries have been made. *Third*, there is an artificiality about the respondent’s submission because if that interpretation is correct there would be nothing preventing the applicant from filing a new application for discovery or orally making such an application at this hearing. The respondent accepted as much during the hearing. *Fourth*, if correct, the condition, because it is linked to the sufficiency of the material, could be satisfied even if, after the application was filed further documents were obtained (even perhaps through the respondent). I note that the observations by Perram J in *Pfizer* referred to above at [11] proceed on the basis that there may be additional material. *Fifth*, the hearing of the application proceeds on the basis of the material before the Court, and whether the conditions are satisfied must be on the evidence at that time. At the time of this hearing, the evidence in this case, admitted without objection by the respondent, was that a request was made in April 2020. No response was received. That is an approach open to the respondent. However, the inference can be drawn that without a court order the respondent is not going to produce the documents.
5. The applicant had made a number of inquiries which were reasonable before the application. It was an obvious step to make an inquiry from the respondent for the documents even if it considered the documents would not be produced. A perception that the documents would not be provided should not prevent that occurring when it can be easily done. That said, that it was not done prior to the filing of the application does not lead to the conclusion that reasonable inquires had not been made.
6. The second condition is satisfied.
7. In relation to r 7.23(1)(c), the respondent’s submission in respect to each aspect was based on the assertion that the only documents relevant were those before the Commission and therefore this condition could not be satisfied. That submission must fall away in light of the basis for the conclusion in respect to the first condition.
8. The order sought has been refined and confined. It only relates to documents in the control of the respondent. The documents sought are now directed to those recording the explanation provided to the employees. Once that was understood, the respondent’s initial submission as to the order being onerous was accepted to lose some force. The evidence reflects that at least some of the documents sought meet the description in the Form 17 as to how the respondent informed and explained the Agreement.
9. The respondent also made submissions as to the discretion. It submitted that there was a delay, being two and a half years after the Decision to bring this application; that the applicant represented to the Commission in March 2017 that it should approve the Agreement; the applicant could and should have made inquiries prior to filing its statutory declaration in the Commission, as to the existence of documents that it now says are directly relevant; the applicant chose not to appeal the Decision of the Commission; it made no inquiry of the respondent after the Decision in relation to the documents it now seeks to obtain by way of Court order; it must have known that the delay in bringing any proceedings to challenge the validity of the Commission’s approval decision would substantially prejudice the respondent.
10. The applicant submitted that it was unaware that there was a potential issue until the tender for work at the Kwinana Refinery in August 2019, which it submitted explained the delay in bringing the application. The applicant also accepted that if proceedings were brought, given the nature of the discretionary relief, some of these matters would be hurdles but submitted that those potential hurdles need to be considered in determining whether to initiate proceedings, and for that decision they need the documents sought.
11. As noted above, there is normally limited scope to refuse the order sought in these circumstances: *Optiver* at [45]. The conditions of r 7.23 having been satisfied, the matters relied on do not provide a basis for refusing the order. Rather, although some of the matters relied on may prove to be hurdles, and potentially significant ones if any proceedings were to be commenced, as described above, given the nature of the potential consequences these matters must necessarily be part of any assessment by the applicant of whether to start a proceeding in the Court.

**Conclusion**

1. The order for preliminary discovery is made.

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| I certify that the preceding fifty-nine (59) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Abraham. |

Associate:

Dated: 16 October 2020