

IN FAIR WORK AUSTRALIA
AT MELBOURNE
BEFORE THE FULL BENCH

C2011/4401

IN THE MATTER OF THE FAIR WORK ACT 2009 (CTH)

IN THE MATTER OF AN APPEAL PURSUANT TO S. 604 OF THE ACT
FROM THE DECISION OF ACTON SDP ON AN APPLICATION BY ADJ
CONTRACTING PTY LTD PURSUANT TO S. 185 OF THE ACT
(AG2011/364)

OUTLINE OF SUBMISSIONS

ON BEHALF OF THE AUSTRALIAN INDUSTRY GROUP

I. Introduction

1. These submissions are made in support of the appeal brought by the Australian Industry Group (**Ai Group**) from the decision of Acton SDP in Fair Work Australia (**FWA**) Matter No. AG2011/364 (**the Decision**).
2. The appeal raises four broad issues. They are:
 - a. Whether clause 4.3(b)(v) of the *ADJ Contracting Pty Ltd Enterprise Agreement 2010-2014* (**the Agreement**) is an unlawful term because it has the effect of requiring or permitting ADJ Contracting (**the Employer**) to contravene “General protections” provisions found in Part 3-1 of the FW Act – namely, s. 340(1)(a) of the *Fair Work Act 2009* (Cth) (**FW Act**), which (read with ss. 341 and 342) provides that a person must not, as principal, take adverse action against a contractor or proposed contractor, because that contractor has a workplace right or proposes to exercise a workplace right, being a right arising from it being entitled to the benefit of a workplace instrument;
 - b. Whether compliance with clause 4.3(b)(v) of the Agreement may, in the terms of s. 192 of the FW Act, result in a person, namely the Employer or the Communications, Electrical, Electronic, Energy, Information,

Postal, Plumbing and Allied Services Union of Australia (**CEPU**), being liable to pay a pecuniary penalty in relation to a contravention of ss. 45E or 45EA of the *Competition and Consumer Act 2010* (Cth)(**CC Act**);

- c. Whether clause 15.2(k) of the Agreement, which concerns right of entry, is an unlawful term because it provides for right of entry other than in accordance with Part 3-4 of the FW Act (see FW Act, sub-s. 194(f)); and
 - d. Whether sub-clauses 16.6(b) and (d) of the Agreement, which concern inducement of employees to take union “membership action”, are unlawful terms because they require a contravention of s. 350 of the FW Act.
3. If the Full Bench holds that any one of the impugned clauses is an unlawful term, it must, in accordance with s. 186(4) of the FW Act, set aside the Decision and order that the application for approval of the Agreement be refused or dismissed.¹
 4. If the Full Bench holds that compliance with clause 4.3(b)(v) of the Agreement may, in the terms of s. 192 of the FW Act, result in a person being liable to pay a pecuniary penalty in relation to a contravention of a law of the Commonwealth (viz. ss. 45E or 45EA of the CC Act), the Full Bench should set aside the Decision and exercise its discretion under s. 192 to refuse to approve the Agreement.²

II. The Decision under appeal

5. The Decision was made on 28 April 2011. It has the medium neutral citation of [2011] FWA 2380 (AB 4-26). The Decision was to approve the Agreement upon the provision of undertakings (AB 27-230).

¹ See *Australian Industry Group v Pacific Brands Limited t/a Dunlop Foams* [2010] FWAFB 4337 at [27] per Giudice P, Watson SDP and Blair C.

² In such circumstances, the Agreement is not curable by undertakings given pursuant to s. 190 of the FW Act. That section is not applicable: see sub-s. 190(1).

6. On 4 May 2011, the Senior Deputy President made orders giving effect to the Decision. The orders have the medium neutral citation of [2011] FWAA 1447 (AB 27).
7. The hearing of the application for approval of the Agreement occurred on 4 April 2011: AB 231 - 287.
8. At the hearing, the Senior Deputy President granted leave to Ai Group and the Australian Building and Construction Commissioner (**ABCC**) to intervene in the proceeding and to make submissions, orally and in writing, in opposition to the approval of the Agreement.
9. Ai Group had, in advance of the hearing, written a letter (AB 358) to the Senior Deputy President in which it identified at least 7 particular arguments in opposition to approval. At the hearing, a number of these arguments were not pursued, while others were made on behalf of the ABCC.
10. In its capacity as a bargaining representative, and as a party to the Agreement (clause 6) seeking the approval of the Agreement, the CEPU presented its arguments first. An outline of submissions (AB 322) was filed by the CEPU (Exhibit CEPU1).
11. Ai Group then addressed the Tribunal. Its outline of submissions (Exhibit AIG1) is at AB 289. The ABCC then addressed the Tribunal and relied upon submissions (Exhibit ABCC1) which are reproduced at AB 311. Ai Group was given leave to file a note dealing with a discrete issue in the proceeding, and the Note was filed on 6 April 2010, two days after the hearing (AB 307-310).
12. The CEPU was then given leave to file an outline of submissions in Reply, instead of making oral submissions in reply at the hearing. Those submissions, which were detailed, were filed approximately one week after the hearing and are at AB 343.

13. Neither Ai Group nor the ABCC were given an opportunity to respond to the submissions in reply.

III. Public interest and permission to appeal

14. Ai Group is a person who is aggrieved by the Decision and accordingly may appeal the Decision, with the permission of FWA.³
15. As noted above, Ai Group was granted leave to appear as an intervener in the proceeding before Acton SDP. In submitting that it is a person aggrieved by the Decision, Ai Group relies upon the written submissions it made below in support of its intervention, and the authorities to which reference is made in those submissions, including *Australian Industry Group v Pacific Brands Limited t/a Dunlop Foams*⁴: see AB 291-293.
16. For the reasons advanced below, it is submitted that the Decision is affected by relevant error. On that basis alone, the Full Bench should grant permission to appeal.⁵
17. There are further reasons why permission should be granted on public interest grounds. They include the following:
 - a. The Decision considers the operation and application of uniform clauses in a pattern enterprise agreement which the CEPU has recently negotiated with the National Electrical and Communications Association, Victorian Chapter (**NECA**), and which it intends to make with a large number of employers (approximately 850) (see AB 306; 372-373);

³ FW Act, s. 604(1). Section 604(2) of the FW Act relevantly provides that, “[w]ithout limiting when FWA may grant permission, FWA must grant permission if FWA is satisfied that it is in the public interest to do so.”

⁴ [2010] FWAFB 4337 at [9] – [12] per Giudice P, Watson SDP and Blair C.

⁵ The errors made by the Senior Deputy President have the result that the decision is wrong in law and should not be allowed to stand. The fact that legal error has been established is enough to found a grant of permission to appeal: *Daniel Brett Lally v Westend Pallets Pty Limited* (Print N3842, Ross VP, Williams DP and McDonald C, 2 August 1996). The conventional considerations for the granting of leave, including whether, in all the circumstances, the decision is attended with sufficient doubt to warrant its being reconsidered by the Full Bench, or whether substantial injustice would result if leave were refused, supposing the decision to be wrong, also apply: *CFMEU v AIRC* (1998) 89 FCR 200 at 220.

- b. The Decision considers the application of s. 192 of the FW Act, in connection with the operation and effect of provisions of the CC Act, which the Tribunal has not considered before (no similar provision to s. 192 is to be found in industrial legislation which preceded the enactment of the FW Act); and
 - c. The Decision, if allowed to stand, will have far reaching effects on the rights of independent contractors in particular, and for enterprise bargaining generally, in that clauses similar to the impugned clauses will be able to be included in future enterprise agreements across a range of industries.
18. There is, accordingly, a strong public interest in granting permission to appeal.

IV. The nature of the appeal, public interest and establishing error

19. The appeal is to the Full Bench of FWA and, as such, is properly described as an appeal by way of rehearing.⁶
20. The power of the Full Bench when hearing such an appeal is to be exercised for the correction of error on the part of primary decision-maker.⁷
21. Before the Full Bench can exercise its powers on appeal, it is necessary to establish that there has been error of fact or law below;⁸ in the absence of error being

⁶ *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 204 [17]. See also the Explanatory Memorandum to the Fair Work Bill 2008 (Cth) at paragraphs [2320] – [2331] (p.355 ff.).

⁷ *Coal & Allied Operations* at 204; *CDJ v VAJ* (1998) 197 CLR 172 at 201-202 [111], per McHugh, Gummow and Callinan JJ.

⁸ *Coal & Allied Operations* at 204. There are three categories or kinds of error which affect the Decision under appeal. They are: jurisdictional error (see *Craig v South Australia* (1995) 184 CLR 163 at 179; *Kirk v Industrial Relations Commission*; *Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1 (3 February 2010) at [66] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); error of the kind described in *House v The King* (1936) 55 CLR 499 at 505 (see Jessup C N, 'Appeals from Discretionary Decisions in Industrial Cases', (1994) 7 *Australian Journal of Labour Law* 280); and (mere) error of fact or law (*Lally v Westend Pallets Pty Limited*, (1996) 69 IR 1; Print N3842, Ross VP, Williams DP and McDonald C, 2 August 1996).

shown, it is not open to the Full Bench merely to substitute its own decision for the decision below.⁹

22. The public interest consideration in s. 604(2) of the FW Act is tied up with the requirement that error be demonstrated. Where there has been error of fact or law on the part of the primary decision-maker, the public interest in granting permission to appeal will materialise.¹⁰
23. It is sufficient for the purposes of this appeal that only **one** of the errors identified below needs to be established for the Full Bench to exercise its power to set aside the Decision.

V. Clause 4.3(b)(v) is an objectionable, and thus unlawful term

(Grounds of Appeal 1 - 3)

24. Clause 4.3(b)(v) of the Agreement provides:

The Employer shall only engage contractors and employees of contractors, to do work that would be covered by this Agreement¹¹ if it was performed by the Employees, who apply wages and conditions that are no less favourable than that provided for in this Agreement. This will not apply where the Employer is contractually obliged by the head contractor/ client to engage a specific nominated contractor to do specialist work.

25. It is respectfully submitted that the first error affecting the Decision is the finding, at paragraph [18], to the effect that clause 4.3(b)(v) was not an “objectionable term”.

⁹ *House v The King* (1936) 55 CLR 499 at 504 - 505: “It is not enough that the judges composing the appellate court consider that, had they been in the position of the primary judge, they would have taken a different course” (per Dixon, Evatt and McTiernan JJ).

¹⁰ See, e.g., *CFMEU v AIRC* (1998) 89 FCR 200 at 220. (Note that the Full Federal Court’s observations in relation to leave to appeal were not the subject of criticism by the High Court, unlike other aspects of the Full Federal Court’s decision.)

¹¹ “...work that would be covered by this Agreement if it was performed by the Employees”. The coverage of the Agreement is extremely broad. Clause 1.1 of Part A states that the Agreement applies to all work covered by: Part A - Service, Maintenance and Installation; Part B – Construction; and Part C - Country and Cottage. The coverage of each Part of the Agreement is defined broadly. In effect, the Agreement applies to all employees of the Employer who carry out work covered by any of the 10 levels in the classification structure in the Agreement. The 10 levels are not defined. Given the extremely broad coverage of the Agreement, the term “work that would be covered by this Agreement if it was performed by the Employees” has little if any work to do. In effect the rights of all contractors and their employees will be adversely affected by Clause 4.3(b)(v).

26. Clause 4.3(b)(v) of the Agreement is an objectionable term within the meaning of s. 12 of the FW Act. As such, it is also an “unlawful term” (s. 194(b)) which cannot be included in an enterprise agreement, and more importantly, the Tribunal cannot approve an enterprise agreement which contains an “unlawful term” (s.186(4)).
27. Relevantly, an “objectionable term” (defined in s. 12 of the FW Act) is one that has the effect of requiring a person to take adverse action against a contractor, because that contractor has a workplace right or proposes to exercise a workplace right (FW Act, s. 340(1)(a)(i), (iii)); s. 341; s. 342, Items 3 and 4).

Workplace right

28. A contractor has a workplace right¹² which is founded upon it having the benefit of the content of an applicable workplace instrument (FW Act, s. 341(1)), including where that instrument contains less generous terms and conditions than those found in the Agreement: see *Greater Dandenong City Council v Australian Municipal, Clerical and Services Union* (2001) 112 FCR 232 at [77] – [80] per Wilcox J; [132] – [164] especially at [161] per Merkel J; and [212] – [216] per Finkelstein J.
29. See also *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14 at [28] – [32], especially at [30] per Gray and Bromberg JJ.
30. Most cases concerning workplace rights deal with the workplace rights of employees. *Greater Dandenong* and *Barclay* are examples. Employers, like the contractors in the present case, also have workplace rights. They have a right to employ their employees at a rate which is the rate prescribed by the relevant workplace instrument,¹³ be it an award, enterprise agreement or similar instrument

¹² Paragraph 1338 of the Explanatory Memorandum to the Fair Work Bill 2009 (**EM**) states that workplace rights “can be broadly described as employment entitlements and the freedom to exercise and enforce those entitlements”. Paragraph 1362 of the EM states that “The use of the phrase ‘entitled to the benefit of’ in paragraph 341(1)(a) is intended to capture both the fact that a workplace law or instrument applies to the person, as well as the individual entitlements under the workplace law or instrument”.

¹³ The fact that a particular (generous) contractor might in its discretion or by contract choose to pay higher rates than those which it is entitled to pay under the workplace instrument covering it and its employees, does not derogate from the proposition that the contractor is entitled to the benefit of that workplace instrument and has a workplace right to pay the employees the lower minimum rate under that instrument.

made under a workplace law: FW Act, s. 12 (definition of “workplace instrument”).¹⁴ The rate prescribed by the instrument is “the only sum which by law the employer [contractor] is obliged to pay”: *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253 at 258 per Barwick CJ (with whom McTiernan J, at 259, agreed.)

Adverse action

31. Clause 4.3(b)(v) has the effect of requiring the Employer (and other employers covered by the pattern agreement) only to engage or deal with contractors and employees of contractors “*who apply wages and conditions that are no less favourable than that provided for in this Agreement*”.
32. The word “require” is defined to mean, inter alia, “demand”, “order”, “need”, or “call for”: Oxford English Dictionary (2nd ed., 1989, reprinted 1991).
33. The effect of the Clause is that the Employer is required:
 - a. where *existing contractors* are concerned,
 - i. to alter the position of the contractor to the contractor’s prejudice, by requiring, in accordance with clause 4.3(b)(v), that the contractor increase its wage rates beyond the minimum level at which wages are set by the applicable workplace instrument, and alter employee conditions provided by that instrument, by reference to the terms of the Employer’s Agreement with the CEPU (s. 342(1), Item 3(c));
 - ii. to threaten to alter the position of the contractor to the contractor’s prejudice, by requiring, in accordance with clause 4.3(b)(v), that the contractor increase its wage rates beyond the minimum level at which wages are set by the applicable workplace

¹⁴ In accordance with FW Act, s. 12, a “workplace instrument” would include workplace agreements made under the *Workplace Relations Act 1996* (Cth), “pre-reform” certified agreements made under that Act, and any form of “Old IR agreement”, Australian Workplace Agreement or Individual Transitional Employment Agreement, all of which are made under “workplace laws”. For a full list of workplace instruments apart from those for which the FW Act provides (modern awards and enterprise agreements), see Item 2(2) of Part 2 of Schedule 3 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

- instrument, and alter employee conditions provided by that instrument, by reference to the terms of the Employer's Agreement with the CEPU (s. 342(1), Item 3(c); s. 342(2));
- iii. to refuse to make use of the contractor's services where the contractor insists on according wages and conditions pursuant to its applicable workplace instrument (s. 342(1), Item 3(d));
 - iv. to threaten to refuse to make use of the contractor's services where the contractor insists on according wages and conditions pursuant to its applicable workplace instrument (s. 342(1), Item 3(d); s. 342(2));
 - v. to terminate the contract with the contractor where the contractor insists on according wages and conditions pursuant to its applicable workplace instrument (s. 342(1), Item 3(a)); or
 - vi. to threaten to terminate the contract with the contractor where the contractor insists on according wages and conditions pursuant to its applicable workplace instrument (s. 342(1), Item 3(a); s. 342(2)).
- b. where *proposed contractors* are concerned,
- i. to refuse to engage the contractor where it insists on according wages and conditions pursuant to its applicable workplace instrument (s. 342(1), Item 4(a));
 - ii. to threaten to refuse to engage the contractor where it insists on according wages and conditions pursuant to its applicable workplace instrument (s. 342(1), Item 4(a); s. 342(2));
 - iii. to refuse to make use of, or agree to make use of, the services offered by a contractor which is not prepared to increase its wage rates beyond the minimum level at which wages are set by the applicable workplace instrument, and alter employee conditions provided by that instrument, by reference to the terms of the Employer's Agreement with the CEPU (s. 342(1), Item 4(c)); or
 - iv. to threaten to refuse to make use of, or agree to make use of, the services offered by a contractor which is not prepared to increase its wage rates beyond the minimum level at which wages are set by the applicable workplace instrument, and alter employee

conditions provided by that instrument, by reference to the terms of the Employer's Agreement with the CEPU (s. 342(1), Item 4(c); s. 342(2)).

34. It is plain that clause 4.3(b)(v) has the effect of requiring the Employer to act in a manner prejudicial, or "adverse", to the contractor, in the specific ways just described. The conduct is undoubtedly "adverse action" within the meaning of FW Act, s. 342(1), items 3 and 4.

"Because" the contractor has or proposes to exercise a workplace right

35. This adverse action is taken *because* the person against which it is taken has a workplace right or proposes to exercise a workplace right.¹⁵
36. In part, it is the existence of the contractor's workplace instrument (*Greater Dandenong* at 290 [213] per Finkelstein J) that causes the Employer to engage in the adverse action. It is also the fact that the contractor proposes to exercise its rights under that workplace instrument which is an operative or immediate reason for the Employer's conduct.¹⁶
37. It is also true to say that compliance with clause 4.3(b)(v) is the reason for the adverse action, however the fact must be acknowledged that the Employer will not engage in adverse action against a contractor which accords its employees equal or greater rights under its own industrial instrument than those found under the Agreement. In other words, analysed from a common sense perspective, but for clause 4.3(b)(v) the adverse action would not occur.

¹⁵ Section 360 of the FW Act provides that a person takes action for a particular reason if the reasons for the action include that reason. In *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14 (from which the High Court has granted special leave to appeal) the majority of the Full Federal Court held that the central question is "why was the aggrieved person treated as he or she was?", and that the determination of this question "involves characterisation of the reason or reasons of the person who took the adverse action."

¹⁶ *Mikasa (NSW) Pty Ltd v Festival Stores* (1972) 127 CLR 617 at 634-5 per Barwick CJ; *Maritime Union of Australia v CSL Australia Pty Limited* [2002] FCA 513; 113 IR 326 at [54]-[55] per Branson J, applying *Greater Dandenong City Council v Australian Municipal, Administrative, Clerical and Services Union* [2001] FCA 349; (2001) 112 FCR 232.

38. It is also important to remember that the Employer's reasons for engaging in adverse action need only *include* a "prohibited reason": FW Act, s. 360. That is to say, the contractor's workplace right, or its proposal to exercise that right, need not be the only reason for the Employer's conduct.
39. With respect to the Senior Deputy President, she misunderstood the effect of clause 4.3(b)(v). Contrary to her Honour's observation at [18], the clause is squarely and directly concerned with "whether or not an enterprise agreement or other workplace agreement covers the contractor". In any event, this statement does not support a conclusion that the impugned clause did not have the effect for which Ai Group contends. The Senior Deputy President erred by, among other things, not focusing upon what the clause requires the Employer to do, or not to do.
40. The clause operates in a way that has the effect of requiring the Employer to take adverse action against a contractor, because that contractor has, or proposes to exercise a workplace right arising from its being entitled to the benefit of a workplace instrument. The entitlement to the benefit of the instrument encompasses the right to pay wages at rates no higher than the rates which the workplace instrument mandates, and to accord the minimum entitlements required to be accorded by the instrument (*Blackley*, supra).
41. Clause 4.3(b)(v) is aimed at contractors engaged, or proposed to be engaged, by the Employer, and more specifically at the wages and conditions which those contractors provide to their employees under their own workplace instruments (whether an award or an enterprise agreement of some kind). The industrial purpose of the clause is clear: to ensure that, regardless of the fact that the contractor is entitled to apply its own workplace instrument and to have its own workplace rights protected by the FW Act, the contractor, in effect, becomes bound to accord employees terms and conditions arising under a foreign Agreement which would not otherwise bind it in any way.¹⁷

¹⁷ The FW Act, properly and consistently with the principle of freedom of association (ss. 3(e), 336) and the object of achieving productivity and fairness through an emphasis on enterprise-level collective bargaining (s. 3(a), (f)), makes such clauses in enterprise agreements unlawful.

42. To the extent that the decision of the Full Bench in *Asurco Contracting Pty Ltd v Construction Forestry, Mining and Energy Union* [2010] 197 IR 365 supports this aspect of the Decision, this Full Bench should respectfully decline to follow that earlier Full Bench on the basis that the *Asurco* decision is wrong in principle: *Nguyen v Nguyen* (1990) 169 CLR 245 at 268 - 270 per Dawson, Toohey and McHugh JJ; *TWU v Australian Air Express and Another* - PR959284 (24 June 2005) at [14] – [15] per Harrison SDP, Hamberger SDP and Smith C.

Ground 2 – “permitting”

43. The word “permit” is defined by the Oxford English Dictionary (2nd ed., 1989, reprinted 1991) to mean “allow, suffer, give leave; not to prevent.”
44. It is submitted that the scope of the word permit in the s. 12 definition of “objectionable term” is very broad.¹⁸ “Permit” can mean more than a failure to prevent something occurring, “and may extend to the facilitation of [an occurrence] which could not otherwise occur”: *Smith v Williams* at [2006] QCA 439; (2006) 47 MVR 169; (2006) Aust Torts Reports 81-863, at [22] per Keane JA with whom McMurdo P and Holmes JA agreed.
45. The term is given an even wider meaning by reference to the broader notion of something “having the effect of” permitting something else. It is certainly a broader concept than “requiring.”
46. The failure of the Senior Deputy President even to address, or turn her mind to the question of whether clause 4.3(b)(v) *permitted* or *had the effect of permitting* a contravention of s 340 of the FW Act is an error in itself: *Waterways Authority v Fitzgibbon* (2005) 221 ALR 402 at 428 [130] per Hayne J.¹⁹

¹⁸ “Permitting” means authorizing or allowing liberty to do something: *Re Mechanical Maintenance Solutions (MMS) Maintenance Fabrication Workshop and Site Certified Agreement 2000-2003*, PR935155, per Lawler VP, Kaufman SDP and Whelan C at [16] –[23]. See also, in the copyright context, *Adelaide City Corporation v Australasian Performing Right Association Ltd* (1928) 40 CLR 481 at 488 – 489, 490 – 492, 497 – 501 and 503. (Note the High Court’s identification of the word “permit” with the similar words, “authorise”, “sanction”, “approve” and “countenance”: at 489 per Isaacs J and per Higgins J.)

¹⁹ “[B]ecause the primary judge was bound to state the reasons for arriving at the decision reached, the reasons actually stated are to be understood as recording the steps that were in fact taken in arriving at that result.” In relation to the error committed by the Senior Deputy President, see also *CFMEU v Fair Work Australia* [2011] FCA 719 at [96] per Katzmann J.

VI. Clause 4.3(b)(v) and contravention of the CC Act

(Grounds of Appeal 4 and 5)

47. Compliance with clause 4.3(b)(v) is giving effect to an unlawful arrangement or understanding, contrary to s. 45EA of the CC Act.
48. The terms of clause 4.3(b)(v) have been set out above at paragraph [24].
49. As well as having the effect described above, namely the effect of requiring a contravention by the Employer of ss. 340(1)(a), 341 and 342 of the FW Act (the General protections provisions) in relation to contractors, where those contractors are in a supply or acquisition situation vis-à-vis the Employer the clause will also amount to a provision of an unlawful arrangement or understanding which contravenes s. 45E of the CC Act.
50. Accordingly, compliance with the clause “may result in the Employer having to pay a pecuniary penalty” for a contravention of s 45EA. This is the test established by s. 192 of the FW Act. An application of that test means that the Agreement should not be approved.
51. The Senior Deputy President expressly did not deal with the question of whether clause 4.3(b)(v), and the negotiations antecedent to the inclusion of that clause in the Agreement, amounted to making an unlawful arrangement or arriving at an unlawful understanding in contravention of s. 45E: Decision at [24]. Ai Group submits that that question should be answered in the affirmative, for the reasons set out below.

Section 45E – application of relevant principles

52. Section 45E of the CC Act prohibits the Employer from making a contract or arrangement with the CEPU, or otherwise arriving at an understanding with the CEPU, if the proposed contract, arrangement or understanding contains a

provision included for the purpose (or for purposes including the purpose) of preventing or hindering the Employer from acquiring goods or services from a contractor, with which it is accustomed to dealing.

53. Section 45E is directed towards preventing conduct engaged in by trade unions: that is, preventing through the exercise of significant power, including through the bargaining process with the threat of protected industrial action, companies from dealing with other companies, who do not possess the qualities the union seeks or requires. Clause 4.3(b)(v) is such a provision. It is apparent that the CEPU regards labour hire companies that “undercut” rates of pay in any agreement with the Employer, as undesirable. Hence, it seeks the Employer’s agreement that it will not deal with those companies.²⁰
54. There are a number of principles which govern the application of s. 45E.

Purpose

55. First, “purpose”, in s. 45E, means the subjective purpose of the participants to the contract, etc. Each participant must possess the requisite purpose, even though they may possess other purposes which are not shared.²¹ The requisite purpose need only be one of several purposes, and need not be operative nor dominant: it only needs to be causal.²²
56. Purpose is not to be confused with motive. The motive is the reason for seeking the end: here presumably, the CEPU’s desire to protect the employment of its members. That, however, is not its purpose. Its purpose is consistent with what is

²⁰ In the case of this Agreement, the rates of pay are extraordinarily high. It is most unlikely that a contractor with which the Employer is dealing will have equal or higher rates of pay; pursuant to its own workplace instrument, it will probably be entitled to pay lower rates. For example, if the *Electrical, Electronic and Communications Contracting Award 2010* applies to the contractor, a Level 1 employee is entitled to be paid \$15.73 per hour, whereas under the Agreement an employee in that classification is entitled to be paid \$29.91, \$28.06, \$30.91 or \$24.69 per hour, depending on the area in which the employee works (maintenance, workshop, construction or cottage work).

²¹ *CEPU v ACCC* (2007) 162 FCR 466 at [182] and [192].

²² *Ibid.* at [192]-[194].

sought to be achieved. “*The purpose of conduct is the end sought to be accomplished by the conduct.*”²³

57. In the present case, what is sought to be achieved (by the CEPU, and by the Employer giving its agreement) is the prevention of the Employer acquiring cheaper labour hire.²⁴ This falls squarely within the prohibition on purpose.²⁵ As has been noted by Gleeson CJ, the manifest effect of a provision in a contract may be the clearest indication of its purpose.²⁶
58. Ai Group does not contend that a *contract* with the CEPU would have arisen by the Employer agreeing to the Agreement. However, the Employer and the CEPU would clearly have made an *arrangement*, or at least reached an *understanding*, as those terms are understood.

“*Arrangement*” or “*understanding*”

59. The Agreement plainly operates as an arrangement or understanding, within the meaning of s. 45E of the CC Act.²⁷ An “arrangement” is something less than a binding contract or agreement, being something in the nature of an understanding not enforceable at law.²⁸ An understanding is, as is suggested, something even less formal again.
60. For liability to arise under s. 45E, there must, however, be a meeting of the minds and a consensus as to what is to be done, rather than a mere hope or expectation of what might be done.²⁹ A mere factual expectation that something will happen is usually not sufficient: at least one party must assume an obligation or give an

²³ *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at [18]. See also *CEPU v ACCC*, supra at [181] and the cases cited therein.

²⁴ The second person need not be known or identified: *Ibid.* at [199] - [207].

²⁵ Whilst the employer might not agree with the object of a clause in an agreement, and agrees to include it reluctantly or under protest, that is of no moment in analysing its purpose: “*The behaviour at which s. 45E(3) typically strikes will be where the “first person” succumbs to an abuse of power by an organisation of employees and includes a proscribed provision not wanting to bring about the result, but appreciating that that is the end that will be achieved by doing so.*” (*CEPU v ACCC*, supra at [194]).

²⁶ Referred to in *CEPU v ACCC*, supra at [181].

²⁷ See the decision of Smithers J in *Gibbins v Australasian Meat Industry Employees’ Association* (1986) 12 FCR 450, cited in *CEPU v ACCC* (2007) 162 FCR 466 at 494 [98], where his Honour found that the conciliation agreement made under the *Conciliation and Arbitration Act 1904* (Cth) operated as an arrangement or understanding in contravention of s. 45E of the *Trade Practices Act 1974* (Cth).

²⁸ *FCT v Lutovi Investments Pty Ltd* (1978) 140 CLR 434 at 444 (Gibbs and Mason JJ, Murphy J agreeing).

²⁹ *ACCC v Amcor Printing Papers Group Ltd* (2000) 169 ALR 344 at [75]; *CEPU v ACCC*, supra at [14]-[15].

assurance or undertaking that it will act in a particular way.³⁰

61. There is a sufficient arrangement or understanding in this case, which arises from the Employer agreeing with the CEPU to include clause 4.3(b)(v) in the Agreement.
62. To suggest that no arrangement or understanding was made with the CEPU is not consistent with the evidence.
63. The fact that under the FW Act, enterprise agreements are now no longer formally made with the union (except in a greenfields scenario) is of no moment. In the circumstances of this case, it was the CEPU as bargaining representative, which entered into negotiations with the Employer.³¹
64. Further the CEPU is named as a “party” to the Agreement: clause 6 (definitions).
65. Further and in any event, a person can make an arrangement or arrive at an understanding within the meaning of s. 45E of the CC Act, irrespective of the capacity in which he, she or it is doing so.³² The person can reach such an arrangement or understanding, irrespective of the fact that some other organisation or body must vote on and ratify it, before it has actual legal effect.³³
66. Thus, the individual directors on a Board of Directors of a company enter an arrangement simply by passing a resolution and then convening a meeting of shareholders such that they can vote on the resolution. This is so even though at no time were the directors acting in their own personal capacities.³⁴
67. It is clear on the facts of the present case that the Employer and the CEPU have made, or arrived at, an arrangement or understanding, a provision of which is clause 4.3(b)(v).
68. Ai Group submits that the inclusion of clause 4.3(b)(v) in the Agreement amounts to the making of an arrangement, or the reaching of an understanding with the

³⁰ *Apco Service Stations Pty Ltd v ACCC* (2005) 159 FCR 452 at [45] (Special leave refused on 2 June 2006).

³¹ The CEPU is negotiating the same term with many other employers. See AB 306.

³² *Lutovi Investments*, supra at 444-5.

³³ *Ibid.*

³⁴ *Ibid.* *Lutovi Investments* was referred to with approval in the context of s. 45E, in *CEPU v ACCC*, supra at [16]-[18]. And see also the cases referred to in paragraph [106] of the first instance decision: *ACCC v IPM Operation and Maintenance Loy Yang Pty Ltd* (2006) 157 FCR 162.

CEPU, that included a provision at least one of the purposes of which was to prevent or hinder the Employer from acquiring services from existing contractors, which did not pay to their employees the rates of pay (and other conditions) set out in the Agreement.

69. The arrangement or understanding is manifested in, and constituted by:
- a. the negotiations antecedent to the approval of the Agreement whereby inclusion of clause 4.3(b)(v) was agreed;³⁵ and
 - b. the Agreement itself, which is capable in itself of operating as an arrangement or understanding.³⁶

Compliance with clause 4.3(b)(v) may result in the Employer being liable to pay a pecuniary penalty in relation to a contravention of s. 45EA of the CC Act

70. The Employer's subsequent conduct in compliance with the terms of clause 4.3(b)(v), for example, in:
- i. terminating the contracts of existing contractors who are not prepared to apply wages and conditions that are at least as favourable as those in the Agreement; or
 - ii. not entering into contracts with contractors who are not prepared to apply wages and conditions that are at least as favourable as those in the Agreement,³⁷

amounts to compliance with the unlawful arrangement or understanding made in contravention of s. 45E.

71. Section 192 applies if FWA considers that compliance with the terms of an enterprise agreement may result in a person being liable to pay a pecuniary penalty in relation to a contravention of a law of the Commonwealth. This is such a case.
72. Indeed, in the present case, compliance with the terms of the Agreement not only "may", but would in the normal course result in the Employer being liable to pay a pecuniary penalty in relation to a contravention of s. 45EA (see also CC Act, s. 76,

³⁵ See AB 378 at paragraph 7.1; AB 382 at paragraph 2.1(c).

³⁶ *Gibbins v Australasian Meat Industry Employees' Association* (1986) 12 FCR 450.

which provides for the imposition of pecuniary penalties for such a contravention).

73. This is because conduct of the kind described in paragraph 33 above would be giving effect to an unlawful arrangement or understanding reached with the CEPU.

Point taken for the first time on appeal

74. It is conceded that the preceding submission based on the operation and application of s. 45EA of the CC Act was not made to Acton SDP. It is important, however, and necessary for the Full Bench to consider and rule upon this submission, for the following reasons:
- a. in the first place, the issue of the operation and application of s. 45EA is a pure question of law, which, although raised on appeal for the first time, is based upon facts either admitted or proved beyond controversy;³⁸
 - b. secondly, no evidence could have been given by the Respondent or the Employer which could have prevented the s. 45EA point from succeeding at first instance;³⁹
 - c. thirdly, arguing the s. 45EA point on appeal, which is closely related to the s. 45E point that was fully argued below, leads to no injustice or prejudice to the Respondent;
 - d. fourthly, the Respondent is being accorded procedural fairness in that it has the opportunity to respond to the s. 45EA argument both in written submissions, and orally at the hearing of the appeal;
 - e. fifthly, the reason the s. 45EA point was not raised below was that no argument was put by the CEPU, the Applicant, that *compliance* with clause 4.3(b)(v) was at issue and to be distinguished from the *making* of that clause, except in the CEPU's written Reply submissions filed after the

³⁷ Other conduct referred to in paragraph 33 above would also be relevant.

³⁸ *O'Brien v Komisaroff* (1982) 150 CLR 310 at 319 per Mason J.

³⁹ *Coulton v Holcombe* (1986) 162 CLR 1 at 7 - 8.

hearing before Acton SDP,⁴⁰ and to which the Appellant was not entitled to respond;⁴¹

- f. sixthly, there is a public interest in the Full Bench ruling on the s. 45EA point; and
- g. finally, the question arising under s. 192 of the FW Act is one that requires FWA to exercise its jurisdiction in determining whether compliance with the terms of the Agreement may result in conduct contrary to a law of the Commonwealth, and the Full Bench cannot choose to ignore this important question in the circumstances set out above, as that would amount to a failure to exercise its jurisdiction.

75. It follows from the reasons advanced above that the Full Bench, in the exercise of its discretion,⁴² should refuse to approve the Agreement pursuant to s. 192 of the FW Act on the basis that compliance with clause 4.3(b)(v) may result in the Employer being liable to pay a pecuniary penalty in relation to a contravention of s. 45EA of the CC Act (under CC Act, s. 76).

VII. Clause 15.2(k) is an unlawful term

(Grounds of Appeal 6 and 7)

76. Clause 15.2(k) provides for right of entry to an ETU official “to assist with representing an employee(s) under the dispute resolution clause in this Agreement...”
77. The clause provides as follows (in part):⁴³

⁴⁰ AB 348 at [13].

⁴¹ In *Carr v Finance Corporation of Australia Ltd* (1981) 147 CLR 246 at 258, Mason J said: “The impression, unfortunately abroad, that parties may file supplementary written material after the conclusion of oral argument, without leave having been given beforehand, is quite misconceived. We have to say once again, firmly and clearly, that the hearing is the time and place to present argument, whether it be wholly oral or oral argument supplemented by written submissions.” See also *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318 at 329-330 [27]- [31], per McHugh J with whom Gummow J agreed (at 330 [32]).

⁴² The limits on the Tribunal’s exercise of the discretion pursuant to s. 192 of the FW Act are clear from *House v R.* (1936) 55 CLR at 504-505 per Dixon, Evatt and McTiernan JJ.

⁴³ AB 59-60.

15.2 *Resolving Other Issues*

(a) *Where a dispute arises over permitted matters (as currently defined in the Fair Work Act), the application of this Agreement or the NES, the matter shall be first submitted by the Union, employee or Employee representative (if any) to the supervising officer or another appropriate manager, or vice versa. If not settled, the matter may be referred to more senior persons.*

...

(k) *An Employee Representative or an official of the ETU shall be allowed to enter the workplace (excluding residential premises) to assist with representing an employee(s) under the dispute resolution clause in this agreement...*

78. Sub-clause 15.2(k) must, of course, be read as a whole, in the context of clause 15.2 and in the overall context of the Agreement. It provides for right of entry in circumstances where a dispute has arisen “over permitted matters (as currently defined in the Fair Work Act), the application of this Agreement or the NES”: sub-clause 15.2(a).
79. The entry of the official provided for by this clause is entry for the purpose of investigating a suspected contravention of the Act or a fair work instrument (FW Act, s. 481). It may also be entry for the purposes of holding discussions with employees, that is a FW Act, s. 484 purpose.
80. For example, if an official enters the workplace, he or she is necessarily there in the context of a dispute about the relevant employee’s rights and entitlements, whether under the Agreement or the FW Act. The official is also there to hold discussions with the employee (or a number of affected employees). The official is there to investigate whether or not the Agreement or the FW Act have been contravened by the Employer. This is unavoidable. The official, in “assisting with representing” the employee where a dispute has arisen, has clearly entered the workplace for a s. 481 purpose, and a s. 484 purpose, notwithstanding the CEPU’s

attempt to characterise the purpose of right of entry under clause 15.2(k) as something else.⁴⁴

81. The entry is part of the “investigation” being undertaken. The investigation is tied up with the question of whether there has been a relevant contravention, and with the advocacy by the official on behalf of the employee, whereby the contravention alleged is investigated and discussed.
82. The Senior Deputy President accurately described the right of entry for which clause 15.2(k) provides as being “for the purpose of representing an employee under the dispute resolution clause of the ADJ Agreement”: Decision at [37]. However, that purpose is not able to be divorced or separated from the clear s. 481 and s. 484 purposes which right of entry under this clause also has. In setting up the various purposes as separate, or in opposition to one another, the Senior Deputy President was led into error.
83. The Senior Deputy President was correct, though, to view clause 15.2(k) as impermissibly providing for disputes about right of entry for s. 481 and s. 484 purposes to be resolved outside the process provided by Div 5 of Part 3-4 of the FW Act: Decision at [37], [57]. Clause 15.2(k) is clearly an attempt to exclude FWA’s role, and the application of Part 3-4 of the FW Act.

Inconsistency

84. Once the true purpose of clause 15.2(k) is understood, it is clear that the clause is an unlawful term within the meaning of sub-s. 194(f) of the FW Act. It is unlawful because it provides for right of entry in a manner inconsistent with a provision of Part 3-4 of the FW Act and purports to permit entry other than in accordance with Part 3-4.
85. Clause 15.2(k) is inconsistent with Part 3-4 because:

⁴⁴ See *Vlach v Electrolux Home Products Pty Ltd* [2010] FWA 2435 per O’Callaghan SDP.

- a. it does not require that a representative or shop steward be a permit holder (see Division 6 of Part 3-4), and so permits persons without permits to enter the Employer's premises;
- b. it does not require the representative to give an entry notice or exemption certificate at least 24 hours (but no more than 14 days) before the entry (s. 487), and thus permits entry at any time without written notice;
- c. it does not require production of authority documents (s. 489);
- d. it enables entry and discussions outside working hours and meal breaks (s. 490); and
- e. it does not require the representative to comply with reasonable requests of the Employer (s. 492).

86. See *Australian Industry Group v Pacific Brands Limited t/a Dunlop Foams* [2010] FWAFB 4337 at [7] – [8], [28] – [36], especially at [33] and [35].

VIII. Sub-clauses 16.6(b) and (d) are objectionable, and thus unlawful terms
(Grounds of Appeal 8 and 9)

87. Sub-clauses 16.6(b) and (d) provide:

(b) Union membership shall be promoted by the Employer to all prospective and current Employees.

...

(d) The employees who are members of the ETU shall be encouraged to participate in Union meetings and exercise their democratic rights.

88. Sub-clauses 16.6(b) and (d) are objectionable, and thus unlawful terms.

89. Those clauses require the Employer to induce its employees to engage in “membership action” within the meaning of s. 350 of the FW Act. The relevant

“membership action” is “becoming”, or “remaining” a “member” of an industrial association”.

90. Section 350 will be contravened “*by conduct that leads or moves, by persuasion or influence, an employee to... [become]... a member of a union. [Whether there has been a contravention] is essentially a question of fact, to be determined by looking at all the circumstances of the case ...[and]... the existence of a particular intention may be a significant consideration*”: *BHP Iron Ore v Australian Workers’ Union* (2000) 102 FCR 97 at [60] – [62] and at [78].⁴⁵
91. See also *BHP Iron Ore v Australian Workers’ Union* (2000) 106 FCR 402 at [70] – [83] and [212] – [245] per Kenny J; *Finance Sector Union of Australia v Commonwealth Bank of Australia* (2000) FCA 1372 at [29], [35] – [41], per Finkelstein J.
92. The Oxford English Dictionary (2nd ed., 1989, reprinted 1991) defines “promote” to mean to “further”, to “advance” or to “encourage” something.
93. It is submitted that conduct by the Employer which promotes, furthers, advances or encourages union membership will be conduct that leads or moves, by persuasion or influence, an employee to become a member.
94. Conduct by the Employer in compliance with, or pursuance of sub-clauses 16.6(b) and (d) will include:
 - a. initiating employees into the workplace and, at the same time, taking steps to facilitate and encourage union membership applications;
 - b. putting pressure on employees to become members of the union;
 - c. influencing employees, collectively and individually, to join the union;
 - d. telling employees they should attend union meetings and events; and
 - e. all the while exercising power and control over the employees as their Employer, with all the influence that that entails.⁴⁶

⁴⁵ In this decision the Full Court construed and applied s.298M of the *Workplace Relations Act 1996* (Cth, the predecessor provision to s.350 of the FW Act.

⁴⁶ *Re Liquorland Hotels Agreement 2003*, PR935354, per Richards C at [48] – [51].

95. It follows that sub-clauses 16.6(b) and (d) require a contravention of Part 3-1 (s. 350) of the FW Act. In the terms of sub-s. 350(3), they require an employee to become, or to remain, a member of an industrial association. The clauses are, accordingly, objectionable and thus unlawful.
96. The Senior Deputy President was in error in confining her analysis to the words of sub-clauses 16.6(b) and (d) and the dictionary meaning of those words (Decision at [44]). While the words and their meaning are relevant, the s. 12 definition of “objectionable term” requires FWA to consider the *conduct* in compliance with the impugned sub-clauses and their words, and then to make findings about whether that conduct would amount to inducing employees to engage in “membership action.” The Senior Deputy President erred in failing to make such findings.

IX. Conclusion and orders sought on the appeal

97. Having established that error was made, Ai Group seeks that the Decision be wholly set aside.

DATED: 30 June 2011

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.....
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