[2024] FWCFB 432

The attached document replaces the document previously issued with the above code on 14 November 2024.

The catchwords section referring to the decision under appeal now reads [2024] FWCA 2260 instead of [2024] FWC 2260.

Associate to Vice President Gibian

Dated 18 November 2024

# DECISION

*Fair Work Act 2009*
s.604 - Appeal of decisions

**"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)**
**v**
**Sublime Infrastructure Pty Ltd, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia**
(C2024/4595)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT DEAN
DEPUTY PRESIDENT WRIGHT

SYDNEY, 14 NOVEMBER 2024

*Appeal against decision [2024] FWCA 2260 of Deputy President Colman at Melbourne on 18 June 2024 in matter number AG2024/2061 to approve the Sublime Infrastructure Pty Ltd and CEPU - Plumbing Division NSW Branch Mechanical (Sheetmetal) Enterprise Agreement 2023-2027 – further evidence sought to be relied upon on appeal – evidence disclosed that agreement made by two employees of Sublime Infrastructure – shortly after the vote on the agreement approximately 29 employees purportedly transferred to the employment of Sublime Infrastructure from another entity and thereafter covered by the agreement – 29 employees not involved in bargaining or given opportunity to vote on agreement – permission to appeal granted – agreement not genuinely agreed to by employees – appeal upheld – application for approval of the agreement dismissed.*

## Introduction

**[1]** The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (the **AMWU**) has lodged an appeal, for which permission is required, under s 604 of the *Fair Work Act 2009* (Cth) (the **Act**). The AMWU seeks to appeal against a decision of Deputy President Colman made on 18 June 2024 to approve the *Sublime Infrastructure Pty Ltd and CEPU – Plumbing Division NSW Branch Mechanical (Sheetmetal) Enterprise Agreement 2023 – 2027* (the **Agreement**).[1] The Agreement covers a single employer, namely, Sublime Infrastructure Pty Ltd (**Sublime Infrastructure** or the **respondent**).

**[2]** The Agreement was made by a vote involving two employees conducted on 4 June 2024. On 7 June 2024, the Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (the **CEPU**) applied to the Commission for approval of the Agreement. Together with the application for approval, a Form F17B – Employer's declaration in support of an application for approval of a single-enterprise agreement (other than a

greenfields agreement) was filed. The declaration was made by Sergio Gonzalez who was identified as being a director of Sublime Infrastructure.

**[3]** Mr Gonzalez's declaration indicated, among other things, that a notice of employee representational rights had been sent by email to "all team members to be covered by the Agreement" on 6 February 2024. The declaration provided information in relation to the steps it was said had been taken to provide employees with a copy of the Agreement and any material incorporated by reference and to explain the terms of the Agreement to employees. The steps said to have been taken included: that the company held meetings to discuss the offer and the terms of the Agreement on 7 February 2024; that employees were notified at "company tool box meetings" on 1 March 2024 that they would receive an email in regards to the proposed agreement; that "team members (including those on leave during the access period) were encouraged to seek clarification by approaching their Union or Site Manager"; that "throughout the negotiations, the team members were updated on the progress of the agreement and invited to ask questions directly of the employer"; and that the proposed agreement was distributed by email to "affected employees" on 27 May 2024 together with a company memo stating the date, time and type of the vote.

**[4]** Contrary to the inference that might have been drawn from reading these parts of Mr Gonzalez's declaration, the class of persons described as "all team members to be covered by the Agreement" was comprised of two individuals, James Klessattel and Daniel Portes. Some indication of the class of persons involved in the bargaining process and who participated in the vote on the Agreement was provided later in the declaration. When describing voting on the Agreement, the declaration stated that voting on the agreement commenced and concluded on 4 June 2024, that two employees were covered by the Agreement at the time of the vote, that both the employees cast a valid vote and that both of the employees had voted to approve the Agreement.

**[5]** The AMWU was not involved in the bargaining or aware of the application for approval of the Agreement until after it had been approved. Nonetheless, the AMWU filed a notice of appeal on 9 July 2024 seeking permission to appeal and to appeal against the decision to approve the Agreement. An affidavit made by a legal officer employed by the AMWU, Brieanna Munoz, was filed together with the notice of appeal and explained how the AMWU came to have concerns about the approval of the Agreement.

**[6]** Ms Munoz' affidavit explains that, on 3 July 2024, she had a discussion with two organisers employed by the AMWU, Steve Isberg and Fergal Eiffe. Mr Isberg and Mr Eiffe told Ms Munoz that they were going to visit AMWU members at a site operated by Sublime because some members had reported that they had noticed a change to their rates of pay, allowances and the company name appearing on their pay slips and had seen that a new enterprise agreement had been uploaded on the app they used at work. Following that conversation, Ms Munoz conducted research on the Commission's website and discovered for the first time that the Agreement had been approved.

**[7]** Later the same day, Ms Munoz had a further conversation with Mr Isberg and Mr Eiffe after they had visited the site. Mr Isberg and Mr Eiffe reported that members had indicated that no one had received a notice of employee representational rights, that the first time the members became aware of the Agreement was when it was uploaded onto the internal company software

and that no one had been notified of the change of company name on their pay slips. On 4 July 2024, Ms Munoz spoke to two members employed at the site who told her directly that they were not aware of bargaining, had not received a notice of employee representational rights, had not participated in a vote for a new enterprise agreement and had only become aware of a new enterprise agreement after it had been made. Ms Munoz was shown a copy of the payslips of one member of the AMWU that listed the employer as another company, Sublime Air Site Pty Ltd (**Sublime Air**), for the pay period between 10 June 2024 and 16 June 2024 and then Sublime Infrastructure for the pay period between 17 June 2024 and 23 June 2024.

**[8]** After filing the notice of appeal, the AMWU asked the Commission to issue an order for production as contemplated by s 590(2)(c) of the Act requiring Sublime Infrastructure Pty produce material believed to be in its possession. In addition, the AMWU sought an order that Mr Gonzalez answer certain questions by way of statutory declaration, which it described as being "in the manner of an interrogatory". The Commission made orders substantially in the form sought by the AMWU.[2] In summary terms, the order for production required the production of documents relating to the bargaining process that resulted in the making of the Agreement as well as in relation to the apparent transfer of employees from Sublime Air to Sublime Infrastructure shortly after the vote to approve the Agreement had taken place.

**[9]** Documents were produced in response to the notice to produce and a statutory declaration made by Mr Gonzalez was filed with the Commission. In his statutory declaration dated 13 August 2024, Mr Gonzalez declared as follows:

> 1. I confirm that there were 4 toolbox meetings which took place in relation to the proposed Agreement.
>
> 2. The following are the names and job titles of those individuals who attended those tool box meetings:
>
>    a) James Klessattel – First Class Sheetmetal;
>    b) Daniel Portes – Second Class Sheetmetal.
>
> 3. There were 29 employees employed by Sublime Air Site Pty Ltd on 4 June 2024 and 0 employees as at the date of the Order made on 9 August 2024.
>
> 4. There were 2 employees employed at Sublime Infrastructure Pty Ltd on 4 June 2024 and 31 employees as at the date of the Order made on 9 August 2024.

**[10]** On 19 August 2024 and in accordance with directions made by the Commission, the AMWU filed a bundle of documents upon which it proposed to rely as further evidence on the appeal, an outline of submissions and a witness statement of Rochelle Dobson, a legal secretary employed by the AMWU. Ms Dobson's witness statement provided evidence in relation to a review which she had conducted of the documents produced in accordance with the order for production and in relation to company and other searches Ms Dobson had undertaken.

**[11]** On 13 September 2024 and after receipt of the AMWU's submissions and the additional evidence upon which it wishes to rely in relation to the appeal, Sublime Infrastructure and the CEPU filed outlines of submissions. Both Sublime Infrastructure and the CEPU indicated that they do not oppose permission to appeal being granted or the appeal being upheld. The outline of submissions of Sublime Infrastructure stated as follows:

> 3. Other than to say that the intention was to establish a CEPU Enterprise Agreement because the AMWU would not renegotiate a nominally expired Enterprise Agreement with another Sublime Group entity and not to disadvantage any employees, Sublime does not seek to make oral submissions or be heard further in relation to the matter.
>
> 4. Sublime also has no objections to permission being granted, or the appeal being upheld.
>
> 5. Sublime understands the CEPU also do not oppose, or seek to be heard against, permission being granted, or the appeal being upheld.
>
> 6. As such, the Commission may deem it appropriate to make a determination in relation to the appeal without conducting a Hearing, pursuant to s.607(1) of the *Fair Work Act 2009* (Cth). Sublime supports the conduct of the appeal in this manner.

**[12]** The outline of submissions of the CEPU stated, in part, as follows:

> 4. On 19 August 2024, the Appellant filed and served an outline of submissions and other materials.
>
> 5. The CEPU has read the submissions and other materials filed by the Appellant.
>
> 6. The CEPU was unaware of the circumstances outlined at [2], [11]-[16] of the Appellants' submissions.
>
> 7. The CEPU does not seek to be heard further in this matter. It does not oppose, or seek to be heard against, permission being granted or the appeal being upheld.

**[13]** The submissions received by the Commission indicated that neither Sublime Infrastructure nor the CEPU wished to be heard in relation to the application for permission to appeal or the appeal. As a result of these submissions, the Commission requested that the AMWU indicate whether it wished to make oral submissions to supplement the written submissions it had filed. The AMWU indicated that it was also content for the application for permission to appeal and the appeal to be determined on the papers.

**[14]** For the reasons that follow, permission to appeal should be granted, the appeal upheld, the approval of the Agreement quashed and the application for approval of the Agreement dismissed.

**Statutory Provisions**

**[15]** The making and approval of enterprise agreements is governed by Part 2-4 of the Act. Certain amendments were made to the provisions of the Act dealing with the approval of enterprise agreements by Part 14 of Schedule 1 to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth). Those amendments commenced on 6 June 2023. Among other things, those amendments repealed and replaced s 188 of the Act dealing with determining whether an enterprise agreement has been genuinely agreed to by employees.

**[16]** In this matter, the notice of employee representational rights was issued to Mr Klessattel and Mr Portes and those employees were informed of the commencement of bargaining on 6

February 2024. As the notification time for the proposed enterprise agreement was after the commencement of Part 14 of Schedule 1 to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) on 6 June 2023, the amended provisions of Part 2-4 apply in relation to the Agreement.[3]

**[17]** Section 186(1) of the Act provides that the basic rule is that the Commission must approve an enterprise agreement is the requirements of that section and s 187 are met. Relevantly, s 186(2)(a) provides that, if the agreement is not a greenfields agreement, the Commission must be satisfied that the agreement has been genuinely agreed to by the employees covered by the agreement. The task of determining whether an enterprise agreement has been genuinely agreed to by employees is governed by s 188 which now provides:

> **188 Determining whether an enterprise agreement has been genuinely agreed to by employees**
>
> *Statement of principles*
> (1) The FWC must take into account the statement of principles made under section 188B in determining whether it is satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement.
>
> *Sufficient interest and sufficiently representative*
> (2) The FWC cannot be satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the employees requested to approve the agreement by voting for it:
>
> (a) have a sufficient interest in the terms of the agreement; and
> (b) are sufficiently representative, having regard to the employees the agreement is expressed to cover.
>
> Note: In *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77 (2018) 262 FCR 527, a Full Court of the Federal Court observed that whether an agreement has been genuinely agreed involves consideration of the authenticity of the agreement of the employees, including whether the employees who voted for the agreement had an informed and genuine understanding of what was being approved.
>
> *Agreement of bargaining representatives that are employee organisations*
> (2A) The FWC cannot be satisfied that an enterprise agreement to which section 180A or 180B applies has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the employer complied with section 180A or 180B (as the case requires) in relation to the agreement.
>
> *Where notice of employee representational rights was required*
> (3) Subsection (4) applies in relation to an enterprise agreement if an employer was required by subsection 173(1) (which deals with giving notice of employee representational rights) to take all reasonable steps to give notice in relation to the agreement.
>
> (4) The FWC cannot be satisfied that the agreement has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the employer complied with the following provisions in relation to the agreement:
>
> (a) sections 173 and 174 (which deal with giving notice of employee representational rights);

> (b) subsection 181(2) (which requires that employees not be requested to approve certain enterprise agreements until 21 days after the last notice of employee representational rights is given).
>
> *Explanation of terms of the agreement*
> (4A) The FWC cannot be satisfied that the agreement has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the employer complied with subsection 180(5) in relation to the agreement.
>
> *Minor errors may be disregarded*
> (5) In determining whether it is satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement (including determining whether it is satisfied that an employer complied with the provisions mentioned in subsection (2A) or (4) or (4A)), the FWC may disregard minor procedural or technical errors made in relation to the following requirements if it is satisfied that the employees were not likely to have been disadvantaged by the errors:
>
> (a) section 173 or 174 (which deal with notices of employee representational rights for certain agreements);
> (aa) subsection 180(5) (which requires employers to explain the terms of agreements);
> (ab) section 180A or 180B (which deal with agreement of certain bargaining representatives);
> (b) subsection 181(2) (which requires that employees not be requested to approve certain enterprise agreements until 21 days after the last notice of employee representational rights is given);
> (c) subsection 182(1) or (2) (which deal with the making of different kinds of enterprise agreements by employee vote).
>
> *Regulations*
> (6) The FWC cannot be satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the requirements (if any) prescribed by the regulations for the purposes of this subsection are met.

**[18]** Section 188(1) requires that the Commission must take into account the statement of principles issued under s 188B. The Commission issued a Statement of Principles on Genuine Agreement on 23 May 2023. The Statement of Principles includes the following:

> 17. In considering whether employees have a sufficient interest in the terms of an enterprise agreement as required by section 188(2)(a) of the Fair Work Act, and whether the employees are sufficiently representative as required by section 188(2)(b), the FWC may take into account:
> (a) whether the employees entitled to vote on the enterprise agreement are to be paid the rates of pay provided for in the agreement, and
> (b) the extent to which the employees entitled to vote on the enterprise agreement are employed across the full range of:
>
> (i) classifications in the agreement
> (ii) types of employment in the agreement (for example, full-time, part-time and casual)
> (iii) geographic locations the agreement covers, and
> (iv) industries and occupations the agreement covers.
>
> 18. An enterprise agreement will generally not have been genuinely agreed to by the employees covered by the agreement unless the agreement was the product of an authentic exercise in agreement-making between the employer(s) and employees in one or more enterprises, and the

> employees who voted for the agreement had an informed and genuine understanding of what was being approved.

**[19]** The Full Bench has made clear that the Statement of Principles does not operate as a set of mandatory rules that must be complied with by an employer absent which the Commission cannot be satisfied that an agreement has been genuinely agreed. Further, the requirement to take into account the Statement of Principles does not displace the requirement to consider each of the other matters set out in s 188 in determining whether an agreement has been genuinely agreed.[4] The Statement of Principles must, however, be taken into account in determining whether an enterprise agreement has been genuinely agreed to.

**Permission to appeal and further evidence on appeal**

**[20]** The AMWU seeks to rely on further evidence on appeal in the form of the affidavit of Brieanna Munoz dated 9 July 2024, the witness statement of Rochelle Dobson dated 19 August 2024, and the bundle of documents produced by Sublime Infrastructure. The Full Bench is satisfied that it is appropriate to admit the further evidence on appeal under s 607(2) of the Act. The circumstances in which the courts have considered it may be appropriate to admit new evidence on appeal are discussed in *Akins v National Australia Bank* (1994) 34 NSWLR 155 as follows:[5]

> Although it is not possible to formulate a test which should be applied in every case to determine whether or not special grounds exist there are well understood general principles upon which a determination is made. These principles require that, in general, three conditions need be met before fresh evidence can be admitted. These are: (1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; (2) The evidence must be such that there must be a high degree of probability that there would be a different verdict; (3) The evidence must be credible.

**[21]** Whilst the principles governing the admission of fresh evidence on appeal in the courts provide a useful guide to the exercise of the discretion in s 607(2) of the Act, the discretion is not constrained by those principles.[6] In an appropriate case, further evidence might be admitted under s 607(2) of the Act even if the fresh evidence would not be admitted if those principles were strictly applied because, for example, it was available at the time of the hearing at first instance. Ultimately, where further evidence is sought to be admitted on appeal, the Full Bench must make a broad discretionary decision as to whether to admit that evidence having regard to the objects of the Act and to equity, good conscience and the substantial merits of the matter as well as the requirement that the Commission exercise its functions in a manner that is fair and just and is quick, informal and avoids unnecessary technicalities.[7]

**[22]** We have no doubt that it is appropriate to admit the further evidence relied upon by the AMWU in this matter. The AMWU was not aware of the bargaining or any proposal to make a new enterprise agreement until after the Agreement was approved. The AMWU's state of ignorance arose from the fact that Sublime Infrastructure chose to bargain for a new agreement to apply to a group of employees with only two individuals. The AMWU's members performing work at the Sublime workplace, albeit for the time being for a different Sublime entity, were also unaware of the proposal to make a new enterprise agreement. Plainly, the AMWU could not have obtained the evidence, or put it before the Commission at first instance, as it was unaware of the existence of the bargaining or the application for approval of the Agreement.

**[23]** The evidence discloses a concerning picture in relation to the process adopted in making the Agreement. It appears that the Agreement was made with two individual employees in circumstances in which Sublime Infrastructure intended that it would cover a wider group of employees then employed by another Sublime entity. The remaining and larger group of employees were not provided with a notice of employee representational rights, provided with access to the proposed agreement or with the opportunity to vote. Those employees were then transferred to the employment of Sublime Infrastructure shortly after the Agreement was made by a vote of the two employees and thereby became covered by the Agreement. The evidence is substantially drawn from documents produced or information provided by Sublime Infrastructure and is obviously credible. Given the content of the evidence, it is capable of affecting whether the Agreement should have been approved by the Deputy President.

**[24]** For similar reasons, we are satisfied it is appropriate to grant permission to appeal because it is in the public interest to do so for the purposes of s 604(2) of the Act and because we would, in any event, exercise our discretion to grant permission. The appeal raises matters of general importance and application in relation to the approach to be adopted to determining whether an enterprise agreement has been genuinely agreed to for the purposes of ss 186(2)(a) and 188 of the Act. Furthermore, and as we have said, the further evidence relied upon by the AMWU suggests that an enterprise agreement was made through a process which deprived the bulk of employees to whom it was intended to apply of the opportunity to participate in bargaining or vote on the agreement. The conditions of employment of those employees are now governed by an instrument over which they had no say. It is in the public interest that the Full Bench examine whether the Agreement should have been approved.

**Disposition of the appeal**

**[25]** The notice of appeal was filed soon after the AMWU became aware of the approval of the Agreement. Understandably, the grounds in the notice of appeal are cast in simple terms merely asserting that the Deputy President erred in finding that the Agreement was genuinely agreed to for the purposes of ss 186(2)(a) and 188 of the Act and otherwise erred in approving the Agreement. In its written submissions, the AMWU advanced a series of reasons as to why the Deputy President erred in being satisfied that the Agreement had been genuinely agreed to including that the agreement lacked authenticity or moral authority, that Sublime Infrastructure had failed to provide a notice of employee representational rights or explain the terms of the Agreement to employees, no adequate explanation of the terms of the Agreement was provided for the purposes of s 180(5) of the Act and that the Agreement was not validly made in accordance with s 182(1) of the Act because the voting did not involve a majority of the employees intended to be covered by the Agreement.

**[26]** It is unnecessary to deal with each of the contentions advanced by the AMWU. It is sufficient to address the submission that, in light of the further evidence we have admitted on the appeal, the Deputy President erred in being satisfied that the Agreement was genuinely agreed to by the employees. That is said to be case because the employees who voted on the agreement did not have a sufficient interest in the terms of the agreement and were not sufficiently representative, having regard to the employees the agreement is expressed to cover, and otherwise that the Agreement was not the product of an authentic exercise in agreement-making.

**[27]** Having admitted further evidence on the appeal, error may be demonstrated by the further evidence received even if the error might not necessarily have been apparent on the material that was before the Deputy President.[8] Once new evidence is admitted, it is incumbent on the Full Bench to decide the appeal "upon the facts and in accordance with the law as it exists at the time of hearing the appeal" because "the further evidence may demonstrate error in the outcome" even though the primary decision was correct at the time it was made.[9] Having regard to the further evidence relied upon by the AMWU, the requirement that the Agreement be genuinely agreed to was incapable of satisfaction.

**[28]** The AMWU's submissions provided a summary of the events disclosed by the further evidence which we accept. The course of events may be summarised as follows:

(a) On 6 February 2024, Mr Gonzalez called Mr Klessattel and Mr Portes to notify them that bargaining would commence. On the same day, Mr Gonzalez sent a notice of employee representational rights to Mr Klessattel and Mr Portes.

(b) On 1 March 2024, a toolbox meeting took place in the lunchroom, during which Mr Gonzalez apparently provided Mr Klessattel and Mr Portes with hard copies of:

- a document entitled "Sublime Claim";
- the National Employment Standards;
- the *Plumbing and Fire Sprinklers Award 2010*;
- a document summarising various conditions in the *Plumbing and Fire Sprinklers Award 2020*; and
- a document purporting to compare the "Sublime Claim" in comparison to the Plumbing Award.

(c) During the meeting on 1 March 2024, the terms of the Agreement were explained verbally. However, a copy of the Agreement does not appear to have been actually provided to Mr Klessattel and Mr Portes until it was sent by email on 27 May 2024. Mr Gonzalez says four toolbox meetings were held, although it is not clear when these other three meetings occurred, or what was discussed.

(d) On 27 May 2024, Mr Klessattel and Mr Portes received a memorandum from the company advising that the vote would take place on 4 June 2024. A vote took place on 4 June 2024 and both the two employees voted to approve the Agreement. On 7 June 2024, an application was made by Sublime Infrastructure to the Commission for approval of the Agreement.

(e) On or around 13 or 14 June 2024, Mr Gonzalez attended various work sites to hold verbal discussions with and notify employees of Sublime Air that their employment would transfer from Sublime Air to Sublime Infrastructure. Shortly after this notification on 13 or 14 June 2024, approximately 29 employees of Sublime Air Site were transferred to Sublime Infrastructure.

(f) The timing of the transfer is not entirely clear. However, the documents indicate that the payslips of the employees for the period covering 10 June and 16 June

2024 recorded their employer as being Sublime Air and the payslips for the period covering 17 June to 23 June 2024 recorded the employer as Sublime Infrastructure. The statutory declaration of Mr Gonzalez recorded that as at 4 June 2024, there were two employees of Sublime Infrastructure and 29 employees of Sublime Air. Ms Dobson's witness statement indicated that 23 of the employees of Sublime Air are members of the AMWU. By 9 August 2024, there were 31 employees of Sublime Infrastructure and zero employees of Sublime Air. Sublime Air was put into voluntary liquidation on 19 June 2024 being one day after the Agreement was approved.

(g) The transferring employees were never advised of, or involved in, any aspect of the agreement-making process. In particular, the remaining employees were never provided with a notice of employee representational rights, were not provided with copies of the Agreement or any reference material, received no explanation in relation to the terms of the Agreement and were not advised of, or afforded the opportunity, to vote on the Agreement.

**[29]** The course of events demonstrates that the process adopted to make the Agreement was entirely lacking in authenticity and moral authority in the sense discussed by the Full Court of the Federal Court in *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77; (2018) 262 FCR 527.[10] Once the further evidence is considered, the Commission could not have been satisfied the Agreement was genuinely agreed to having regard to the Statement of Principles on Genuine Agreement. Further, the requirement in s 188(2) that the Commission be satisfied that the employees requested to approve the Agreement by voting for it have a sufficient interest in the terms of the Agreement and are sufficiently representative was incapable of being met.

**[30]** That is the case for at least two reasons. Firstly, and most importantly, the further evidence admitted on appeal demonstrates that the Agreement was anything but a product of an authentic exercise in agreement-making contemplated by Principle 18 of the Statement of Principles on Genuine Agreement. The only inference to be drawn from the course of events set out above is that the bargaining was undertaken so as to deliberately confine voting on the Agreement to two employees in circumstances in which it was known and intended that the Agreement would apply to a wider group of employees then employed by Sublime Air. Although Sublime Infrastructure says that it did not intend to disadvantage the employees, it implicitly acknowledges that it sought to avoid dealing with members of the AMWU employed by Sublime Air because (it asserts) the AMWU would not renegotiate a nominally expired enterprise agreement with another Sublime Group entity. Irrespective of the question of motive, the effect of the course of conduct engaged in by Sublime Infrastructure was to deprive the bulk of employees who were intended to be covered by the Agreement the opportunity to participate in bargaining or vote on its approval. Taking into account the Statement of Principles, the conclusion that the Agreement was genuinely agreed to is not open.

**[31]** Secondly, the Agreement purports to cover employees engaged in industry of the occupations, businesses or employers of plumbers, gasfitters, roof plumbers, lead burners, ship plumbers and heating, air conditioning or ventilation (HVAC) plumbers, irrigation installers, laggers and plumber's labourers engaged on site or in construction work who are employed or usually employer in the plumbing industry executing any plumbing, gas-fitting, pipe fitting or

domestic engineering works.[11] Pay rates are set for five classifications of sheetmetal workers (being first class sheetmetal, second class sheetmetal, HVAC labourers, laggers and apprentices), three types of employment (being daily hire, casual and full-time employees) and employees based in all of NSW and the ACT. Mr Klessattel (a first class sheetmetal worker) and Mr Portes (a second class sheetmetal worker) are only employed under two of the five classifications and at one site. The type of employment in which Mr Klessattel and Mr Portes are engaged is unknown. There was no material before the Deputy President, or now before the Full Bench, that could justify a conclusion that those two employees were sufficiently representative of the employees to be covered by the Agreement.

**[32]** That is sufficient to lead to the conclusion that the Agreement should not have been approved. Once regard is had to the further evidence admitted on appeal, the Deputy President erred in being satisfied that the Agreement was genuinely agreed to by the employees covered by the Agreement for the purposes of ss 186(2)(a) and 188. In particular, the Commission could not be satisfied that the Agreement was genuinely agreed to having regard to the Statement of Principles on Genuine Agreement in accordance with s 188(1) or that the employees who were requested to approve the Agreement by voting on it had a sufficient interest in its terms and were sufficiently representative for the purposes of s 188(2). To the extent that the Deputy President was satisfied of those matters, the decision has been demonstrated to have been in error. The decision to approve the Agreement must, as a result, be set aside. That is without any criticism of the Deputy President. The error was revealed by material not available to the Commission at first instance.

**Redetermination**

**[33]** Neither the CEPU nor Sublime Infrastructure suggest that the Full Bench should be satisfied that the requirements for approval of the Agreement have been met on redetermination. For the reasons we have already explained, the Full Bench is not satisfied that the Agreement was genuinely agreed to by employees for the purposes of s 186(2)(a) , including because the Agreement was not the product of an authentic exercise in agreement-making as contemplated by Principle 18 of the Statement of Principles on Genuine Agreement. The Full Bench is further not satisfied that the two employees who did vote on the Agreement have a sufficient interest in the terms of the Agreement and are sufficiently representative of employees to be covered by the Agreement for the purposes of s 188(2). Those conclusions mean that the Commission must not approve the Agreement.

**[34]** For completeness, if it were necessary to do so, we would also not have been satisfied that Sublime Infrastructure had taken all reasonable steps to explain the terms of the Agreement for the purposes of s 180(5) of the Act even to Mr Klessattel and Mr Portes. As the AMWU submitted, the employees' conditions were wrongly compared to the Plumbing Award rather than the *Building and Construction General On-Site Award 2020*, the "Sublime Claim" was compared to the Australian Pipe Solutions Pty Ltd & CEPU Plumbing Division – NSW Branch Mechanical Enterprise Agreement 2019-2023 without that being explained and the metadata of the documents Sublime Infrastructure asserts were provided to employees prior to the vote, reveals that those documents appear to have been created after the vote on the Agreement on 4 June 2024. There was not sufficient material before the Deputy President to demonstrate that the terms of the Agreement, and the effect of the terms, had been adequately explained to the

two employees. The further evidence conclusively demonstrates that the Agreement was not adequately explained.

**Conclusion**

**[35]** For the reasons set out above, permission to appeal should be granted, the appeal upheld, the approval of the Agreement quashed and the application for approval of the Agreement dismissed. The Full Bench makes the following orders:

(a) The affidavit of Brieanna Munoz dated 9 July 2024, the witness statement of Rochelle Dobson dated 19 August 2024, and the bundle of documents entitled "Tender Bundle" filed by the AMWU be admitted as further evidence on the appeal under s 607(2) of the Act;
(b) Permission to appeal is granted;
(c) The appeal is allowed;
(d) The decision to approve the *Sublime Infrastructure Pty Ltd and CEPU - Plumbing Division NSW Branch Mechanical (Sheetmetal) Enterprise Agreement 2023-2027* in Matter No. AG2024/2061 is quashed; and
(e) The application for approval of the *Sublime Infrastructure Pty Ltd and CEPU - Plumbing Division NSW Branch Mechanical (Sheetmetal) Enterprise Agreement 2023-2027* is dismissed.


VICE PRESIDENT

*Final Written Submissions*:

Mr *J Martin*, counsel, for the Appellant
Ms *J Hundle*, Ai Group for the First Respondent
Ms *K Reid*, CEPU for the Second Respondent

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[1] *Sublime Infrastructure Pty Ltd and CEPU - Plumbing Division NSW Branch Mechanical (Sheetmetal) Enterprise Agreement 2023-2027* [2024] FWCA 2260.

[2] "*Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v Sublime Infrastructure Pty Ltd* [2024] FWC 2135.

[3] *Fair Work Act 2009* (Cth), Item 66 of Schedule 1; *Woolworths Australian Food Group Agreement 2024* [2024] FWCFB 314 at [2].

[4] *Shop, Distributive and Allied Employees Association v Allen Family Pty Ltd t/a Subway Clare, Subway Findon, Subway Broken Hill, Subway Kadina, Subway Port Adelaide, Subway Port Pirie* [2024] FWCFB 48 at [76].

[5] *Akins v National Australia Bank* (1994) 34 NSWLR 155 at 160 (Clarke JA).

[6] *JJ Richards & Sons Pty Ltd v Transport Workers' Union of Australia* [2010] FWAFB 9963; (2010) 202 IR 180 at [95] (Lawler VP and Bisset C); *Mermaid Marine Vessel Operations Pty Ltd v Maritime Union of Australia* [2014] FWCFB 1317; (2014) 241 IR 35 at [18]; *Construction, Forestry, Maritime, Mining and Energy Union v LS Precast Pty Ltd* [2019] FWCFB 1431 at [19].

[7] *Fair Work Act 2009* (Cth), ss 577 and 578.

[8] See, for example, *United Workers' Union v Hot Wok Food Makers Pty Ltd* [2023] FWCFB 4 at [55] referring to *CDJ v VAJ* (1998) 197 CLR 172 at [111] (McHugh, Gummow and Callinan JJ), *Allesch v Maunz* [2000] HCA 40; (2000) 203 CLR 172 at [23] (Gaudron, McHugh, Gummow and Hayne JJ) and *Coal and Allied v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194 at [13]-[17] (Gleeson CJ, Gaudron and Hayne JJ).

[9] *ALDI Foods Pty Ltd v Shop, Distributive & Allied Employees* [2017] HCA 53; (2017) 262 CLR 593 at [100]-[101] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

[10] *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77; (2018) 262 FCR 527 at [131]-[165].

[11] Clause 2.1.