



## DECISION

*Fair Work Act 2009*  
s.512—Right of entry

### **Applications by The Australian Workers' Union** (RE2018/1350; RE2018/1387)

DEPUTY PRESIDENT GOSTENCNIK

MELBOURNE, 11 JULY 2019

*Applications for Entry Permits for Douglas Charles Heath and Daniel Christopher Cain – whether Mr Cain and Mr Heath are employees and officials of the AWU – whether fit and proper persons to hold an entry permit under the Act – satisfied that Mr Cain is a fit and proper person to hold a permit – permit to issue – satisfied that Mr Heath is a fit and proper person to hold a permit with a condition – permit with a reporting condition to issue.*

[1] On 5 and 17 December 2018 respectively, the Australian Workers' Union (AWU) applied to the Fair Work Commission (Commission) under s.512 of the *Fair Work Act 2009* (Act) for the issue of right of entry permits to Messrs Douglas Charles Heath and Daniel Christopher Cain who are each said to be employed as organisers of the AWU. An amended application in relation to Mr Heath was lodged on 22 February 2019. Mr Heath is also an organiser with the Construction, Forestry, Maritime, Mining and Energy Union<sup>1</sup> (CFMMEU) whilst Mr Cain is a Divisional Branch Assistant Secretary of the CFMMEU.<sup>2</sup>

[2] The Australian Building and Construction Commissioner (Commissioner) advised of his intention to make submissions in respect of the applications and did so. The Australian Mines and Metals Association (AMMA) also sought to be heard in relation to the applications and was permitted to participate in the proceedings.

[3] Before turning to consider the matters that I must take into account in assessing whether the proposed permit holders are each a fit and proper person to hold a right of entry permit, a preliminary issue requires determination. That is, whether either or both of Messrs Heath and Cain are employees and thus officials<sup>3</sup> of the AWU for it is only in respect of officials of the AWU to which an application by it for the issue of entry permits may be made under s.512 of the Act.

[4] In dealing with this preliminary issue it is necessary to set out some relevant background.

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<sup>1</sup> Exhibit 35 at [1]

<sup>2</sup> Exhibit 19 at [1]

<sup>3</sup> See s.12 of the Act, definition of “official” and “industrial association”

[5] On or about 29 October 2018, the AWU and the CFMMEU executed a Memorandum of Understanding (MOU) concerning an AWU-CFMMEU Offshore Alliance (Alliance).<sup>4</sup> The MOU states that the signature organisations “recognise the value in a joint organising approach to the offshore oil and gas industry in Western Australia.”<sup>5</sup> The aim of the joint organising approach is said to be to:

- “a. Ensure union membership within the offshore oil and gas industry through a concerted organising campaign.
- b. Ensure worker representation and genuine collective bargaining within the offshore oil and gas industry.
- c. Empower employees by providing collective representation on workplace issues.
- d. Ensure offshore oil and gas workers are informed on all facets of workplace matters.
- e. Foster democratic decision making in the workplace.”<sup>6</sup>

[6] A key element of the MOU is said to be that the demarcation between signature organisations which otherwise exists, will not apply in the agreed and relevant sections of Western Australian offshore operations for the duration of the term of the MOU.<sup>7</sup> The term of the MOU is two years from 29 October 2018,<sup>8</sup> although the term may be extended.<sup>9</sup>

[7] Coverage or eligibility for membership of the signature organisations in the offshore oil and gas sector is determined largely by the location of the work. Thus, on a non-propelled fixed platform or vessel, the AWU has coverage of all workers including those engaged in catering and cleaning, while the CFMMEU will have coverage of divers. On a propelled support ship or vessel, the CFMMEU will have industry and occupational coverage of all workers including those engaged in catering and cleaning but excluding engineers, mates and masters. Neither organisation will generally have coverage of supervisors and managers.

[8] The Alliance is established because the signature organisations are said to recognise the critical importance of an organised offshore industry to the future of collective representation in Western Australia’s oil and gas offshore sector.<sup>10</sup>

[9] Pursuant to the MOU, the signature organisations have agreed, *inter alia*, that:

- there be a joint organising approach through dual accreditation of officials who would organise and recruit members on the basis of a formal agreement between the organisations;<sup>11</sup>

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<sup>4</sup> Exhibit 4

<sup>5</sup> Ibid at [1.1]

<sup>6</sup> Ibid at [1.3]

<sup>7</sup> Ibid at [1.4]

<sup>8</sup> Ibid at [4.1] and p.4

<sup>9</sup> Ibid at [4.2]

<sup>10</sup> Ibid at [2.1]

<sup>11</sup> Ibid at [2.1(b)]

- they will work together to grow the membership through the Alliance to recruit new members in accordance with the MOU;<sup>12</sup>
- the Alliance will produce common publications and documents directed to offshore employees to ensure a consistent message;<sup>13</sup>
- a working group consisting of officials of relevant branches of the signature organisations will be established to develop joint strategies for organising the offshore industry;<sup>14</sup>
- the Alliance in no way confers or transfers any of the respective organisation's constitutional coverage, now or in the future, to the other or to the Alliance;<sup>15</sup> and
- the Alliance, the terms thereof, the recruitment or representation of employees under the Alliance and the MOU, including industrial activities, campaigning or any associated activities will not be used as:
  - a basis to alter, or to establish a basis for altering, historical coverage now or in the future; or
  - a basis to claim active representation of persons eligible to be members of the respective organisation in extension of each organisation's constitutional coverage, now or in the future.<sup>16</sup>

**[10]** As to the Alliance:

- it is said to cover the recruitment of all production, maintenance and catering workers in the offshore oil and gas industry in Western Australia, including those employed by external contractors;<sup>17</sup>
- the signature organisations are each to nominate at least one organiser who shall be dual accredited as an official of both organisations;<sup>18</sup>
- new members are to join the Alliance and sign a membership form that authorises joining both signature organisations. All membership applications will be processed and administered at a single point – the AWU West Australian Branch – to ensure equal distribution, regardless of classification;<sup>19</sup>
- current members of the signature organisations who would be covered by the MOU will be advised of the Alliance;<sup>20</sup>
- the signature organisations will, following consultation, jointly support strategic litigation to further Alliance organising activities and there will be a high level of consultation of applications to the Commission and other dispute notifications to ensure a consistent approach by the signature organisations;<sup>21</sup>
- the membership dues from the Alliance will be split on a 50/50 percentage basis between the signature organisations;<sup>22</sup>

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<sup>12</sup> Ibid at [2.1(c)]

<sup>13</sup> Ibid at [2.1(d)]

<sup>14</sup> Ibid at [2.1(e)]

<sup>15</sup> Ibid at [2.1(f)]

<sup>16</sup> Ibid at [2.1(g)]

<sup>17</sup> Ibid at [3.1]

<sup>18</sup> Ibid at [3.2]

<sup>19</sup> Ibid at [3.3]

<sup>20</sup> Ibid at [3.4]

<sup>21</sup> Ibid at [3.5]

<sup>22</sup> Ibid at [3.6]

- the membership dues for all workers joining the Alliance will initially be set at the rate of \$20.00 per week (\$1,040.00 per year);<sup>23</sup>
- membership of the Alliance will provide the members with access to the collective benefits provided by both signature organisations to members;<sup>24</sup>
- the costs associated with the Alliance will be shared on a 50/50 percentage basis between the signature organisations;<sup>25</sup>
- the provision of any required infrastructure (which may involve accommodation, vehicles and technology) will be agreed as between the signature organisations prior to the commencement of the campaign and any subsequent changes to the arrangements will be agreed as between the signature organisations;<sup>26</sup> and
- employment terms and conditions of dedicated resources will be determined by the respective Branch Secretaries of the signature organisations.<sup>27</sup>

[11] It seems to me plainly the case, having regard to the terms of the MOU, that the evident purpose for the establishment of the Alliance is to share and combine resources for the purposes of engaging in the joint recruitment of members and the pursuit of industrial activities to further the common interests of the signature organisations and their members in the offshore oil and gas industry in Western Australia.

[12] Messrs Heath and Cain are organisers who are to be dual accredited as an official of both organisations as noted in the MOU, and presumably these applications are intended to give effect to part of that dual accreditation.

[13] The Alliance is not one that operates nationally as between the signature organisations. It is only intended to operate in the offshore oil and gas industry in Western Australia.<sup>28</sup> Excluded from its scope and operation are all onshore hydrocarbon facilities,<sup>29</sup> work under the construction and general division of the CFMMEU's rules<sup>30</sup> and any work in the Northern Territory.<sup>31</sup>

[14] The Alliance is represented to persons in the offshore oil and gas industry in Western Australia variously as “your oil and gas union”; as giving workers the organisational and industrial strength “to collectively end the race to the bottom and stop the continual decline of wages and conditions of employment”; as members of the Alliance also “*become members of both the MUA and the AWU*”; that the Alliance is a formal partnership between the Maritime Union of Australia (MUA) and the AWU “to represent offshore production, drilling, maintenance, construction and catering workers”; and that it is “open for workers to belong to more than one union if they believe that it serves their industrial interests.”<sup>32</sup>

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<sup>23</sup> Ibid at [3.7]

<sup>24</sup> Ibid at [3.8]

<sup>25</sup> Ibid at [3.9]

<sup>26</sup> Ibid at [3.10]

<sup>27</sup> Ibid at [3.11]

<sup>28</sup> Transcript of proceedings dated 24 April 2019 at PN604

<sup>29</sup> Ibid at PN605

<sup>30</sup> Ibid at PN606-PN607; PN642

<sup>31</sup> Ibid at PN608

<sup>32</sup> Exhibit 10

[15] The Alliance is also promoted by means of an “Offshore Alliance Fact Sheet”<sup>33</sup> (Fact Sheet) which is authorised by the AWU and the CFMMEU.<sup>34</sup> It is jointly distributed by the organisations, is responsive to questions from offshore workers,<sup>35</sup> and is available to potential members providing answers to questions about the coverage of the Alliance in the offshore construction and maintenance sector.<sup>36</sup>

[16] There are some questionable representations that are made in the various documents that are circulated by the AWU and the CFMMEU about the Alliance. As with some other information promoting the Alliance,<sup>37</sup> the Fact Sheet provides that it “is open for workers to belong to more than one union if they believe that it serves their industrial interests.”<sup>38</sup> Mr Daniel Walton, the National Secretary of the AWU, gave evidence that this representation reflected the position of the AWU and the CFMMEU and that it is simply a matter of choice as to which organisation a person belongs.<sup>39</sup> He said that if a worker was a member of the Alliance, irrespective of whether the MUA had eligibility to represent that particular person, the MUA could represent that member.<sup>40</sup> This is plainly not correct. Eligibility for membership of the AWU and the CFMMEU is determined by their respective eligibility rules. A person who is not otherwise eligible to become a member of the CFMMEU cannot by dint of membership of the Alliance become eligible to be a member of the CFMMEU.

[17] This perhaps is the point that is sought to be made in response to the question “Is My Job Classification Covered by the Offshore Alliance?”. The response provides:

“The combined constitutional coverage of both the MUA and AWU means that all offshore workers can become members of the Offshore Alliance.”<sup>41</sup>

[18] However, the sentence which immediately follows that “[U]nion membership is a matter of choice and it is up to individual workers which union they believe best represents their interests”<sup>42</sup> is apt to confuse. Though it is true that a person who is eligible to be a member of more than one union because of overlapping coverage may choose as between those unions or join each of them, but the choice does not extend to joining an organisation in respect of which the person is not eligible to join simply because the individual believes that the organisation will best represent his or her interests.

[19] The Fact Sheet also represents that “production and catering workers are exclusively represented by the Offshore Alliance.”<sup>43</sup>

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<sup>33</sup> Exhibit 15

<sup>34</sup> Transcript of proceedings dated 24 April 2019 at PN347

<sup>35</sup> Ibid at PN346

<sup>36</sup> Ibid at PN359 and PN376

<sup>37</sup> See for example Exhibit 10

<sup>38</sup> Exhibit 15

<sup>39</sup> Transcript of proceedings dated 24 April 2019 at PN646

<sup>40</sup> Ibid at PN650-PN651

<sup>41</sup> Exhibit 15

<sup>42</sup> Ibid

<sup>43</sup> Ibid

**[20]** Responding to a question “[H]ow Can I Join the Offshore Alliance?”, and after explaining the need to complete an application form, the Fact Sheet provides:

“...Current members of the MUA and AWU who sign up with the Offshore Alliance will stop paying union dues to the MUA and AWU and instead will pay their dues to the Offshore Alliance (where they will become members of both the MUA and the AWU).”<sup>44</sup>

**[21]** Again, the statement that “they will become members of both the MUA and the AWU” is not accurate in respect of any person who joins the Alliance but is not eligible to be a member of both organisations. As earlier noted, and without embarking upon a detailed analysis of the respective eligibility rules of the organisations, there is little if any overlapping coverage as between the AWU and the CFMMEU in the offshore oil and gas industry in Western Australia. The evidence discloses that the AWU will require the Alliance Organisers to use the Fact Sheet in promoting the Alliance.<sup>45</sup>

**[22]** Recruitment of members to join the Alliance will occur through a document described as “Application for Membership of the Australian Workers’ Union and the Construction, Forestry, Maritime, Mining and Energy Union”<sup>46</sup> (Application form). The document is comprised of two pages. One page requiring completion of personal, employment and payment details and the other containing some information about the Alliance and emblazoned with AWU MUA Alliance logo and separate logos of each organisation.

**[23]** The Application form describes the “Offshore Alliance” as combining:

“... the strength of the AWU and MUA to provide our members the benefits of both unions and a powerful voice campaigning for your workplace rights.”<sup>47</sup>

**[24]** The reference to “members” above is intended to be to both members of the AWU and the MUA.<sup>48</sup> The Application form provides that to find out more, a website is available or one may “call Alliance Organisers” which includes Danny Cain.<sup>49</sup> Mr Cain’s contact details on the Application form are his MUA email address and a mobile telephone number.<sup>50</sup> It was accepted by Mr Walton that the Application form represented that Mr Cain was a person from whom a person could find out more about the Alliance.<sup>51</sup>

**[25]** The Application form also provides that members of the Alliance have access to representation for industrial, disciplinary matters and confidential advice; representation for unfair dismissal cases and recovery of underpayments; and representation and assistance in Occupational Health and Safety matters.<sup>52</sup> Mr Walton explained that the reference to

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<sup>44</sup> Ibid

<sup>45</sup> Transcript of proceedings dated 24 April 2019 at PN663

<sup>46</sup> Exhibit 5

<sup>47</sup> Ibid

<sup>48</sup> Transcript of proceedings dated 24 April 2019 at PN508

<sup>49</sup> Exhibit 5

<sup>50</sup> Ibid

<sup>51</sup> Transcript of proceedings dated 24 April 2019 at PN512-PN513

<sup>52</sup> Exhibit 5

representation for “industrial” matters included bargaining for a new enterprise agreement with employers.<sup>53</sup>

[26] Under the heading “Benefits of Offshore Alliance Membership” in the Application form, there is an image of a handshake, under which there is a reference to “Collective Agreements”. Mr Walton explained that this is intended to represent that both organisations will represent anyone who signs up to the Alliance in collective bargaining with employers for new enterprise agreements.<sup>54</sup>

[27] On the page headed “Application For Membership” as already noted, there follows the words “of the Australian Workers' Union and the Construction, Forestry, Maritime, Mining and Energy Union”<sup>55</sup> which as Mr Walton accepted represents to persons who may wish to join to the Alliance that, by joining the Alliance, the person would become a member of both the AWU and the CFMMEU.<sup>56</sup>

[28] As earlier noted, on this page there is provision for an applicant to provide personal and employment details in the left-hand columns.<sup>57</sup> In the right-hand columns there is provision for payment details, which authorises the AWU to deduct monies for the amounts that are to be paid.<sup>58</sup> At the bottom left-hand corner of the page there is a space for the applicant to sign the Application form.<sup>59</sup> Immediately above the place for signature is a declaration which is in the following terms:

“I, the undersigned, being eligible to be a member of The Australian Workers’ Union, West Australian Branch, hereby make application for membership of The Australian Workers’ Union, a Federal Union registered under the Fair Work Act 2009, and The Australian Workers' Union, West Australian Branch, Industrial Union of Workers, a Union registered under the Industrial Relations Act 1979, and pledged that I will abide by the Rules and Constitution of both Unions (Federal and State) and any amendments thereto. Resignation notification should be in writing to an officer of this Branch and members should be financial at time of notice. To resign I agree to inform the union of my intention in writing.”<sup>60</sup>

[29] A privacy statement appears at the bottom right-hand corner of that page that requires the AWU to preserve the privacy of the person who completes the Application form.<sup>61</sup> Mr Walton accepted that there is no authority in the privacy statement or the Application form authorising the AWU to share any information with the CFMMEU,<sup>62</sup> although he suggested

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<sup>53</sup> Transcript of proceedings dated 24 April 2019 at PN516

<sup>54</sup> Ibid at PN520

<sup>55</sup> Exhibit 5

<sup>56</sup> Transcript of proceedings dated 24 April 2019 at PN528

<sup>57</sup> Exhibit 5

<sup>58</sup> Ibid

<sup>59</sup> Ibid

<sup>60</sup> Ibid

<sup>61</sup> Ibid

<sup>62</sup> Transcript of proceedings dated 24 April 2019 at PN563

that it would not be improper for the material to be shared with the CFMMEU.<sup>63</sup> The Application form is the only form that provides for “membership” of the Alliance<sup>64</sup> and a large number of people have signed up to join the Alliance using the Application form.<sup>65</sup>

[30] Following the signing of the MOU, Mr Walton said, *inter alia*, that pursuant to the MOU, the AWU and MUA had each supplied an organiser to work full-time on the Alliance, that it would have a single application form and that workers would effectively be members of both organisations which would split the membership fees 50/50.<sup>66</sup>

[31] The Maritime Division of the CFMMEU also posted on it’s website under the media centre menu a communication in which Mr Will Tracey, CFMMEU Maritime Division Deputy National Secretary, is quoted as saying that “the Offshore Alliance will have a single application form with workers effectively becoming members of both unions, which would split the membership fees”; and that “with over 40 platforms, plants and offtake tankers operating in WA, and some 20,000 employees in the oil and gas sector, both unions said they have a responsibility to ensure workers get a fair deal from the resource companies.”<sup>67</sup> During his evidence, Mr Walton accepted that the comments attributed to Mr Tracey reflect the Alliance arrangement<sup>68</sup> and that Mr Tracey’s reference to a “single application form” is to the Application form.<sup>69</sup>

[32] Mr Tracey has also been reported as saying that “members in WA’s offshore gas sector will get access to the resources and benefits of both unions.”<sup>70</sup> Mr Walton gave evidence that this comment is endorsed by the AWU<sup>71</sup> and reflects the position that the Alliance is aiming to promote to potential members who sign up to the Alliance those benefits.<sup>72</sup> Mr Walton also gave evidence that the reference to “access” in the quote attributed to Mr Tracey, includes access to the resources of both unions including in respect of bargaining for new enterprise agreements.<sup>73</sup>

[33] In the earlier mentioned communication posted on the website of the Maritime Division of the CFMMEU, Mr Tracey is quoted as saying that by working together the AWU and MUA pooling their resources would have a real opportunity to “do what we couldn’t do by ourselves”; that the “Offshore Alliance will have a single application form with workers effectively becoming members of both unions, which would split the membership fees”; that the Alliance would enable the two unions to “work cooperatively to organise offshore workers

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<sup>63</sup> Ibid at PN564 – PN565

<sup>64</sup> Ibid at PN527

<sup>65</sup> Ibid at PN525-PN526

<sup>66</sup> Exhibit 8

<sup>67</sup> Exhibit 9

<sup>68</sup> Transcript of proceedings dated 24 April 2019 at PN382

<sup>69</sup> Ibid at PN396-PN397

<sup>70</sup> Exhibit 8

<sup>71</sup> Transcript of proceedings dated 24 April 2019 at PN393

<sup>72</sup> Ibid at PN391-PN393

<sup>73</sup> Ibid at PN394-PN395



and be a powerful voice for workers' rights"; and that "members in WA's offshore gas sector will get access to the resources and benefits of both unions."<sup>74</sup>

**[34]** Through the various documents and statements referred to above, the AWU and the CFMMEU make various representations to persons in the offshore oil and gas industry in Western Australia. Some are accurate, some are not. A number are just wrong. The representations, expressly made or which could be said to arise as implications from representations made, include the following:

- the CFMMEU is entitled to represent the industrial interests of all offshore oil and gas workers in Western Australia. This, as is evident from the brief coverage discussion earlier, is incorrect;
- the CFMMEU is entitled to, and will attempt to, represent the industrial interests of persons employed in the catering/cleaning, maintenance and production sectors of the offshore oil and gas industry in Western Australia who sign up to the Alliance. For the reasons already noted, there is no such general entitlement;
- "members" of both organisations will have access to representation from both organisations for industrial matters and the benefits of collective agreements and representation in bargaining for new collective agreements;
- a person may choose the union or unions to which the person belongs in the offshore oil and gas industry in Western Australia. For reasons earlier given, this is inaccurate. Membership of a union is not simply a matter of choice but is conditioned on whether a person is eligible for membership of that union in accordance with its rules;
- by signing the Application form, employees in the offshore oil and gas industry in Western Australia will become "members" of the CFMMEU and the AWU. This is also inaccurate. By signing the Application form, employees in the offshore oil and gas industry in Western Australia, who are not members of the CFMMEU, do not become members of both the CFMMEU and the AWU. Despite all the colour and movement in the Application form, in truth, it is an application for membership of the AWU, the Federally registered organisation and the corresponding State registered union, as the fine print discloses; and
- the CFMMEU and AWU are entitled to exclusively represent the industrial interests of production workers. This is inaccurate as the CFMMEU is not entitled to represent the industrial interests of those persons.

**[35]** In his evidence, Mr Walton acknowledged that some of the representations were not correct or were misleading,<sup>75</sup> although he would not accept that a person signing the Application form, who was not a member of the CFMMEU, would not become a member of the CFMMEU and the AWU pursuant to the Application form.<sup>76</sup> In this regard, he is plainly wrong.

**[36]** Mr Cain is, and has been, a full time employee of the MUA, and now the CFMMEU, since 11 April 2011 and an elected official, Assistant Branch Secretary of the Western Australian Branch of the MUA (now Maritime Division of the CFMMEU), for a term of four

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<sup>74</sup> Exhibit 9

<sup>75</sup> Transcript of proceedings dated 24 April 2019 at PN322-PN324; PN437; PN556-PN557; PN624

<sup>76</sup> Ibid at PN665-PN669

years commencing 1 July 2015.<sup>77</sup> His normal work hours were and remain 8:30am to 5:00pm plus additional hours as required to fulfil his duties in accordance with the needs of the CFMMEU.<sup>78</sup>

[37] On 5 December 2012, Mr Cain signed a letter from the AWU dated 3 December 2012 purporting to offer him the “position of National Organiser (Offshore Oil and Gas) with the” AWU.<sup>79</sup> The letter relevantly stated:

“...In doing so, I refer to your employment with the Maritime Union of Australia (MUA). Your conditions of employment will be the same as you currently enjoy at the MUA. Your salary will continue to be paid by the MUA and this organisation will make the necessary arrangements with the MUA.

If you accept this offer of employment, your employment will be with both organisations and you will be expected to perform duties for the MUA and this organisation. As such you will be a joint employee of both organisations. This offer employment has been the subject of discussion between the MUA and this organisation, and the MUA has no objection to you accepting this offer of joint employment.

As a joint employee of both organisations you will be responsible to the National Secretary of the AWU when performing duties for this organisation.”<sup>80</sup>

[38] There is no material before me that would suggest that the terms and conditions which pertain to Mr Cain’s employment and office within the CFMMEU were altered by reason of his acceptance of the above-mentioned offer, save that there is an indication in the letter of offer that the MUA had knowledge of the offer and did not object to Mr Cain accepting the offer.

[39] Through his period of employment with and office in the MUA and CFMMEU and until mid-March 2019, Mr Cain was paid a full salary as a full time organiser and then as a full time Assistant Branch Secretary of the MUA/CFMMEU by the MUA/CFMMEU and he was not paid a salary by the AWU.

[40] Mr Cain’s duties as an official of the WA Branch of the Maritime Division of the CFMMEU include recruiting members, negotiating enterprise agreements, representing members’ industrial interests and advancing the industrial and working interests of employees in all relevant areas of coverage of the CFMMEU.<sup>81</sup> He is obliged to act in the best interests of the CFMMEU<sup>82</sup> and doubtless he owes a fiduciary duty to the organisation.

[41] In fulfilling his duties of recruitment, Mr Cain will try to enrol persons as members of the CFMMEU who are eligible to be members pursuant to the Maritime Division of the

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<sup>77</sup> See Exhibits 23 and 25

<sup>78</sup> Ibid

<sup>79</sup> Exhibit 24

<sup>80</sup> Ibid

<sup>81</sup> Transcript of proceedings dated 24 April 2019 at PN949-PN953

<sup>82</sup> Ibid at PN954

CFMMEU's eligibility rules,<sup>83</sup> and he recognises that he is not entitled to enrol persons as members of the CFMMEU who are not eligible to be members under the relevant eligibility rules.<sup>84</sup> Part of his duties also include the collection of union dues and making sure that members pay their dues to the CFMMEU, that is, that members are and remain financial members of the CFMMEU.<sup>85</sup>

[42] Mr Cain is also an organiser for the Alliance. He is provided by the CFMMEU pursuant to the MOU. The delineation as between Mr Cain as an official of the CFMMEU, as a National Organiser with the AWU and as an organiser for the Alliance, it must be said is less than clear. For example, the evidence discloses that Mr Cain represents himself to members, potential members and employers in the offshore oil and gas industry as a CFMMEU official and he seeks to be the CFMMEU official who represents employees in the offshore oil and gas industry as a bargaining representative of employees who have signed up to the Alliance.<sup>86</sup>

[43] There is no office accommodation for the Alliance nor does the AWU provide Mr Cain with any office accommodation or other facilities; his base is the CFMMEU office in Freemantle and he does not attend the AWU offices at all.<sup>87</sup> Mr Cain's email contact details on the Application form used to recruit members to the Alliance are of the MUA.<sup>88</sup>

[44] Mr Cain said that his time is split between work for the MUA and the AWU and that he uses his discretion in respect of prioritising work commitments. He said that in his role he reported to Shane Roulstone who is the National Organiser for the AWU but that he was ultimately responsible to the National Secretary of the AWU and the AWU National Executive. He said that he liaised closely with Craig Beveridge and Doug Heath who are organisers with the AWU and that he spoke with these individuals several times per week.<sup>89</sup>

[45] It is uncontroversial that Mr Cain has previously held right of entry permits in his capacity as an official of the AWU.<sup>90</sup>

[46] Mr Heath commenced employment as an organiser working within the WA Branch of the Maritime Division of the CFMMEU on 17 September 2018. The role description describes Mr Heath's job purpose as "to develop and sustain the structures of the union and build and sustain membership in the workplace" and "to provide organising assistance and support to the Western Australian Branch Officers, particularly in the identified areas of growth."<sup>91</sup> Mr Heath's hours of work and his duties as set out in the role description<sup>92</sup> are in essence the same as those pertaining to Mr Cain earlier described.

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<sup>83</sup> Ibid at PN955

<sup>84</sup> Ibid at PN956

<sup>85</sup> Ibid at PN957-PN958

<sup>86</sup> See for example Exhibits 30 and 31 and Transcript at PN1097-PN1098; PN1104-PN1107; PN1156-PN1157; PN1117-PN1120; PN1537

<sup>87</sup> Transcript of proceedings dated 24 April 2019 at PN1048-PN1055

<sup>88</sup> Exhibit 5

<sup>89</sup> Exhibit 19 at [5]

<sup>90</sup> Ibid at [7]; RE2012/2157; RE2016/65

<sup>91</sup> Exhibit 40 at p.4

<sup>92</sup> Ibid at p.1

[47] By letter dated 28 November 2018, the AWU purported to formalise in writing his “position of National Organiser (Offshore Oil and Gas) with the” AWU, which was said to have commenced on 21 October 2018.<sup>93</sup> Relevantly, the letter provided:

“...In doing so, I again refer to your employment with the Maritime Division of the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU). Your conditions of employment will be the same as you currently enjoy at the CFMMEU. Your salary will continue to be paid by the CFMMEU and the AWU will make the necessary arrangements with the CFMMEU.

As you know, your employment is with both the CFMMEU and the AWU and you perform duties for both organisations. As such, you are a joint employee of both organisations. This employment has been the subject of discussion between the CFMMEU and the AWU, and the CFMMEU has no objection to you formalising in writing your acceptance of this offer of joint employment.”<sup>94</sup>

[48] Mr Heath signed the letter on 28 November 2018.<sup>95</sup> There is no material before me that would suggest that the terms and conditions which pertain to Mr Heath’s employment within the CFMMEU were altered by reason of his acceptance of the above-mentioned offer, save that there is an indication in the letter of offer that the CFMMEU had knowledge of the offer and did not object to Mr Heath accepting it. Mr Heath is also an organiser for the Alliance and is provided by the CFMMEU pursuant to the MOU. As with Mr Cain, the delineation between Mr Heath as an organiser of the CFMMEU, as a National Organiser with the AWU and as an organiser for the Alliance, is less than clear. Many of the matters discussed earlier in respect of Mr Cain also apply to Mr Heath.

[49] Mr Heath was on unpaid leave on commencing his employment with the CFMMEU and until 15 October 2018. Thereafter and until mid-March 2019, Mr Heath was paid a full salary as an organiser of the CFMMEU by the CFMMEU and he was not paid a salary by the AWU.

[50] On 19 February 2019, a circular letter to members of the National Executive of the AWU containing a postal ballot was sent.<sup>96</sup> Attached was a ballot paper containing the following resolution on which members of the National Executive were asked to vote by postal ballot:

“The AWU National Executive resolves that:

The Offshore Alliance between the AWU and the MUA (now a Division of the CFMMEU) has operated in Western Australia since the early 2000s. The AWU National Executive has carried various resolutions approving the implementation of the Offshore Alliance and all its relevant arrangements including the sharing of

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<sup>93</sup> Exhibit 35

<sup>94</sup> Ibid

<sup>95</sup> Ibid

<sup>96</sup> Exhibit 6

resources and the utilisation of organisations that are employed by both the AWU and the MUA.

The AWU National Executive has been advised that the Australian Mines and Metals Association Inc. (“AMMA”) has recently escalated its efforts to try and frustrate the Offshore Alliance. This has included opposing applications by the AWU for right of entry permits for AWU employees that are also employed by the MUA Division of the CFMMEU. AMMA has recently queried whether the employment by the AWU of individuals who also work for the MUA Division of the CFMMEU has been approved by the AWU National Executive in accordance with AWU Rule 60(7). This rule is directed at qualifications for holding office in the AWU.

To avoid any doubt about the validity of the current arrangements, the AWU National Executive hereby confirms that the employment by the AWU of individuals who also work for the MUA (now a Division of the CFMMEU) was confirmed prior to the commencement of the Offshore Alliance and is specifically approved for the following individuals:

- Daniel Cain
- Douglas Heath
- Jeffrey Cassar<sup>97</sup>

[51] Sixteen ballots were distributed to members of the National Executive and 14 ballot papers were returned by the close of the ballot which was 4:00pm on 21 February 2019. The resolution was carried by 14 votes to nil.<sup>98</sup> On 22 February 2019, Messrs Cain and Heath signed letters which purported to be a variation of their contracts of employment with the AWU.<sup>99</sup> Each letter is in essentially the same form. For convenience, I set out below the relevant paragraphs of the letter to Mr Cain which provide:

“To that end, the AWU proposes the following variations to your permanent employment contract dated 3 December 2012:

1. All references to you being a "joint employee" will not apply. The term "joint employee" can have a technical meaning that was not intended to apply in relation to your employment with the AWU. This change simply clarifies that you have employment relationships with both the AWU and the Construction, Forestry, Maritime, Mining and Energy Union ("CFMMEU").
2. You will be paid an annual salary of \$24,000 (gross) plus superannuation by the AWU in compensation for you performing an average of 10 ordinary hours of work per week for the AWU. Your salary will be paid on a monthly basis in arrears. You will receive a payment for February 2019 in early March 2019.

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<sup>97</sup> Ibid

<sup>98</sup> Exhibit 7

<sup>99</sup> Exhibits 26 and 36

I have spoken with Paddy Crumlin (CFMMEU - MUA Division National Secretary) about the variations identified above in the context of the Offshore Alliance arrangements and can confirm that the CFMMEU is supportive of the changes.

These variations do not alter your employment conditions with the CFMMEU- any changes to those terms would need to be negotiated between you and CFMMEU. To avoid doubt, you will continue being responsible to the AWU National Secretary in accordance with your employment contract dated 3 December 2012 and you must continue acting in accordance with all applicable AWU policies and procedures.

If the variations identified above are acceptable, please confirm this by signing in the appropriate space below. The variations will commence operating immediately when this document has been signed by both parties.”<sup>100</sup>

**[52]** AMMA contends that neither of the proposed permit holders are, or at least that the applicant has not established that they are, in a true employment relationship with the AWU.

**[53]** Whether an employment relationship exists is a question of fact which requires an examination of the real substance of the relationship between the parties. There are a range of indicia which inform the question of whether there is in truth an employer employee relationship between the relevant parties. One of the ingredients is actual or substantial control.

**[54]** It must be said that I seriously doubt, on the material before me that prior to the purported variations made on 22 February 2019 of the contracts of employment said to exist between the AWU and Messrs Cain and Heath, whether either was in an employment relationship with the AWU. There is no evidence of any payment of wages by the AWU to either of the proposed permit holders from the commencement of the so-called employment until the variation earlier this year. There is no document before me which suggests that either of the proposed permit holders identified themselves as employees or officials of the AWU as opposed to officials of the CFMMEU and sometimes as being associated with the Alliance. There is no evidence that either official attended the offices of the AWU or that they were provided any support or infrastructure in order that they might carry out the duties arising from the purported employment relationship. No group certificates or payslips were produced which would show that the AWU made payments of wages to the purported employees.

**[55]** The letters purporting to be contracts of employment by themselves provide an insufficient basis for concluding the existence of an employment relationship. In truth, the purported contracts of employment do not appear to be supported by any consideration flowing to either of the proposed permit holders in the arrangement in return for their promise to perform work. On its face, the arrangement appears to be nothing more than the CFMMEU/MUA making available two of its officials to perform work for the AWU pursuant to which the AWU would reimburse to the CFMMEU/MUA the cost of wages incurred by CFMMEU/MUA in respect of Messrs Cain and Heath.

**[56]** The purported contractual variations made on 22 February 2019 however, had a material impact on the arrangement. It was in truth an offer of part-time employment by the

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<sup>100</sup> Exhibit 26

AWU in respect of which each of Messrs Cain and Heath would be required to perform work for a fixed number of hours per week as organisers in respect of which they would be paid an annual salary of \$24,000 plus superannuation. Whether or not the parties proceeded upon the mistaken belief that there was already in existence an employment relationship does not change the character of that which has existed since 22 February 2019. The essential work wage bargain now exists. Messrs Cain and Heath perform duties as organisers for the AWU pursuant to the reporting structures set out in the 22 February 2019 correspondence and there is evidence that each of has been paid wages by the AWU pursuant to the arrangement.<sup>101</sup> There is also evidence that both Messrs Cain and Heath have completed induction training with the AWU in their capacities as part-time employees of the AWU.<sup>102</sup>

**[57]** I am satisfied on the material before me that at least since 22 February 2019, Messrs Cain and Heath were part-time employees each in the position of an organiser, of the AWU. I also note the employment is authorised by resolution of the AWU National Executive of 21 February 2019.

**[58]** Although it is unlikely that either of the proposed permit holders was an employee of the AWU at the time that the applications for entry permits were made in December 2018, that is not fatal to the application as ultimately I need to be satisfied that at the time that I consider whether an entry permit should be issued that relevantly each of the proposed permit holders is an official of the AWU. I am so satisfied. To the extent that it is necessary to do so, in order to avoid delay and the incurring of unnecessary expenditure by requiring fresh applications, and so that unnecessary technicalities are avoided and I can deal with the substantive merits of the matters, I propose pursuant to s.586(b) of the Act to waive the irregularity in the form or manner in which the application for right of entry permits was made to the Commission.

**[59]** I turn then to consider the substance of the applications. Subdivision A, Division 6 of Part 3–4 of the Act contains provisions dealing relevantly with issuing entry permits to officials of registered organisations. Section 512 of the Act provides that the Commission may, on application, issue a right of entry permit to an official of an organisation if it is satisfied that the official is a fit and proper person to hold the entry permit. Section 513 of the Act contains a number of matters described as permit qualification matters that the Commission must take into account in deciding whether an official is a fit and proper person to hold an entry permit. The matters are:

- whether the official has received appropriate training about the rights and responsibilities of a permit holder;
- whether the official has ever been convicted of an offence against an industrial law;
- whether the official has ever been convicted of an offence against a Federal, State/Territory or foreign law involving entry onto premises, fraud or dishonesty or intentional use of violence against another person or intentional damage or destruction of property;
- whether the official or any other person has ever been ordered to pay a penalty under the Act or other industrial law in relation to the action taken by the official;

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<sup>101</sup> Exhibit 22; Exhibit 38

<sup>102</sup> Exhibit 21; Exhibit 37

- whether a permit issued to the official under the Act or similar law of the Commonwealth has been revoked, suspended or made subject to conditions;
- whether a court or other person or body under State/Territory law or OHS law has cancelled, suspended or imposed conditions on a permit for industrial or OHS purposes or disqualified the official from exercising or applying for a right of entry for industrial or OHS and purposes; and
- any other matters that the Commission considers relevant.

[60] Section 514 of the Act restricts the Commission's power to issue a right of entry permit at a time when a suspension or disqualification imposed by a court or other person or body applies to the official's exercise of or prevents the official from exercising or applying for a right of entry for industrial or OHS purposes under a State/Territory industrial or OHS law.

[61] Section 515 of the Act gives the Commission power to impose a condition on a right of entry permit when it is issued and in deciding whether to do so, the Commission must take into account the permit qualification matters to which earlier reference has been made.

[62] The operation of these provisions and their application is now well settled. In previous decisions I summarised the relevant principles and without repetition I adopt what is therein said.<sup>103</sup> In short compass however, the assessment of whether an official of an organisation is a fit and proper person to hold an entry permit requires taking into account the permit qualification matters set out in s.513 of the Act considered in the context of the rights the holder of an entry permit may exercise under the Act, the limitations on and conditions attaching to the exercise of those rights and the responsibilities that must be exercised in respect of those rights.

[63] A statutory requirement that a matter be taken into account means that the matter is a 'relevant consideration' in the sense discussed in *Minister for Aboriginal Affairs and Another v Peko-Wallsend Limited and Others (Peko-Wallsend)*,<sup>104</sup> that is, it is a matter which the decision maker is bound to take into account. The obligation to take into account the matters set out at s.513 means that each of the matters must be treated as a matter of significance in the decision-making process.<sup>105</sup> As Wilcox J said in *Nestle Australia Ltd v Deputy Federal Commissioner of Taxation*:<sup>106</sup>

"To take a matter into account means to evaluate it and give it due weight, having regard to all other relevant factors. A matter is not taken into account by being noticed and erroneously discarded as irrelevant."<sup>107</sup>

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<sup>103</sup> See for example *Construction, Forestry, Mining and Energy Union-Construction and General Division, Victoria-Tasmania Divisional Branch* [2017] FWC 666 at [4]–[8]

<sup>104</sup> [1986] HCA 40; (1986) 162 CLR 24; see also *Griffiths v The Queen* (1989) 167 CLR 372 at 379; *Ho v Professional Services Review Committee No 295* [2007] FCA 388 at [23]–[26] and *Hasim v Attorney-General of the Commonwealth* [2013] FCA 1433; (2013) 218 FCR 25 at [65]

<sup>105</sup> See *Friends of Hinchinbrook Society Inc v Minister for Environment (No 3)* (1997) 77 FCR 153; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121; *Edwards v Giudice* [1999] FCA 1836 and *National Retail Association v Fair Work Commission* [2014] FCAFC 118

<sup>106</sup> (1987) 16 FCR 167 cited with approval by Hely J in *Elias v Federal Commissioner of Taxation* (2002) 123 FCR 499 at [62] and by Katzmann J in *CFMEU v FWA* (2011) 195 FCR 74 at [103]

<sup>107</sup> (1987) 16 FCR 167 at 184



**[64]** The weight given to a particular matter is ultimately a matter for the Commission subject to some qualification. As Mason J explained in *Peko-Wallsend*:<sup>108</sup>

“It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power. ... I say "generally" because both principle and authority indicate that in some circumstances a court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is "manifestly unreasonable".<sup>109</sup>

**[65]** Having regard to the structure and content of s.513, in deciding whether an official of a registered organisation is a fit and proper person to hold an entry permit, all of the permit qualification matters identified in s.513(1) of the Act must be taken into account. Whilst it will often be the case that the likely area of focus and attention during a contested application will be on contravening conduct of an official giving rise to the matters identified in s.513(1)(d) of the Act, the other permit qualification matters cannot be ignored and must be given appropriate weight. The absence of, for example, a conviction of an official of an offence against a law of the Commonwealth relating to or involving fraud or dishonesty, is relevant in the assessment, just as a conviction of the official for such an offence would be. The absence of such a conviction must be accorded appropriate weight.

**[66]** Turning first to the position of Mr Cain. As already noted, Mr Cain has at least since 22 February 2019 been employed by the AWU as a part-time organiser and is thus an official of the AWU. As the material earlier set out also shows, Mr Cain has been and remains a long-standing employee and official of the CFMMEU. He has held entry permits as an official of the MUA/CFMMEU.<sup>110</sup> One of these remains current.<sup>111</sup> Mr Cain has also held entry permits purportedly as an official of the AWU.<sup>112</sup>

**[67]** According to declarations filed in support of the application for a permit to be issued to Mr Cain:<sup>113</sup>

- he has received appropriate training about the rights and responsibilities of a permit holder as evidenced by the training certificate dated 3 December 2018 (section 513(1)(a));
- he has not been convicted of an offence against an industrial law (section 513(1)(b));

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<sup>108</sup> [1986] HCA 40; (1986) 162 CLR 24

<sup>109</sup> Ibid at [15], pp.39-41

<sup>110</sup> RE2011/2913; RE2014/810 and RE2017/478

<sup>111</sup> RE2017/478

<sup>112</sup> RE2012/2157 and RE2016/65

<sup>113</sup> Exhibit 1; Exhibit 18

- he has not been convicted of an offence against a law of the Commonwealth, a State, a Territory or a foreign country, involving entry onto premises, or fraud or dishonesty or intentional use of violence against another person or intentional damage or destruction of property (section 513(1)(c));
- neither he nor any other person has ever been ordered to pay a penalty under this Act or any other industrial law in relation to action taken by him (section 513(1)(d));
- he has not had a permit issued to him under Part 3-4 of the Act, or under a similar law of the Commonwealth (no matter when in force) revoked or suspended or made subject to conditions (section 513(1)(e)); and
- no court, or other person or body, under a State or Territory industrial law or a State or Territory OHS law has ever “cancelled, suspended or imposed conditions on a right of entry held by Mr Cain for industrial or occupational health and safety purposes, or disqualified him from exercising, or applying for, a right of entry for industrial or occupational health and safety purposes” (section 513(1)(f)).

[68] All the matters just discussed are not contested (save for the weight that is to be attributed to the training in the circumstances of this case) and plainly the matters weigh in favour of a conclusion that Mr Cain is a fit and proper person to hold an entry permit. I will return later to consider other matter for the purposes of s.513(1)(g) of the Act.

[69] Turning then to consider the position of Mr Heath, he has at least since 22 February 2019 been employed by the AWU as a part-time organiser and is therefore an official of the AWU. As the material earlier set out also shows, Mr Heath has been and remains an employee and official of the CFMMEU. He has held several permits previously and currently holds an entry permit in his capacity as a CFMMEU official.<sup>114</sup> A condition attaches to that permit as well as an earlier issued permit<sup>115</sup> as follows:

If any penalty is imposed on Mr Heath in relation to the events that form the subject of the Chevron case, Mr Heath must notify the Fair Work Commission within two weeks of the date that the penalty is imposed.

[70] The existence of the condition was not disclosed in the original declarations filed with the application. Mr Walton said that he had made proper inquiries about relevant matters before completing the first declaration,<sup>116</sup> and that he was not aware of the imposition of the condition on Mr Heath’s right of entry permit as an official of the CFMMEU at the time that he completed the first declaration.<sup>117</sup> The first declaration discloses that the only step that Mr Walton took was to cause to be sent to Mr Heath by email on 4 December 2018 a request seeking confirmation about the permit qualification matters and relying on Mr Heath’s response, which turns out to be erroneous, also in an email on 4 December 2018.<sup>118</sup>

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<sup>114</sup> RE2018/1127

<sup>115</sup> RE2018/458

<sup>116</sup> Transcript of proceedings dated 24 April 2019 at PN748

<sup>117</sup> Ibid at PN749

<sup>118</sup> Exhibit 2

[71] Members of a Committee of Management of an organisation which is applying for an entry permit who make declarations about permit qualification matters ought to take more steps than simply rely upon the statements made to them by the proposed permit holder. It would not have been difficult for Mr Walton to ask Mr Heath to produce his right of entry permit which would have on its face disclosed the existence of a condition. An enquiry could also have been made of the Commission. I did not accept at all that Mr Walton made proper inquiries. The Commission relies upon the declarations filed in support of applications for the issuing of right of entry permits. It is entitled to expect that officials completing declarations take more steps than to simply rely upon statements uttered by proposed permit holders as to the permit qualification matters. The permit holder in this case plainly did not see the need to look at his own permit on which the condition imposed is clear. The barest of enquiry that was made in this case by Mr Walton is simply not good enough.

[72] Mr Heath said that his first declaration<sup>119</sup> in which he failed to disclose the condition was an error.<sup>120</sup> I accept his evidence, in the sense that Mr Heath did not set out to deliberately make a false declaration, but I observe that the error was very careless in circumstances where the decision to issue the permit with the condition was made on 22 November 2018<sup>121</sup> and the permit containing the condition was issued on 3 December 2018, the day before Mr Heath sent his email to Mr Walton and two days before he made the declaration on 5 December 2018. One would have thought that the imposition of a condition on an entry permit so recently issued would have been burned into his memory and in any event he ought to have looked at the permit before making the declaration. A proposed permit holder who makes a declaration ought to take the making of the declaration much more seriously than Mr Heath appears to have done in this case. This is a matter that I take into account and weigh it against the assessment whether Mr Heath is a fit and proper person to hold an entry permit.

[73] According to amended declarations filed in support of the application for a permit to be issued to Mr Heath:<sup>122</sup>

- he has received appropriate training about the rights and responsibilities of a permit holder as evidenced by the training certificate dated 30 November 2018 (section 513(1)(a));
- he has not been convicted of an offence against an industrial law (section 513(1)(b));
- he has not been convicted of an offence against a law of the Commonwealth, a State, a Territory or a foreign country, involving entry onto premises, or fraud or dishonesty or intentional use of violence against another person or intentional damage or destruction of property (section 513(1)(c));
- neither he nor any other person has ever been ordered to pay a penalty under this Act or any other industrial law in relation to action taken by him (section 513(1)(d));

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<sup>119</sup> Exhibit 33

<sup>120</sup> Transcript of proceedings dated 24 April 2019 at PN1352

<sup>121</sup> *Construction, Forestry, Maritime, Mining and Energy Union - The Maritime Union of Australia Division* [2018] FWC 7170

<sup>122</sup> Exhibit 3; Exhibit 34

- he has not had a permit issued to him under Part 3-4 of the Act, or under a similar law of the Commonwealth (no matter when in force) revoked or suspended but has had his current entry permit issued with the condition earlier noted (section 513(1)(e)); and
- no court, or other person or body, under a State or Territory industrial law or a State or Territory OHS law has ever “cancelled, suspended or imposed conditions on a right of entry held by Mr Heath for industrial or occupational health and safety purposes, or disqualified him from exercising, or applying for, a right of entry for industrial or occupational health and safety purposes” (section 513(1)(f)).

[74] The matters just discussed are not contested and save for the imposed condition, they weigh in favour of a conclusion that Mr Heath is a fit and proper person to hold an entry permit.

[75] Mr Heath’s amended declaration also discloses the following:

- (i) I was named as a a (sic) respondent in *Jeff Radisich v Michael Buchan, Doug Heath, Walter Molina and Construction, Forestry Mining and Energy Union* [2008] AIRC 896 and the consequential consent orders with reference PR984581. However, no order to revoke, suspend or to impose conditions on my permit were made in this matter; and
- (ii) the Federal Court of Australia made findings on my actions in *Chevron Australia Pty Ltd v The Maritime Union of Australia (No.2)* [2016] FCA 768. To date, no orders requiring me or any other person, to pay pecuniary penalties under the *Fair Work Act 2009* have been made in this matter.

[76] The first matter the subject of the disclosure was also the subject of consideration in respect of the right of entry permit issued to Mr Heath in June 2018 in *Construction, Forestry, Maritime, Mining and Energy Union – Construction and General Division, WA Divisional Branch*.<sup>123</sup> The disclosed proceedings did not result in the suspension or revocation of Mr Heath’s right of entry permit nor the imposition of any condition on that permit. The circumstances which led to the making of what was a consent order occurred more than a decade ago, and does not in my opinion present a particularly weighty consideration against a conclusion that Mr Heath is a fit and proper person to hold an entry permit.

[77] The second matter disclosed was also the subject of consideration in the aforementioned proceedings and it is as a consequence of the disclosed proceeding that the condition is imposed on his current entry permit.

[78] The disclosed proceeding concerned a finding that the organisation of the industrial action was primarily carried out by, *inter alia*, Mr Heath and that the organising of industrial action was done with the knowledge and consent of the most senior officials of the MUA. Consequently, it was concluded that the MUA has committed contraventions of s.417 of the

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<sup>123</sup> [2018] FWC 3525

Act by organising the certain industrial action during the nominal term of an enterprise agreement.<sup>124</sup> A penalty on the now CFMMEU is yet to be imposed by the Court.

**[79]** Although it is clear from the judgment that Mr Heath was central to the organising of industrial action in circumstances which led to the finding that the MUA contravened s.417 of the Act, absent the imposition of a penalty, this is not a matter which yet engages with the permit qualification matter in s.513(1)(d) of the Act, however, it is a matter that may be taken into account under s.513(1)(g). Presumably, it is for this reason that the condition was imposed on his existing permit.

**[80]** For my own part, I am not persuaded that the imposition of such a condition has any great utility, at least not in circumstances where extant proceedings do not engage with one or more of the matters which would lead to suspension or revocation of a permit under s.510 of the Act. Put another way, once the condition attaching to the permit is met in this case, what is it that the Commission will do or can do armed with that information. The short answer is nothing. The AWU does not object to the same condition which I have earlier noted that attaches to Mr Heath's entry permit issued in his capacity as a CFMMEU also attaching to any permit issued pursuant to this application.<sup>125</sup> Neither AMMA nor the Commissioner contended that the disclosed proceeding was such a significant factor as to lead to a conclusion that Mr Heath was not a fit and proper person to hold an entry permit. I agree.

**[81]** Despite my reservations as to the utility of a condition of the kind that is imposed on Mr Heath's current entry permit, I will nonetheless impose such a condition if I am satisfied that Mr Heath is a fit and proper person to hold an entry permit. I will do so in the interests of consistency but the condition will be modified to give effect to that which is evidently intended by it, as there is no prospect of penalties being imposed on Mr Heath arising out of those proceedings since he is not a respondent to them.

**[82]** I will turn now to consider other relevant matters which are raised by AMMA and the Commissioner arising from the Alliance arrangements discussed earlier and which touch upon both applications. In essence, the Commissioner raises concerns about the operation of the Alliance and the role of Messrs Cain and Heath in that Alliance and contends that if permits are to be granted there should be attached conditions which would involve a condition being imposed for a period of six months with further proceedings determining whether the condition should be extended, varied or removed. The conditions proposed would be directed to addressing the concern about the permit holder holding permits for two registered organisations and ensuring that the exercise of rights of a permit holder when attending as an official of one organisation does not encroach upon or extend to areas which are not within the coverage of that organisation. The conditions would also limit the exercise of any entry rights to the offshore hydrocarbon industry and require entry records to be kept by the proposed permit holders.<sup>126</sup>

**[83]** AMMA contends that neither Mr Cain nor Mr Heath is a fit and proper person to hold a right of entry permit. In summary, this contention is based on the following matters.

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<sup>124</sup> *Chevron Australia Pty Ltd v The Maritime Union of Australia (No.2)* [2016] FCA 768 at [109] – [110]

<sup>125</sup> AWU final submissions dated 29 April 2019 at [19]

<sup>126</sup> Australian Building and Construction Commissioner's outline of submissions dated 2 April 2019 at [41] – [46]; Australian Building and Construction Commissioner's outline of submissions in reply dated 2 May 2019 at [11] – [13]

[84] In respect of Mr Cain, the assessment whether he is a fit and proper person is to be determined by reference to the specific statutory context in which that phrase is deployed. This is also true in respect of Mr Heath. AMMA says that the activities in which Mr Cain is, or will be engaged and the ends to be served by those activities will tell against his fitness and propriety to hold an entry permit. Without repeating these matters, which are earlier summarised, they go to questions such as the representations made to persons wishing to join the Alliance by the Alliance material with which Mr Cain is associated. Representations about eligibility for membership of one or other of the organisations involved in the Alliance, representations about the capacity of one or more of the organisations to act as a bargaining representative for members of the Alliance irrespective of eligibility for membership of either of the organisations involved in the Alliance and representations about the consequences of completing the membership Application form said to be an application form for membership of the Alliance but which in truth is an application for membership of the AWU. This is also the case in respect of Mr Heath.

[85] AMMA also contends that improper conduct involving Mr Cain has occurred, and is likely to occur, if a permit is granted. This arises also from the material earlier summarised. This is also the case in respect of Mr Heath.

[86] It also says that the weight that would be attributed to the training received by each of Messrs Cain and Heath should be minimal in light of the Alliance arrangements and their involvement in those arrangements, particularly as it concerns the right to enrol particular persons as members of either the AWU or the CFMMEU. It is suggested that this conduct cannot give rise to a confidence that either of the proposed permit holders would, if armed with an entry permit, exercise those rights within the scope and confines of the Act.

[87] AMMA contends that I should conclude that these factors weigh against satisfaction that either Mr Cain or Mr Heath is a fit and proper person to be granted a permit. It says that these matters are of such a significance as to outweigh the other considerations under s.513 of the Act.

[88] In respect of Mr Heath, AMMA also contends that the permit qualification matters requiring consideration under s.513(1)(e) further weigh against the granting of a permit in his favour.

[89] It is to be accepted, as I have already earlier noted, the AWU and the CFMMEU make various representations to persons in the offshore oil and gas industry in Western Australia in relation to the Alliance. Some are accurate, some are not. A number are just wrong.

[90] But it does not follow that these matters weigh against a conclusion that Mr Cain and Mr Heath are not fit and proper persons to hold an entry permit.

[91] Mr Cain gave evidence that when he speaks to eligible workers, he refers to the Alliance as being two unions working together to advance the industrial interests of workers.<sup>127</sup> He said that if workers join the Alliance, they are industrially represented by the

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<sup>127</sup> Transcript of proceedings dated 24 April 2019 at PN976

AWU.<sup>128</sup> He said that he was not familiar with the Fact Sheet and is not the author of it and that he does not tell people they are entitled to be represented by more than one union.<sup>129</sup> He said that he does not tell workers that by signing up to the Alliance they will get industrial representation by the MUA/CFMMEU as they are represented by the AWU.<sup>130</sup> He said that workers who join the Alliance are paying to be part of the two unions working together, but as for industrial representation, they being represented by the AWU and that workers understand this when he speaks to them.<sup>131</sup>

[92] Mr Cain also gave evidence that he has represented the AWU in enterprise bargaining for the Alliance, and that he has negotiated a number of enterprise agreements over the past seven years.<sup>132</sup> He said that he has held two right of entry permits issued in his capacity as an official of the AWU over the last six years and has issued entry notices 8 to 10 times.<sup>133</sup>

[93] Mr Cain said that when exercising these entry rights, he has only spoken with AWU members.<sup>134</sup> He said that it was rare for him to encounter MUA/CFMMEU members when exercising AWU permit holder right of entry, and that if he was approached by a MUA/CFMMEU member while he was exercising AWU permit holder right of entry he would not speak to the MUA/CFMMEU member whilst exercising those rights.<sup>135</sup> He also said that when he is exercising AWU permit holder right of entry it is extremely unlikely that MUA/CFMMEU and AWU members will be present on the same facility or vessel.<sup>136</sup>

[94] I accept this evidence.

[95] Mr Heath gave evidence that where there is overlapping coverage between the MUA/CFMMEU and the AWU he enrolls workers into the AWU.<sup>137</sup> He said that if he used his right of entry as an AWU official to enter a facility this would be as an AWU organiser and for the purposes of enrolling persons into the AWU.<sup>138</sup> He said that he uses the Application form to enrol persons into the AWU and that he has not signed any MUA/CFMMEU members into the Alliance.<sup>139</sup> He said that members of the Alliance get benefits from the two unions. They get the full benefits of the AWU, such as representation in bargaining, in dispute proceedings in the Commission and for underpayments to be dealt with in a court. In respect to the MUA/CFMMEU, they receive benefits not of an industrial nature such as the benefit from political representation and a journal that provides information about the industry in which they work.<sup>140</sup>

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<sup>128</sup> Ibid at PN977

<sup>129</sup> Ibid at PN984 - PN992

<sup>130</sup> Ibid at PN1003 - PN1005

<sup>131</sup> Ibid at PN1010

<sup>132</sup> Ibid at PN1013

<sup>133</sup> Ibid at PN1165-PN1168

<sup>134</sup> Ibid at PN1171 - PN1172

<sup>135</sup> Ibid at PN1217 – PN1218; PN1237 – PN1248

<sup>136</sup> Ibid at PN1273

<sup>137</sup> Ibid at PN1466

<sup>138</sup> Ibid at PN1481 – PN1482

<sup>139</sup> Ibid at PN1485; PN1498

<sup>140</sup> Ibid at PN1502

[96] Mr Heath also gave evidence that he has not previously held an entry permit as an AWU official but if he was issued with a permit and used it to enter for discussion purposes, it would be to hold discussions with members and potential members of the AWU.<sup>141</sup> He said that if he entered a workplace to hold discussions with AWU members, and a MUA/CFMMEU member approached him for advice or support, he would tell them that he could not talk to them about their issue because he is there exercising the right of entry as an AWU official.<sup>142</sup> He said that if he was exercising entry rights as an AWU official for the purposes of investigating a suspected contravention of the Act or an industrial instrument he would only deal with that issue.<sup>143</sup>

[97] I also accept this evidence.

[98] A great deal of the evidence adduced in these applications concerned the Alliance and the various publications concerning the Alliance. As I have already observed, based on my reading of the MOU, the evident purpose for the establishment of the Alliance is to share and combine resources for the purposes of engaging in the joint recruitment of members and the pursuit of industrial activities to further the common interests of the signature organisations and their members in the offshore oil and gas industry in Western Australia. There is nothing inherently improper about that approach. Whilst I am satisfied that in some of the publications the Alliance appears to be promoting more than it can deliver in respect of industrial representation and membership of both the AWU and CFMMEU where this will not be the case, it is in the nature of puffery, and does not affect my assessment of the fitness and propriety of the proposed permit holders to hold entry permits under the Act. Both were clear as to their understanding of the limitations of powers and functions imposed by the Act on permit holders in their capacity as officials of the AWU. The sharing of fees collected through the Alliance as between the signature organisations to the MOU is a matter for the internal organisation of each and on its face, subject to appropriate authorisation under the respective rules of the organisations, does not appear to be improper.

[99] The enrolment of persons into an organisation which does not have eligibility to accept enrolments under its rules would be a breach of the rules of the organisation. There are remedies for this under the *Fair Work (Registered Organisations) Act 2009*.<sup>144</sup>

[100] I am satisfied based of the evidence of both Mr Cain and Mr Heath, which is summarised above and which I have accepted, that each understands the limitations on the exercise of right of entry powers when doing so as an official of the AWU. Specifically, they each appear to understand that entry for discussion purposes means entry to hold discussions with members and employees who are eligible to be members of the AWU and that this does not extend to holding discussions with members or employees eligible to be members of the CFMMEU. Messrs Cain and Heath also appear to understand that entry as an AWU official for the purposes of investigating suspected contraventions are limited to contraventions that relate to or affect a member of the AWU whose industrial interests the AWU is entitled to represent and who performs work at the premises at which entry is exercised.

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<sup>141</sup> Ibid at PN1629

<sup>142</sup> Ibid at PN1633

<sup>143</sup> Ibid at PN1652

<sup>144</sup> See for example s.167



**[101]** If as officials of the AWU holding an entry permit, either seeks to do that which they have said they will not do, there are ample remedies under the Act to deal with disputes about entry, misrepresentations about whether the doing the thing is authorised or otherwise acting improperly as a permit holder.<sup>145</sup>

**[102]** I am satisfied on the evidence that to the extent that materials promoting the Alliance might misrepresent the eligibility of persons to be members of both the AWU and the CFMMEU or the capacity of these organisations to represent the industrial interest of persons who are not eligible to be a member, that neither Mr Cain nor Mr Heath have made such representations and more relevantly, will not make such representations if permits are issued. The evidence given by Messrs Cain and Heath satisfies me that each is aware of his responsibilities as permit holders and the limitations of the exercise of right of entry powers of a permit holder and that each is capable of meeting those responsibilities and adhering to the limitations in the context of the Alliance. I am also persuaded that Mr Cain's evidence shows that he has been capable of using his previously issued right of entry permit as an AWU official within the constraints of the Act but also in furtherance of the Alliance.

**[103]** The concerns that have been expressed about the Alliance and the materials promoting it, do not involve assessing the relevant personal characteristics of the proposed permit holders in relation to the activities for which satisfaction of the standard is required. The questions of whether Messrs Cain and Heath are fit and proper persons to hold an entry permit necessarily requires a consideration of the rights the holder of an entry permit may exercise, the limitations on and conditions attaching to the exercise of those rights, and the responsibilities that must be discharged in the exercise of those rights. The permit qualification matters, including the matters raised by AMMA and the Commissioner, must be assessed in that light.

**[104]** I do not accept AMMA's submission concerning the prospect of Messrs Cain and Heath becoming or purporting to become bargaining representatives of employees who become or are members of the Alliance if they were granted an entry permit, as relevant to my assessment. The Act sets out who and in what circumstances, a person is a bargaining representative of an employee in relation to a proposed enterprise agreement. Whether or not either of the proposed permit holders at some point in time in the future becomes or purports to become a bargaining representative of an employee, whether or not, the employee is a member of the Alliance is a matter that should properly be dealt with if those circumstances arise. The possibility that there might be some disputation in the future about the capacity of either of the proposed permit holders being a bargaining representative does not seem to me to provide any proper foundation for weighing that possibility as a matter against a conclusion that either of the proposed permit holders is a fit and proper person to hold an entry permit under the Act.

**[105]** In respect of Mr Cain, I am satisfied that each of the permit qualification matters identified in s.513(1)(a)–(f) weigh in favour of a conclusion that he is a fit and proper person to hold a permit under the Act. For the reasons given above, I also do not consider that the other matters identified for the purposes of s.513(1)(g) weigh against such a conclusion.

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<sup>145</sup> See for examples ss.500, 503, 505, 507

[106] I am not persuaded that the conditions proposed by the Commissioner should be imposed. There is no warrant, on the evidence, for the imposition of such conditions. In truth, the conditions are proposed because of a concern that Mr Cain might in the context of the Alliance act in an improper way. This concern which runs counter to the evidence that he gave and which I accept, that he understands the rights and obligations of a permit holder under the Act and the limitations upon those rights and that he will conduct himself accordingly. No conditions will be imposed on the permit that will issue consequent on my conclusion that he is a fit and proper person to hold an entry permit under the Act.

[107] In respect of Mr Heath, I take into account and weigh against a conclusion that he is a fit and proper person the fact that he did not disclose that a condition attached to existing entry permit held by him. As I have already indicated, I do not consider that the first matter disclosed in his amended declaration weighs against a conclusion that he is a fit and proper person to hold an entry permit under the Act. The Chevron proceedings are yet to result in the imposition of a penalty so do not fall within the consideration set out in s.513(1)(d) of the Act. No party suggested and I do not propose to take the Chevron proceedings into account under s.513(1)(g). Thus, save for the failure to disclose the condition and the fact that a condition has been imposed which engages with the permit qualification matters in s.513(1)(e), each of the other permit qualification matters including those discussed above in relation to the Alliance, weigh in favour of or do not weigh against a conclusion that Mr Heath is a fit and proper person to hold an entry permit under the Act. I do not consider that the imposition of the earlier mentioned condition on his existing permit and the failure to earlier disclose that fact, which I accept was careless rather than deliberate, weigh so heavily that they would warrant a conclusion that Mr Heath is not a fit and proper person to hold a permit under the Act. For the reasons earlier stated, I propose to impose a condition on the permit that will issue which is in terms that reflect the intended effect of the condition that attaches to permit number RE2018/1127. For the same reasons as given in respect of Mr Cain, I do not propose to impose the condition as sought by the Commissioner on any permit issued to Mr Heath. With the condition that will be imposed, I am satisfied that Mr Heath is a fit and proper person to hold an entry permit under the Act.

## Conclusion

[108] For the reasons stated, I am satisfied that Mr Cain is a part-time employee of the AWU employed in the position of organiser and so he is an official of the AWU. I am satisfied that he is a fit and proper person to hold an entry permit under the Act. A permit will be issued to Mr Cain in his capacity as an official of the AWU.

[109] For the reasons stated, I am satisfied that Mr Heath is a part-time employee of the AWU employed in the position of organiser and so he is an official of the AWU. I am satisfied that he is a fit and proper person to hold an entry permit under the Act with the following condition:

If any penalty is imposed by the Federal Court of Australia on the CFMMEU consequent on the finding of contravening conduct set out at *Chevron Australia Pty Ltd v The Maritime Union of Australia (No.2)* [2016] FCA 768 at [109] – [110], Mr Heath must notify the Fair Work Commission within two weeks of the date that the penalty is imposed.

[110] A permit with the above condition will be issued to Mr Heath in his capacity as an official of the AWU.



DEPUTY PRESIDENT

*Appearances:*

*T Slevin* of Counsel for the Applicants.

*N Ellery*, Solicitor for the Australian Building and Construction Commissioner.

*H Dixon SC* for the Australian Mines and Metals Association.

*Hearing details:*

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