



# DECISION

*Fair Work Act 2009*  
s.604—Appeal of decision

**United Workers’ Union**

**v**

**Hot Wok Food Makers Pty Ltd**  
(C2022/3219)

ACTING PRESIDENT HATCHER  
DEPUTY PRESIDENT ASBURY  
DEPUTY PRESIDENT GOSTENCNIK

SYDNEY, 12 JANUARY 2023

*Appeal against decision [2021] FWCA 4524 of Deputy President Mansini at Melbourne on 28 July 2021 in matter number AG2021/6101.*

## Introduction

[1] In our previous decision in this matter<sup>1</sup> (October decision), we extended the time for the United Workers’ Union (the UWU) to lodge its notice of appeal to 31 May 2022, granted permission to appeal, allowed the UWU to amend its notice of appeal and upheld appeal grounds 1 and 4.<sup>2</sup> That decision also included the background to this matter and a summary of its procedural history, which we do not propose to repeat here.

[2] The UWU’s amended notice of appeal adds the following new appeal ground:

“Further, and in any event, the Agreement could not be approved because, in fact:

- (a) it had not been made pursuant to section 182(1) of the FW Act; and
- (b) further or alternatively, it had not been genuinely agreed to pursuant to section 186(2)(a).

## Particulars

- (i) Some or all of the employees who purportedly voted to approve the Agreement would not be Relevant Employees because their jobs did not fall within the classifications in the Agreement.

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<sup>1</sup> [2022] FWCFB 191

<sup>2</sup> Ibid at [153]

- (ii) Some or all of the employees who purportedly voted to approve the Agreement would not be Relevant Employees because they were not employed by the respondent at the time the agreement was purportedly made.”

[3] We will refer to the additional appeal ground as appeal ground 5. Accordingly, we are yet to determine appeal grounds 2 and 3 (which are set out in paragraph [60] of the October decision), and appeal ground 5. This decision deals with those grounds.

### Events since the October decision

[4] The October decision indicated that we would list a directions hearing to program the matter for further hearing to determine the outstanding grounds of appeal. That directions hearing took place on 28 October 2022. During that hearing, the following exchange occurred with counsel for Hot Wok Food Makers Pty Ltd (Hot Wok):

“VICE PRESIDENT HATCHER: And one final matter. Perhaps again we’ve heard nothing about the Federal Court proceedings. Is there any impediment that those proceedings pose to us proceeding further?”

MR MEEHAN: There are none, your Honour, for this reason. I anticipate instructions very shortly that will result in the filing of a notice of discontinuance in the Federal Court.”<sup>3</sup>

[5] Accordingly, on 4 November 2022 we listed the appeal for further hearing on 25 November 2022 and, on 8 November 2022, we issued orders pursuant to s 590(2) of the *Fair Work Act 2009* (Cth) (FW Act) requiring Darren Latham, Ashmit Subedi, Jack Nicholson, Shanshan (Shirley) Li and Suet Ying (Carol) Wu to attend the hearing for the purpose of giving evidence.

[6] On 9 November 2022, notwithstanding the advice provided during the directions hearing on 28 October 2022, solicitors for Hot Wok filed an interlocutory application in the Federal Court seeking, *inter alia*, the following order:

“Until the hearing and determination of this proceeding or until further order, the Fair Work Commission be restrained from proceeding with any further hearing, or taking any further action or step in matter C2022/3219.”

[7] The Federal Court (Logan J) heard and determined Hot Wok’s interlocutory application on 15 November 2022. Logan J ordered (relevantly) that the application be dismissed and that the UWU and Hot Wok file submissions in relation to costs.<sup>4</sup>

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<sup>3</sup> Transcript, 28 October 2022, PNs 24-25

<sup>4</sup> [2022] FCA 1417; [relevant orders](#)

## Evidence

### *Documents produced*

[8] Pursuant to an order issued by us on 25 August 2022, Hot Wok produced documents concerning the employment of Mr Subedi, Mr Nicholson, Ms Li and Ms Wu. These documents were comprised of offers, and acceptance, of employment with Hot Wok, and payslips for the pay dates of 19 May, 26 May, 2 June, 9 June, 16 June, 23 June, 30 June, 7 July, 14 July, 21 July, 28 July and 4 August 2021. These documents were placed into evidence by the UWU.<sup>5</sup>

### *Witness evidence*

[9] In accordance with the orders we issued on 8 November 2022, Ms Li, Mr Nicholson, Ms Wu, Mr Subedi and Mr Latham attended the hearing before us on 25 November 2022 and gave evidence. Hot Wok declined the opportunity to adduce evidence in chief from the witnesses, and thus the witnesses primarily gave evidence in response to questions from the UWU (with some additional questions from the Bench). The UWU tendered a number of documents through these witnesses. We will refer to the witnesses' oral evidence, and the tendered documents, later in this decision.

## Submissions

[10] In the October decision, we summarised the submissions made by the UWU<sup>6</sup> and Hot Wok<sup>7</sup> in relation to appeal grounds 2 and 3. In relation to appeal ground 5, the UWU submitted that none of the employees who purported to approve the *Hot Wok Food Makers Pty Ltd (ABN 15 058 494 447) Workplace Agreement 2021*<sup>8</sup> (Hot Wok Agreement) would be covered by it, and the employee who signed the agreement as representative (Ms Wu) had not even read it. Mr Latham had, it submitted, lied in the Form F16 application for approval of the Hot Wok Agreement and in his accompanying Form F17 declaration, as well as in other documents filed with the Commission, and his evidence should not be believed unless corroborated by contemporaneous documents. Notwithstanding what it characterised as the “*frankly incredible*” evidence given by Ms Li, Mr Nicholson, Ms Wu and Mr Subedi, the UWU submitted that there was more than sufficient evidence to support appeal ground 5 in that they all had employment responsibilities not contemplated by the Hot Wok Agreement and none of them was paid anywhere near the amounts in the agreement. Further, it was submitted, none of them could recall with any clarity anything about having had meetings to discuss the Hot Wok Agreement, and it was more likely than not that such meetings never in fact occurred, contrary to the sworn statement of Mr Latham in his Form F17 declaration.

[11] In relation to Mr Latham specifically, the UWU submitted that we should infer that he knowingly made false declarations when he signed his Form F16 and Form F17, in that:

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<sup>5</sup> Exhibits D, E, H, I, K, L, M and N.

<sup>6</sup> [2022] FWCFB 191 at [66]-[67]

<sup>7</sup> Ibid at [74]-[75]

<sup>8</sup> AE512471

- he is an experienced human resources professional who is familiar with industrial legislation, enterprise agreements, the Commission and relevant awards;
- in giving evidence, he was an unsatisfactory witness who dissembled, resorted to bluster and frequently asserted that he could not recall matters;
- as the Chief Human Resources Officer of the Mantle Group, and with his experience and knowledge, he must have known that each of the employees who purportedly made the Hot Wok Agreement would not be covered by it;
- in respect of the s 318 application lodged by Mr Latham on 16 December 2021, and the Commission’s subsequent direction for Hot Wok to email a statement to transferring employees who may be covered by the Hot Wok Agreement, Mr Latham emailed the statement to 10 employees, of whom only one could have been covered by the Hot Wok Agreement.

[12] Consequently, it was submitted, the Commission should find that Mr Latham had intentionally engaged in a course of conduct completely at odds with people in his position and had repeatedly promulgated a view of the Hot Wok Agreement to employees which was inconsistent with the operation of that agreement, and consideration should be given as to what steps might be taken to sanction Mr Latham given the gravity of his conduct.

[13] The UWU submitted that grounds 2, 3 and 5 should be upheld, and sought to be heard as to its costs in the appeal.

[14] Hot Wok submitted, in relation to ground 5, that there was sufficient evidence that the four persons who voted on the Hot Wok Agreement performed work which fell within the scope of the agreement, and that while each of them performed work in either management or administrative tasks, that does not detract from their performance of bar and/or hospitality work or clerical work. Further, it was submitted, the fact that the four employees received salaries well above the rates in the Hot Wok Agreement did not remove them from the coverage of the Hot Wok Agreement because, as provided for in clause 3.2.1, it is a minimum rates instrument. Specifically in relation to each of the four employees who purportedly made the agreement, Hot Wok submitted:

- *Ms Li*: Although titled “Payroll Manager”, she performed a broad range of office work, including on-boarding new staff, getting staff set up on the payroll system, running the weekly payroll, undertaking PAYG taxation and superannuation payments and reconciling the books. These duties fell within the definition of a clerical Grade 3 employee, which manifests an intention to cover persons trained and competent in a broad range of administrative and management related skills and would cover many of the HR duties undertaken by Ms Li, including collection and preparation of time and wage records.
- *Mr Nicholson*: Although his title was “Area Manager”, his duties included serving on the bar, running food, running drinks, clearing the floor, being on the door and monitoring entry and exit.

- *Ms Wu*: As a “Venue Manager”, she had duties which included dealing with whole-venue problems, complaints, marketing and rostering, and she supervised a small team at the Milano Restaurant. The Hot Wok Agreement covered employees performing training and supervision of food and beverage attendants and kitchen staff (clauses 3.1.9(e) and 3.1.11) and duties associated with the preparation of rosters (clause 3.1).
- *Mr Subedi*: He was the Venue Manager at the Charming Squire bar and restaurant and did the rostering, set up the venue, made sure that all the bookings were put out, was responsible for the smooth running of the venue, was on the floor making sure customers were looked after, and hired staff.

[15] Hot Wok submitted that industries such as liquor and hospitality, restaurants and fast food, are notorious for their use of “duty managers,” “shift managers,” “bar managers,” “venue managers” et cetera, and the combination of food and liquor service duties with added responsibilities associated with supervision and management is not inconsistent with such persons continuing to have the protection of industrial instruments. As to the incapacity of Ms Li, Mr Nicholson, Ms Wu and Mr Subedi to recall with clarity anything about having had a meeting to discuss the Hot Wok Agreement, it was submitted that the contemporaneous record of 25 June 2021 should not be impugned on the basis of the memory of people 16 months later. In relation to Mr Latham, Hot Wok submitted that:

- the Form F17 required by the *Fair Work Commission Rules 2013* (FW Rules) is not a statutory declaration for the purpose of the FW Rules or the *Statutory Declarations Act 1959*;
- a finding that Mr Latham knowingly gave false information in relation to any matter is not open on the evidence, nor is it necessary having regard to the issues in dispute;
- Mr Latham’s claims of privilege against self-incrimination do not support a contrary finding, since his having declined to answer various questions does not constitute evidence, let alone adverse evidence; and
- since the material before the Full Bench supports a finding that the named persons voted and were persons who fell within the scope of the Hot Wok Agreement, the test in *Briginshaw v Briginshaw*<sup>9</sup> has not been met and the Commission therefore should not accept the contention that Mr Latham knowingly gave any false information.

[16] Hot Wok submitted that the evidence failed to support a finding that the Hot Wok Agreement could not be approved because it had not been made pursuant to s 182(1) of the FW Act or that it had not been genuinely agreed pursuant to s 186(2)(a).

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<sup>9</sup> [1938] HCA 34, 60 CLR 336

## Consideration – appeal ground 5

### *Statutory framework*

[17] It is convenient to deal with appeal ground 5 first. The statutory framework applicable to this appeal ground is as follows. Section 186(1) of the FW Act provides that if an application for approval of an enterprise agreement is made under, relevantly, s 185, the Commission must approve the agreement under s 186 if the requirements of that section and s 187 are met. One of the approval requirements, in s 186(2)(a), for an agreement that is not a greenfields agreement, is that “*the agreement has been genuinely agreed to by the employees covered by the agreement*”. Section 188 explicates what constitutes genuine agreement for the purpose of s 186(2)(a) and provides:

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

- (1) An enterprise agreement has been ***genuinely agreed*** to by the employees covered by the agreement if the FWC is satisfied that:
  - (a) the employer, or each of the employers, covered by the agreement complied with the following provisions in relation to the agreement:
    - (i) subsections 180(2), (3) and (5) (which deal with pre-approval steps);
    - (ii) subsection 181(2) (which requires that employees not be requested to approve an enterprise agreement until 21 days after the last notice of employee representational rights is given); and
  - (b) the agreement was made in accordance with whichever of subsection 182(1) or (2) applies (those subsections deal with the making of different kinds of enterprise agreements by employee vote); and
  - (c) there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees.
- (2) An enterprise agreement has also been ***genuinely agreed*** to by the employees covered by the agreement if the FWC is satisfied that:
  - (a) the agreement would have been ***genuinely agreed*** to within the meaning of subsection (1) but for minor procedural or technical errors made in relation to the requirements mentioned in paragraph (1)(a) or (b), or the requirements of sections 173 and 174 relating to a notice of employee representational rights; and
  - (b) the employees covered by the agreement were not likely to have been disadvantaged by the errors, in relation to the requirements mentioned in paragraph (1)(a) or (b) or the requirements of sections 173 and 174.

[18] Section 180(5), referred to in s 188(1)(a)(i) above, requires an employer, prior to a vote on a proposed enterprise agreement, to take all reasonable steps to explain to “*relevant employees*” (being the employees employed at the time who will be covered by the proposed agreement<sup>10</sup>) the terms of the agreement and their effect in an appropriate manner taking into account the particular circumstances and needs of the relevant employees. Section 182(1), referred to in s 188(1)(b), provides:

*Single-enterprise agreement that is not a greenfields agreement*

- (1) If the employees of the employer, or each employer, that will be covered by a proposed single-enterprise agreement that is not a greenfields agreement have been asked to approve the agreement under subsection 181(1), the agreement is *made* when a majority of those employees who cast a valid vote approve the agreement.

[19] Section 181(1), referred to in the above provision, provides that an employer that will be covered by a proposed agreement may request the employees employed at the time who will be covered by the agreement to approve the agreement by voting for it.

[20] The particulars to appeal ground 5 involve the contentions that the Hot Wok Agreement was not made in accordance with s 182(1), and thus did not meet the element of genuine agreement in s 188(1)(b), because:

- (1) the four employees who purportedly made the Hot Wok Agreement (Ms Li, Mr Nicholson, Ms Wu and Mr Subedi) were not employees of Hot Wok at the relevant time; or
- (2) they were not covered by the Hot Wok Agreement, even if they were employed by Hot Wok at the relevant time.

*Were Ms Li, Mr Nicholson, Ms Wu and Mr Subedi employees of Hot Wok at the time the Hot Wok Agreement was purportedly made?*

[21] This particular of appeal ground 5 was not developed in the UWU’s final submissions and, ultimately, we consider that it must fail. The documents produced by Hot Wok pursuant to the order we issued on 25 August 2022 included letters sent by Mr Latham to Mr Subedi, Mr Nicholson, Ms Li and Ms Wu dated 16 March 2021, the day before the notice of employee representational rights (NERR) was sent to them in respect of the first version of the Hot Wok enterprise agreement referred to in paragraph [10] of the October decision. These letters stated:

**“Offer to Transfer Employment to Hot Wok Food Makers Pty Ltd**

Following our recent discussions with you, we are pleased to confirm that our offer to transfer your employment to Hot Wok Food Makers Pty Ltd.

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<sup>10</sup> *Fair Work Act 2009* (Cth) s 180(2)(a)

The terms and conditions of your employment with Hot Wok Food Makers Pty Ltd will be the same as those you previously had with Staff Services Employment Pty Ltd. All accrued entitlements and benefits will transfer in their entirety to MGH Employment and Training Pty Ltd.

Your employment with Hot Wok Food Makers Pty Ltd will commence from 16<sup>th</sup> March 2021 by you signing the acknowledgment and acceptance of this offer. Please confirm your understanding and agreement of this offer by signing where indicated below.”

[22] Ms Li and Ms Wu signed their acceptance of this “offer” on 9 April 2021, and Mr Subedi and Mr Nicholson did so on 13 April 2021. We accept therefore that, from these dates, the employing entity of the employees changed from Staff Services Employment Pty Ltd to Hot Wok. The pay slips also produced by Hot Wok show that Hot Wok was the entity paying the employees in the period covered by the pay dates from 19 May 2021 through to 4 August 2021. This covers the period from when the NERR for the proposed Hot Wok Agreement was purportedly issued on 2 June 2021 through to when the vote on the proposed agreement purportedly occurred on 25 June 2021.

[23] Incidentally, the above documents produced by Hot Wok may explain why the first attempt to make and have approved an enterprise agreement for Hot Wok was aborted (see paragraphs [10]-[11] of the October decision). The offers of transfer of employment were made on 16 March 2021, and the NERR for the first proposed agreement was sent to the four employees on 17 March 2021. However, the employees had not yet accepted these offers as at 17 March 2021 and thus were arguably not yet employed by Hot Wok, and this may have caused Hot Wok to consider that, as a result, the NERR for the first proposed agreement was invalid.

*Were Ms Li, Mr Nicholson, Ms Wu and Mr Subedi covered by the Hot Wok Agreement at the time it was purportedly made?*

[24] Section 53(1) of the FW Act relevantly provides that an enterprise agreement *covers* an employee if the agreement is expressed to cover (however described) the employee. Clause 1.4 of the Hot Wok Agreement describes its coverage in the following terms:

#### **1.4. AGREEMENT COVERAGE**

This Agreement will apply to the Employer and all Employees classified under this Agreement performing work in the Commonwealth of Australia. It is the intention of the parties to this Agreement that it will exclude and replace all terms and conditions of the *Restaurant Industry Award 2020* and the *Hospitality Industry (General) Award 2020*, any Industrial Agreements or any Industrial Instruments or any variations thereto unless otherwise stated herein.

[25] The effect of clause 1.4 is that any employee of Hot Wok, wherever employed within Australia, who falls within any of the classifications of the Hot Wok Agreement is covered by the agreement.

[26] Clause 3.1 of the Hot Wok Agreement sets out the classification definitions for seven pay grades: an Introductory Level and Levels 1-6. We summarised these classifications in



paragraph [46] of the October decision. As we observed in paragraph [47] of the October decision, the Hot Wok Agreement's seven-level classification structure reproduces verbatim the classification structures found in the *Hospitality Industry (General) Award 2020* (Hospitality Award) and the *Restaurant Industry Award 2020* (Restaurant Award) for the Food and Beverage, Kitchen, Administration and Stores streams. Mr Latham relied on the alignment between the classification structures in the Hot Wok Agreement and the Hospitality Award and the Restaurant Award in his Form F17 declaration (in his response at question 9) to make good his contention that the Hot Wok Agreement passed the better off overall test.

[27] It should be noted that, separate to and above the seven-level classification structure, the Hospitality Award also contains a hotel manager classification. A hotel manager is, for the purpose of this classification, defined in clause A.2.9 of Schedule A of the Hospitality Award as follows:

“**hotel manager** means an employee (however designated) who:

- under the direction of senior management is required to manage and co-ordinate the activities of a relevant area or areas of the hotel; and
- directs staff to ensure they carry out their duties in the relevant area or areas of the hotel; and
- implements policies, procedures and operating systems for the hotel;

but excludes an employee who is employed to undertake the duties of senior management or is responsible for a significant area of the operations of one or more hotels. Indicative position titles for such an employee include:

- company secretary;
- chief accountant;
- personnel or human resources manager;
- financial controller;
- industrial relations manager;
- venue manager;
- general/hotel manager;
- executive assistant manager;
- regional manager; or
- a manager to whom any of those positions report or are responsible.

An employee appointed as a Manager must have completed an appropriate level of training in business management or have relevant industry experience, including in supervising employees in one or more areas of a hotel.

NOTE: In a General Hotel, this classification is commonly known as an assistant manager. In an Accommodation Hotel, this classification may include any of the following positions: duty manager; assistant food and beverage manager; assistant rooms division manager; assistant front office manager or equivalent position.”

[28] This existence of the Hotel Manager classification in the Hospitality Award, including its reference to senior management positions to whom the classification does not apply (which

expressly includes “*venue manager*” and “*regional manager*”), demonstrates that the seven-level classification structure which sits below it does not encompass any managerial position.<sup>11</sup> The Hotel Manager classification is not reproduced in the Hot Wok Agreement. The Restaurant Award does not include any classification applicable to management positions. Having regard to these matters, we conclude that, because the Hot Wok Agreement does not contain any classification applicable to management positions (whether in a hospitality or restaurant venue), the agreement does not cover employees in such positions.

[29] In his Form F17 declaration, Mr Latham gave the following answers (in response to question 26, which required specified details of the vote on the agreement):

“26.1 At the time of the vote, how many employees were covered by the agreement?  
– 5.

26.2 How many of these employees cast a valid vote? – 4.

26.3 How many of these employees voted to approve the agreement? – 4.”

[30] The material annexed to Mr Latham’s declaration leaves no room for doubt that the four employees who were said to have cast valid votes to approve the Hot Wok Agreement were Ms Li, Mr Nicholson, Ms Wu and Mr Subedi. The fifth person said to be covered by the Hot Wok Agreement at the time of the vote but who did not cast a valid vote has not been identified in any of the evidentiary material before the Commission either at first instance or in this appeal. It may be inferred from Mr Latham’s answer to question 6 in his Form F17 declaration that the purported fifth employee was male and a casual. It may also be noted that, in correspondence to Deputy President Mansini’s chambers dated 21 July 2021, Hot Wok asserted that “*a waiting apprentice is covered*” by the Hot Wok Agreement. This may, arguably, be read as a reference to the fifth employee. Certainly, it is clear that none of Ms Li, Mr Nicholson, Ms Wu and Mr Subedi was a casual employee or an apprentice. However, none of the documents annexed to Mr Latham’s declaration which purportedly evidence the means by which Hot Wok explained the terms of the Hot Wok Agreement pursuant to s 180(5) makes any reference to this fifth employee ever having attended any meeting or ever having been provided with a copy of the agreement or any written explanation of it. There is no evidence that this fifth employee was provided with the opportunity to vote on the Hot Wok Agreement. Nor, after application for approval of the Hot Wok Agreement was made, do any of the relevant documents annexed to Mr Latham’s declaration or subsequently provided to the Commission by Hot Wok make any reference to this fifth employee being supplied with a copy of the application, the Deputy President’s concerns about the agreement, Hot Wok’s responses to those concerns, or the Deputy President’s invitation to employees to express their views about the matter (including the proposed undertakings), as she had directed.<sup>12</sup> Therefore, assuming this fifth employee of Hot Wok existed at all, he played no part whatsoever in the making of the Hot Wok Agreement, and there is no evidence that Hot Wok complied with any of the applicable requirements of s 180 in relation to him.

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<sup>11</sup> See *Johnson v Monti-Haitsma Enterprises Pty Ltd* [2014] FCCA 259; *Fair Work Ombudsman v NSW Motel Management Services Pty Ltd & Ors (No 2)* [2018] FCCA 1935; *Kramer & Anor v Punthill Apartment Hotels Pty Ltd & Anor* [2020] FCCA 1617.

<sup>12</sup> See [2021] FWCA 4524 at [4].

*Witness credibility*

[31] Before we turn directly to assessing the evidence as to whether Ms Li, Mr Nicholson, Ms Wu and Mr Subedi were covered by the Hot Wok Agreement, it is necessary to make some comment about their credibility as witnesses. We do not consider that any of them, with the possible exception of Ms Wu, were credible witnesses. They all asserted a lack of capacity to recall events relevant to the making of the Hot Wok Agreement in 2021 to a degree which we consider to be, as the UWU put it, frankly incredible. As one example of this, Mr Subedi gave the following evidence about his participation in the voting process for the Hot Wok Agreement:

“Did you say you voted in favour of the agreement? - Yes.

And where did that voting process take place? - I can't remember.

You can't remember? - No.

What did it involve, like what did you have to do to vote? - I think - I can't remember. I know I voted, but - yes.

You can't remember the process by which you cast a vote? - Yes. It's just too long ago.

Did you fill out a piece of paper? - I can't remember.

...

So you remember casting a 'Yes' vote but you don't remember how it occurred or where it occurred? - Absolutely.

Was there anybody else present when it occurred? - I can't remember.

Were you alone when you did it? - Like I said I can't remember.

Were you at work? - I can't remember.”<sup>13</sup>

[32] There were also numerous inconsistencies, improbabilities and evasions in the evidence given by these witnesses. For example, as we discuss later, when Mr Nicholson was asked to describe his employment responsibilities, he sought to portray himself as performing basic hospitality duties in a way which completely omitted the key management tasks of his position and the fact that he reported directly to the CEO in respect of four venues.<sup>14</sup> As a further example, the following evidence given by Mr Subedi speaks for itself:

“What have you been doing for the last two hours? - Just sitting waiting for my turn.

Did you speak to Mr Nicholson when he came out? - No.

You didn't speak to him at all after he gave his evidence? - No.

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<sup>13</sup> Transcript, 25 November 2022, PNs 714-719, 722-725

<sup>14</sup> Ibid, PNs 212-229

We just talked about how busy we were and if he was going to see the World Cup.

So, you did talk to Mr Nicholson after he gave evidence? - Well, we were just talking about, like our normal job.

ACTING PRESIDENT HATCHER: So, you were talking about your normal job?- No, I mean, I was just like, asking him if he was showing World Cup.

At the venue? - Yes.

MR CLIFT: This morning, after Mr Nicholson gave evidence, did you speak to him at all? - Yes.

Was anyone else with you when you spoke to him? - Me, Darren and Jack were there.

Darren meaning Mr Latham? - Yes.

So, you, Mr Latham and Mr Nicholson had a discussion after Mr Nicholson gave evidence? - Yes.”<sup>15</sup>

**[33]** It is also necessary for us to make an adverse finding about Mr Latham’s credibility, pertaining not just to the evidence he gave before us at the hearing on 25 November 2022 but also as to the veracity and candour of the information provided in his Form F17 declaration and his honesty in his dealings with the Commission more generally. Mr Latham’s credit is obviously significant in our consideration of appeal ground 5, since the assertion in his Form F17 declaration that the four employees who voted to approve the Hot Wok Agreement were covered by it (see paragraph [30] above) was the only material before the Deputy President concerning this issue and was critical to Hot Wok demonstrating that the agreement had been made in accordance with s 182(1).

**[34]** When he gave evidence before us, Mr Latham refused to answer almost all questions pertaining to his Form F17 declaration on the ground of an apprehension of self-incrimination. However, such evidence as he did give provides an ample basis upon which to conclude that he was not a witness of credit. For example:

- he resisted answering questions he was directed to answer;<sup>16</sup>
- he gave clearly misleading evidence about the role of Group Executive Chef in Mantle Group Hospitality;<sup>17</sup> and
- he was evasive or misleading about straightforward matters within his knowledge.<sup>18</sup>

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<sup>15</sup> Ibid, PNs 563-573

<sup>16</sup> Ibid, PNs 861-894, 1166-1202, 1261-1285

<sup>17</sup> Ibid, PNs 1419-1423, 1498-1504

<sup>18</sup> Ibid PNs 823-838, 1444-1463

[35] There was also ample evidence before us that important parts of the information provided by Mr Latham in his Form F17 declaration were false or misleading. The clearest example of this is the information in the declaration concerning compliance with s 180(5) of the FW Act. In response to question 24, “*When the employer explained the terms of the agreement, and the effect of those terms, to the relevant employees, what was done to take into account the particular circumstances and needs of the relevant employees?*”, Mr Latham stated that the employer met with the employees on three occasions, on 18, 23 and 25 June 2021, to:

- explain the differences in the proposed Agreement as compared to the Award and what those differences meant for the Employees;
- ensure that all employees knew of and had access to additional sources of information;
- encourage employees to ask questions of the employer about how the proposed Agreement affected the[ir] employment, obligations, entitlements and benefits;
- respond to questions from employees (both questions of fact and personal impact) ensuring employees had all information immediately available to them;
- give confidence to employees that the employer was acting in good faith.

[36] Mr Latham attached to his declaration a memorandum addressed to “*All Hot Wok Food Makers Pty Ltd Employees*”, dated 14 June 2021 and signed by him, which identified that he would hold two information sessions about the proposed agreement, on 18 and 23 June 2021. The memorandum stated that both these information sessions would be held at 4.00 pm “*in the Milano Restaurant in the Queen Street Mall*”, and went on to say:

“On Friday 25th June 2021 you will be asked to consider and approve the proposed Workplace Agreement by way of an anonymous vote. The vote will be held at 4.00 pm on Friday 25th June 2021, also in the Milano Restaurant in the Queen Street Mall. For your information, enclosed is a copy of the voting form that will be used.”

[37] Mr Latham subsequently provided the Commission at first instance with two documents each described as an “*Information Session Attendance Sheet*” for the purported meetings on 18 and 23 June 2021. The first was signed by Mr Nicholson, Ms Wu and Ms Li and the second by Mr Subedi, Mr Nicholson, Ms Wu and Ms Li.

[38] The evidence given by Ms Li, Mr Nicholson, Ms Wu and Mr Subedi before us establishes to our satisfaction that the meetings on 18 and 23 June 2021 never happened, nor did the employees meet at the Milano restaurant for the purpose of voting on 25 June 2021. Ms Li had no recollection of her and the other three employees ever attending a meeting to discuss the Hot Wok Agreement.<sup>19</sup> Mr Nicholson had no independent recollection of attending any meeting with the other three employees together with Mr Latham, although he gave evidence

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<sup>19</sup> Ibid, PNs 165-170

that “*I met with Darren*”.<sup>20</sup> Ms Wu — the Venue Manager for the Milano Restaurant — said that Mr Subedi, Mr Nicholson and Ms Li had never sat down and had a meeting at the Milano Restaurant,<sup>21</sup> and she did not recall having any kind of meeting with them about the Hot Wok Agreement.<sup>22</sup> Nor did she have any recollection of participating in a voting process for the agreement.<sup>23</sup> When asked how she came to sign the Hot Wok Agreement as employee representative on 25 June 2021 (the day of the purported vote at the Milano Restaurant) with Ms Li as witness, she said she could not recall Ms Li or anybody being with her when she signed the agreement and that “*to be honest*” she might have received it by email.<sup>24</sup> Mr Subedi said he had never had a meeting with Ms Wu or Ms Li.<sup>25</sup> He had no recollection of any meeting with the other employees at which the Hot Wok Agreement was explained.<sup>26</sup> He had only been at the Milano Restaurant “*ages ago*” when he “*first started*” to help Ms Wu out,<sup>27</sup> and had not been there in 2021 or in the past two years (apart from walking past it).<sup>28</sup> Accordingly, we consider that Mr Latham’s assertions in his declaration about the occurrence of these meetings were knowingly false, and the documents he provided to substantiate their occurrence were fabrications.

**[39]** The evidence also satisfies us that Mr Latham was involved in a deliberate misleading of the Commission in a separate matter concerning an application made by Hot Wok pursuant to s 318 of the FW Act. The background to this matter is set out in detail in paragraphs [23]-[28] of the October decision. By way of brief recapitulation, Hot Wok’s application was for an order that the *Staff Services Pty Ltd Certified Agreement 2000* (Staff Services Agreement) would not apply to employees whose employment was being transferred from Staff Services Employment Pty Ltd (SSE) to Hot Wok, and that instead the Hot Wok Agreement would apply to such employees. The member of the Commission dealing with the matter directed Hot Wok to provide a copy of a statement she had made about the application to any transferring employee and any potentially transferring employee covered by the Staff Services Agreement. To demonstrate compliance with this direction, Hot Wok provided the Commission with an email attaching the Commission’s statement sent by Mr Latham on 6 January 2022 to 10 named employees, four of whom were Ms Li, Mr Nicholson, Ms Wu and Mr Subedi. The evidence before us satisfies us that, of the other six identified employees, at best one and perhaps none held a position that was covered by the Staff Services Agreement and hence affected by Hot Wok’s application.<sup>29</sup> As discussed in paragraph [27] of the October decision, the email was *not* sent to the large number of SSE employees who were actually or potentially affected by Hot Wok’s application, contrary to the Commission’s direction. We infer that Mr Latham’s email of 6 January 2022 was constructed to deceive the Commission into believing that Hot Wok had

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<sup>20</sup> Ibid, PNs 261-280

<sup>21</sup> Ibid, PNs 485, 512

<sup>22</sup> Ibid, PN 511

<sup>23</sup> Ibid, PNs 506-508, 516

<sup>24</sup> Ibid, PN 517-519

<sup>25</sup> Ibid, PNs 655-660

<sup>26</sup> Ibid, PNs 641,646, 664, 674-676

<sup>27</sup> Ibid, PNs 667-668

<sup>28</sup> Ibid, PNs 669-672

<sup>29</sup> Ibid, PNs 1544-1547; Exhibits V, W, X, Y, Z, AA.

complied with its direction. Mr Latham confirmed that he wrote the email<sup>30</sup> and was thus, at the very least, a participant in the deception.

[40] For these reasons, we would not accept any evidence given by Mr Latham or any representation made by him in a document as truthful and accurate unless otherwise corroborated by reliable evidence. In particular, we do not consider that the representation he has made in his Form F17 declaration that the four employees (Ms Li, Mr Nicholson, Ms Wu and Mr Subedi) who (purportedly) voted to approve the Hot Wok Agreement can be accepted as accurate and truthful absent corroboration. We will consider the evidence and other material bearing upon the coverage question in relation to each of these employees in turn.

#### *Ms Li*

[41] Ms Li held the position of Payroll Manager for Mantle Group Hospitality at the time the Hot Wok Agreement was purportedly made and for some time before and after this<sup>31</sup> (she is now employed by Suncorp Bank).<sup>32</sup> She obtained the degree of Bachelor of International Business in 2009.<sup>33</sup> She was initially employed in the position of Payroll Officer in 2009, reporting to the CFO, and she described her duties in that role as “*on-boarding the new staff, get the staff set up in the payroll system, ready for the weekly payroll and you do the ATO compliance, PAYG payments, super payments...reconcile the books on a weekly basis...*”<sup>34</sup> Ms Li was promoted to the position of Payroll Manager some years ago, and a new Payroll Officer was appointed at about the same time.<sup>35</sup> As Payroll Manager, Ms Li worked in Mantle Group Hospitality’s head office.<sup>36</sup> In addition to her duties running the payroll for Mantle Group Hospitality’s employees, Ms Li also did work in “*HR and peer-related projects*” together with Mr Latham, although she said was never formally assigned the title of “*HR Co-ordinator*”<sup>37</sup> (contrary to the apparent representation made to the Commission - see paragraph [81] of the October decision). She also undertook a “*project that was related [to] some dealing[s] with China*” but was “*never really... awarded with the position as International Business Relations Manager*”.<sup>38</sup> In addition, as stated in paragraphs [80]-[81] of the October decision, on at least one occasion Ms Li was tasked with representing Mantle Group Hospitality in a conciliation conference in the Commission, with authority to settle the matter.

[42] The payslips for Ms Li during the relevant period<sup>39</sup> show that she was a full-time employee with an annual salary (not referable to the number of hours worked) of \$100,000.16. Ms Li worked hours ranging from 38 to 45 per week, Monday to Friday.<sup>40</sup>

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<sup>30</sup> Transcript, 25 November 2022, PNs 1302-1307

<sup>31</sup> Ibid, PNs 60, 95-109; Exhibits A, B and C

<sup>32</sup> Transcript, 25 November 2022, PNs 54, 180

<sup>33</sup> Exhibit A

<sup>34</sup> Transcript, 25 November 2022, PNs 61, 83

<sup>35</sup> Ibid, PNs 87-91

<sup>36</sup> Ibid, PNs 115-117

<sup>37</sup> Ibid, PNs 105-114

<sup>38</sup> Ibid, PN 68

<sup>39</sup> Exhibit D

<sup>40</sup> Transcript, 25 November 2022, PNs 124-125

[43] Having regard to her job description, the range of her employment responsibilities, and the mode and quantum of her remuneration, we consider it clear that Ms Li was not at any relevant time covered by any classification in the Hot Wok Agreement. Although Hot Wok is correct in submitting that payment above the rates prescribed in an enterprise agreement does not, by itself, exclude an employee from the coverage of an agreement, in this case Ms Li's salary was completely disproportionate to the hourly rate for a Clerical grade 3 employee under the Hot Wok Agreement (being the classification which Hot Wok contended was applicable). The adult full-time hourly rate for such an employee (at Level 4) under the Hot Wok Agreement is \$24.25, but Ms Li's effective hourly rate (based on her estimation of actual hours worked) was in the range of approximately \$42.70-\$50.60 per hour. There is no evidence that the principal purpose of Ms Li's employment was to perform all, or any, of the duties set out in clause 3.1.16 of the Hot Wok Agreement for a Clerical grade 3 employee. We take into account in that context that Hot Wok could have, but declined to, adduce evidence from Ms Li as to the applicability of the duties in this classification. We likewise do not consider that Ms Li could be characterised as a "*Clerical supervisor*" falling into Level 5 under clause 3.1.20 of the Hot Wok Agreement. Ms Li was a degree-qualified head office salaried manager who performed leading payroll and HR duties and reported to the most senior echelons of management in Mantle Group Hospitality. We find that she was not covered by the Hot Wok Agreement at any time during her employment.

*Mr Nicholson*

[44] Mr Nicholson has at all relevant times held the position of Area Manager<sup>41</sup> with an annual salary (not referable to hours worked) of \$125,000.20.<sup>42</sup>

[45] When Mr Nicholson was asked to describe, in his own words, his responsibilities, he gave the following evidence:

"Pretty broad. So, on Friday, Saturday nights, is the peak [trading] time, so I'd usually be around until 12.30, one o'clock in the morning, whether that's serving on the bar, running food, running drinks, collecting – clearing the floor, being on the door, monitoring entry and exit. During the week it's pretty similar, you know obviously, you don't finish as late. But during the week, in service, in those peak times. So, probably over lunch and sort of happy hour time at around knock-off."<sup>43</sup>

[46] We reject this evidence, by which Mr Nicholson sought to portray himself as merely performing basic hospitality duties, as deliberately misleading. Its credibility is risible having regard to Mr Nicholson's job title and salary, and also having regard to the following evidence he gave when the UWU put specific propositions to him:

- he manages a portfolio of four hospitality venues;<sup>44</sup>

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<sup>41</sup> Exhibit G

<sup>42</sup> Exhibit H

<sup>43</sup> Transcript, 25 November 2022, PN 212

<sup>44</sup> Ibid, PNs 213-216



- he reports to the CEO of Mantle Group Hospitality;<sup>45</sup>
- venue managers and head chefs at the four venues report directly to him;<sup>46</sup>
- he trains all the bartenders and waiters;<sup>47</sup>
- he has a role in the hiring, disciplining and firing of staff;<sup>48</sup>
- he has a role managing the rosters together with the venue managers;<sup>49</sup>
- he is involved in stock purchase, including receiving and placing orders and undertaking stock control;<sup>50</sup> and
- he is responsible to the CEO for the four venues he manages and is responsible for all the difficulties which arise at those venues, and accepted that the buck stops with him for those venues.<sup>51</sup>

[47] It is obvious, we consider, that Mr Nicholson was, at the time of the making of the Hot Wok Agreement, a senior regional manager in Mantle Group Hospitality. No classification in the Hot Wok Agreement applied to him, and Hot Wok did not identify any classification as being applicable. We find that he was not covered by the Hot Wok Agreement at any time.

*Ms Wu*

[48] Ms Wu was, at the time of the purported making of the Hot Wok Agreement, the Venue Manager for the Milano Restaurant. The payslips produced<sup>52</sup> show that she was a full-time employee with an annual salary of \$70,000.32. The payslips do not indicate that this salary was payable for any particular number or pattern of hours per week. Ms Wu confirmed in her evidence that this was the case and that her days and hours of work varied from week to week.<sup>53</sup> Ms Wu confirmed that the description of her duties which she had included in a statement of evidence she had made for the purpose of earlier proceedings<sup>54</sup> in the Commission was true and correct.<sup>55</sup> In that statement, Ms Wu said that:

- she was responsible for managing the day-to-day operations of the Milano Restaurant;

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<sup>45</sup> Ibid, PN 217

<sup>46</sup> Ibid, PNs 218-220

<sup>47</sup> Ibid, PN 220

<sup>48</sup> Ibid, PNs 221-223

<sup>49</sup> Ibid, PNs 224-225

<sup>50</sup> Ibid, PNs 226-227

<sup>51</sup> Ibid, PNs 228-231

<sup>52</sup> Exhibit K

<sup>53</sup> Transcript, 25 November 2022, PNs 390-391

<sup>54</sup> Exhibit J, made for matter AG2020/4190 — see paragraphs [8] and [78] of the October decision.

<sup>55</sup> Ibid; transcript, 25 November 2022, PNs 352-355

- she was responsible for the supervision and management of a pool of approximately 12 staff;
- part of her function as Venue Manager was to recruit, manage and, if necessary, discipline employees under her supervision, as well as managing the day-to-day rostering of staff;
- she had the authority to terminate any venue staff member, and the only other person with such authority was the Director (of Mantle Group Hospitality); and
- the other staff at the Milano Restaurant included (underneath her) two permanently-employed Duty Managers.

[49] In her evidence given before us, Ms Wu said that:

- her responsibilities as Venue Manager were “[r]ostering, costing, helping kitchen in and out. Mainly the whole venue, dealing with whole venue issue problems, complaints, marketing, everything”;<sup>56</sup>
- she reported to an Area Manager, Mitesh Kristi;<sup>57</sup> and
- all the staff at the Milano Restaurant venue reported to her, including the supervisor.<sup>58</sup>

[50] Hot Wok’s submission that Ms Wu performed duties referred to in clauses 3.1.9(e) and 3.1.11 of the Hot Wok Agreement — that is duties applicable to a Food and Beverage Attendant grade 3 or a Kitchen Attendant grade 3 — misconceives entirely the principal purpose of Ms Wu’s position, being that of a salaried venue manager. Nor was she, as Hot Wok submitted, merely involved in supervisory duties, that being the function of the duty managers under her control. No classification in the Hot Wok Agreement applied to her and, consequently, we find that Ms Wu was not, at any time during her employment, covered by the agreement.

*Mr Subedi*

[51] At all relevant times, Mr Subedi has held the position of Venue Manager. At the time the Hot Wok Agreement was purportedly made, Mr Subedi managed the “Pig ‘N’ Whistle” establishment at West End in Brisbane, and has since been moved to management of the Charming Squire establishment.<sup>59</sup> In his current role, about 40 staff report to him, and he reports to his Area Manager (Mitesh Khristi) and the CEO.<sup>60</sup> About 50 employees reported to him when he managed the Pig ‘N’ Whistle at West End.<sup>61</sup> His payslips show that Mr Subedi was, at the

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<sup>56</sup> Ibid, PN 331

<sup>57</sup> Ibid, PNs 366-370

<sup>58</sup> Ibid, PN 381

<sup>59</sup> Ibid, PNs 534-535, 578-582

<sup>60</sup> Ibid, PNs 550-553

<sup>61</sup> Ibid, PN 585

relevant time, a full-time employee and was paid an annual salary (not referable to hours worked) of \$95,000.36.<sup>62</sup> He works about 40 hours per week, usually Tuesdays-Saturdays, starting at around 10.00 am each day.<sup>63</sup> He sets his own hours of work, subject to checking by his Area Manager.<sup>64</sup> His duties include the following:

- setting up the venue, making sure all bookings are put out, and overseeing the smooth operation of the venue;<sup>65</sup>
- hiring staff;<sup>66</sup>
- disciplining and, if necessary, firing staff in consultation with HR;<sup>67</sup> and
- rostering of employees.<sup>68</sup>

[52] We infer that Mr Subedi’s duties as Venue Manager were the same as Ms Wu’s, albeit he was paid a higher salary presumably because he managed larger venues. Hot Wok’s submissions did not identify any classification in the Hot Wok Agreement as applicable to Mr Subedi. For the same reasons as for Ms Wu, we find that no classification in the Hot Wok Agreement applied to Mr Subedi’s salaried venue management position and, consequently, we find that he was not covered by the agreement at any time.

#### *Conclusion re appeal ground 5*

[53] None of the employees who voted to approve the Hot Wok Agreement was covered by it. Consequently, the agreement was not made in accordance with s 182(1) of the FW Act, and the element of genuine agreement in s 188(1)(b) was incapable of satisfaction.

[54] Hot Wok did not contend that genuine agreement might alternatively be found pursuant to s 188(2). It was sensible not to do so. Hot Wok’s selection of a voting cohort which did not include anybody actually covered by the Hot Wok Agreement was not a “*minor procedural or technical error*” to which s 188(2) might apply; it was rather, we consider, part of a deliberate manipulation by which the four employees had their employment transferred from SSE to Hot Wok for the purpose of “making” an enterprise agreement which was intended to apply to the large number of SSE employees who were transferred to employment with Hot Wok only after the agreement was approved.

[55] Accordingly, we consider that the Deputy President erred in being satisfied that the requirement for genuine agreement in s 186(2)(a) was met. That error has been demonstrated by the evidence received and the other material taken into account in the special circumstances

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<sup>62</sup> Exhibit M

<sup>63</sup> Transcript, 25 November 2022, PNs 594-600

<sup>64</sup> Ibid, PN 601

<sup>65</sup> Ibid, PN 554

<sup>66</sup> Ibid, PN 555

<sup>67</sup> Ibid, PNs 556-562

<sup>68</sup> Ibid, PNs 602, 731-732

of this appeal — a permissible, albeit unusual, course in an appeal that is by way of rehearing.<sup>69</sup> Appeal ground 5 is upheld.

### Appeal grounds 2 and 3

[56] We also uphold appeal ground 2. As just stated, the selection of four relatively high-paid managers to “make” the Hot Wok Agreement was part of a deliberate manipulation of the statutory process for making enterprise agreements. Their approval of the agreement, which was subsequently to apply to a host of employees who were not to be given the opportunity to bargain or vote, was entirely lacking in authenticity and moral authority in the sense discussed in the Federal Court Full Court decision in *One Key Workforce Pty Ltd v CFMMEU*.<sup>70</sup> The point is neatly illustrated in the following evidence given by Mr Nicholson:

“So, why did you vote for the agreement, in favour of it? What was in it for you? - Well, as I said before, I think that we are all one sort of team, and we all – the pay rates were better for the casuals and that was why.

Did the casuals ever get to vote on this agreement? - Looking at these names, I’d say no.

Why was that? - I don’t know.

Wouldn’t it have been better for the casuals for them to make their own judgment as to whether it was better [for] them, than you? - I don’t know, you’d need to ask them. But, yes, I would wager that they – I would say my only response to that is they have that ability to vote with their feet every day, whether or not they decide to take a job or not take a job.”

[57] Mr Nicholson, together with Ms Li, Ms Wu and Mr Subedi, were selected to vote on an agreement in which they had no stake because of their management positions and relatively high salaries. In the case of at least Ms Wu, she had so little at stake that, despite signing the Hot Wok Agreement as the purported representative of the employees covered, she did not even bother to read it.<sup>71</sup> In voting to approve the agreement, the four employees made the choice on behalf of the large number of employees to whom the agreement was actually intended to apply but who were deprived of any say in it.

[58] We do not consider it necessary in the circumstances of the appeal to determine appeal ground 3.

### Conclusion and orders

[59] In the October decision, we granted an extension of time to the UWU to file its appeal, granted permission to appeal, upheld appeal grounds 1 and 4, and granted leave to the UWU to

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<sup>69</sup> See *CDJ v VAJ* [1998] HCA 76, 197 CLR 172 at [111] per McHugh, Gummow and Callinan JJ; *Allesch v Maunz* [2000] HCA 40, 203 CLR 172 at [23] per Gaudron, McHugh, Gummow and Hayne JJ; *Coal and Allied v AIRC* [2000] HCA 47, 203 CLR 194 at [13]-[17] per Gleeson CJ, Gaudron and Hayne JJ.

<sup>70</sup> [2018] FCAFC 77, 262 FCR 527 at [131]-[165]

<sup>71</sup> Transcript, 25 November 2022, PNs 444-482

amend its appeal to add appeal ground 5. In this decision, we have upheld appeal grounds 2 and 5. In those circumstances, it is necessary to quash the decision under appeal.

**[60]** Hot Wok did not contend that, on a rehearing of its application for approval of the Hot Wok Agreement, it was open to us to approve the agreement. Indeed, it submitted that it would discontinue the application upon the decision under appeal being quashed if it had the opportunity to do so rather than seeking to be heard further in relation to the application. It is clear in our view that the application must be dismissed having regard to the conclusions we have reached in relation to appeal grounds 1, 2, 4 and 5. The Hot Wok Agreement is incapable of satisfying the approval criteria in s 186(2)(a) and (d).

**[61]** There is one final matter we need to deal with. It is clear that the Deputy President substantially relied on the matters asserted in Mr Latham’s Form F17 declaration in determining to approve the Hot Wok Agreement. As we have found, that declaration was false or misleading in a number of respects, including as to the purported information sessions, the voting process and the number of employees covered by the agreement. It is apparent that this was the result of deliberate conduct on the part of Mr Latham in that, having regard to his position, knowledge and experience and his role in the process of “making” the Hot Wok Agreement, he knew what the true position was but chose to misrepresent or falsify this in his declaration. The Form F17 declaration and any documents accompanying it are, in most cases, the principal or even sole source of information upon which the Commission relies in determining whether an enterprise agreement meets the approval criteria in ss 186 and 187. The process for considering applications for the approval of enterprise agreements would break down entirely if, in every case, the Commission was required to “go behind” and investigate for itself the truth of the matters asserted in such declarations. A person who knowingly gives false or misleading information or knowingly produces a false or misleading document in support of an application for approval of an enterprise agreement is guilty of an offence under ss 137.1 and 137.2 of the Commonwealth *Criminal Code*. Accordingly, we will request that the General Manager of the Commission consider whether Mr Latham’s conduct in respect of his Form F17 declaration in this matter should be the subject of a referral to the Australian Federal Police.

**[62]** In addition to the orders made in the October decision, we make the following orders:

- (1) Appeal grounds 2 and 5 are upheld.
- (2) The decision of Deputy President Mansini of 28 July 2021 ([2021] FWCA 4524) is quashed.
- (3) The application for approval of the *Hot Wok Food Makers Pty Ltd (ABN 15 058 494 447) Workplace Agreement 2021* (matter number AG2021/6101) is dismissed.
- (4) The UWU is directed to file its submissions on the question of costs within 21 days of the date of this decision, and Hot Wok is directed to file its submissions in response within a further 21 days.

ACTING PRESIDENT

*Appearances:*

*H Clift* of counsel for the appellant.

*J Murdoch KC, S Meehan* of counsel for the respondent.

*P Telford* of counsel for Mr Latham, Mr Nicholson, Ms Li, Ms Wu and Mr Subedi.

*Hearing details:*

2022.

Sydney, Melbourne and Brisbane by video link using Microsoft Teams:  
28 October.

Brisbane:  
25 November.

*Final written submissions:*

Appellant: 13 December 2022.

Respondent: 23 December 2022.

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