FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v D'ADAMO NOMINEES PTY LTD (No.4) *[2015] FCCA 1178*

Catchwords:
INDUSTRIAL LAW – Alleged contraventions of an award – whether State Act excluded by Federal Act – whether applicant an employee – whether evidence of apprenticeship – whether apprentice is an employee – whether employer bound by the award – whether employer in the electrical contracting industry – whether employed in the role of electrical assistant – whether an employee directly assisting any other employee – covered by the award – whether any employees employed by employer as at 27 March 2006.

CONSTITUTIONAL LAW – Workplace relations – whether Federal Act excludes State industrial law – whether State industrial law – whether State law applies to employment generally.

EMPLOYMENT LAW – Whether relationship of employer and employee existed – admission as to employment relationship – whether admission could be withdrawn – factors relating to relationship of employer and employee.

EMPLOYMENT LAW – Apprenticeship – whether an apprentice is an employee – history of apprentices as employees in Western Australia.

PRACTICE AND PROCEDURE – Admission – admission that person an employee – whether Federal Court Rules to be applied – whether Federal Circuit Court Rules insufficient – whether admission able to be withdrawn.

WORDS AND PHRASES – "applies to employment generally" – "employee" – expressly provide otherwise" – "electrical assistant" – "apprentice" – "major and substantial test" – "directly assisting".

Legislation:
Acts Interpretation Act 1901 (Cth), s.15AA
Conciliation and Arbitration Act 1904 (Cth), s.132(3)
Constitution, s.109
Electrical Contracting Industry Award 1978 (WA), cll.3, 5, 10, 12, First Schedule
Electricity Act 1945 (WA)
Electricity Regulations 1947 (WA)
Electricity (Licensing) Regulations 1991 (WA)
Evidence Act 1995 (Cth), s.48(1)

Fair Work Act 2009 (Cth), s.701
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth), Sch.2, Item 11(1), Sch.18, Item 13(1)
Federal Circuit Court of Australia Act 1999 (Cth), s.16
Federal Circuit Court Rules 2001 (Cth), rr.1.05(2), 15.30
Federal Court Rules 1976 (Cth), O.11, r.18, O.22, r.4(2)
Federal Court Rules 2011 (Cth), r.26.11
Federal Magistrates Court Rules 2001 (Cth)
Industrial Arbitration Act 1940 (NSW)
Industrial Arbitration Act 1912 (WA), ss.4, 58, 74, 75, 76, 77, 78, 85
Industrial Relations Act 1979 (WA), ss.7(1), 37, 38, 47, 85
Industrial Training Act 1975 (WA), Part V, ss.4, 7, 19, 20, 21, 22, 24, 26, 29, 29A, 29B, 30, 31, 32, 32A(1), 33, 34, 37, 37C, 40, 42
Industrial Training (Apprenticeship Training) Regulations 1981 (WA), Sch.1
Industrial Training (General Apprenticeship) Regulations 1981 (WA), reg.10(1)
Interpretation Act 1984 (WA), s.56(2)
Trade Union Act 1881 (NSW), s.14(5)
Training Legislation Amendment and Repeal Act 2008 (WA), s.50
Workplace Relations Act 1996 (Cth), Part 7, Division 3, ss.4, 5, 6, 7, 16, 17, 182, 204(1), 208(1), 326, 717(1), 718, 719(6), 722, Sch.8, Part 3, Div.1, cll.31, 32, 33, 34, 38
Workplace Relations Regulations 2006 (Cth)
Vocational Education and Training Act 1996 (WA), Part 7, s.60F(7)
Vocational Education, Employment and Training Act 1994 (SA)

Cases cited:
ACT Visiting Medical Officers Association v Australian Industrial Relations Commission [2006] FCAFC 109; (2006) 153 IR 228
Airlite Cleaning Pty Ltd v The Australian Liquor, Hospitality & Miscellaneous Workers' Union, Western Australian Branch [2001] WASCA 19; (2001) 103 IR 241
Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT) [2009] HCA 41; (2009) 239 CLR 27
Amalgamated Collieries of WA Ltd v True (1938) 59 CLR 417
Amcor Ltd v Construction, Forestry, Mining & Energy Union [2005] HCA 10; (2005) 222 CLR 241
Armstrong v Bigeni Contracting Pty Ltd [2008] FMCA 485
Australian Railways Union & Ors v Public Transport Corporation (Vic) & Ors (1993) 47 IR 119
Australian Workers' Union & Anor v Shop Distributive and Allied Employees' Association & Ors [1978] 1 NSWLR 387
Balding v Ten Talents Pty Ltd [2007] FMCA 145; (2007) 162 IR 17
Banque Commerciale SA (in liq) v Akhill Holdings Ltd (1990) 169 CLR 279
Building Workers Industrial Union of Australia v Odco Pty Ltd (1991) 29 FCR 104

Bell v Gillen Motors Pty Ltd (1989) 24 FCR 77; (1989) 27 IR 324
Byrne & Frew v Australian Airlines Limited (1995) 185 CLR 410
Cameron v Human Rights and Equal Opportunity Commission & Anor (1993) 46 FCR 509
Carroll & Ors v Shillinglaw (1906) 3 CLR 1099
Celestino v Celestino (unreported, Full Court of Federal Court of Australia, 16 August 1990)
CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384
City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union [2006] FCA 813; (2006) 153 IR 426
Climaze Holding Pty Ltd v Dyson & Anor (1995) 13 WAR 487
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd [2012] FMCA 621; (2012) 224 IR 99
Construction, Forestry, Mining and Energy Union v CSBP Limited [2012] FCAFC 48; [2012] FCAFC 48, (2012) 212 IR 206, 64 AILR 101-578
Construction, Forestry, Mining & Energy Union v John Holland Pty Ltd [2010] FCAFC 90; (2010) 186 FCR 88
Construction, Forestry, Mining and Energy Union (Construction and General Division) v Master Builders Group Training Scheme Inc [2007] FCAFC 165; (2007) 168 IR 164
Coxon v Kat [2009] SASC 28; (2009) 103 SASR 301
Damevski v Giudice & Ors [2003] FCAFC 252; (2003) 133 FCR 438
Deangrove Pty Ltd (Receivers and Managers appointed) v Commonwealth Bank of Australia [2003] FCA 268
Donnelly v Edelsten (1992) 109 ALR 651
Electrical Trades Union of Workers of Australia (Western Australian Branch) Perth v Signlite Pty Ltd (1989) 69 WAIG 2658
Ex parte McLean (1930) 43 CLR 472
Fair Work Ombudsman v D'Adamo Nominees Pty Ltd (No.2) [2012] FMCA 1217
Fair Work Ombudsman v McGrath & Anor [2010] FMCA 315; (2010) 195 IR 190
Federated Clerks' Union of Australia Industrial Union of Workers (WA Branch) v Cary (1977) 57 WAIG 585
Federated Engine-Drivers & Firemen's Association of Australasia v The Broken Hill Proprietary Company Limited (1911) 12 CLR 398
Forbes Engineering (Asia) Pty Ltd v Forbes (No.3) [2007] FCA 1637
Freshwest Corporation Pty Ltd v Transport Workers Union, Industrial Union of Workers, WA Branch (1991) 71 WAIG 1746
Grunwick Processing Laboratories Ltd v Advisory, Conciliation & Arbitration Service [1978] AC 655
Hollis v Vabu Pty Ltd [2001] HCA 44; (2001) 207 CLR 21
In re National Debenture & Assets Corporation [1891] 2 Ch 505
Jarvis v Imposete (No.2) [2008] FMCA 101; (2008) 169 IR 458
Joyce v Christofferson (1990) 26 FCR 261; 33 IR 390, 32 AILR 401

Kucks v CSR Limited (1996) 66 IR 182
Long v Chubbs Australian Co Ltd (1935) 53 CLR 143
McKellar v Container Terminal Management Services Ltd [1999] FCA 1101
Murran Investments Pty Ltd v Aromatic Beauty Products Pty Ltd [2000] FCA 1732; (2000) 191 ALR 579
Ogle & Anor v Strickland & Ors (1987) 13 FCR 306
Richardson v Sedemuda Pty Ltd (T/as South West Ceramics) (1985) 65 WAIG 2229; (1985) 17 IR 418
RJ Donovan & Associates Pty Ltd v Federated Clerks Union of Australia, Industrial Union of Workers, WA Branch (1977) 57 WAIG 1317
Rowe v Capital Territory Health Commission (1982) 62 FLR 383; (1982) 1 IR 133
Rowe v Capital Territory Health Commission (1982) 2 IR 27
Shenton Enterprises Pty Ltd trading as John Shenton Pumps v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch [2000] WAIRComm 148; (2000) 80 WAIG 2842
Sim v LUO Enterprise Pty Ltd (No.2) [2009] FMCA 1060; (2009) 191 IR 401
Stevens v Brodribb Sawmilling Company Proprietary Limited (1986) 160 CLR 16
The Director of the Fair Work Building Industry Inspectorate v Linkhill Pty Ltd (No.7) [2013] FCCA 1097
The Federated Engine Drivers & Firemen's Union (WA) v Mt Newman Mining Co Pty Ltd (1977) 57 WAIG 794
Thorp v Holdsworth [1876] 3 Ch D 637
Toowoomba Foundry Pty Ltd v The Commonwealth (1945) 71 CLR 545
Transport Workers' Union of Australia v Coles Supermarkets Australia Pty Ltd [2014] FCCA 4
Visscher v Giudice & Ors [2009] HCA 34; (2009) 239 CLR 361
Ware v O'Donnell Griffin (Television Services) Pty Ltd [1971] AR (NSW) 18
Western Australian Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union of Workers v Glover (1970) 50 WAIG 704

ALR Kiralfy, *Potter's Historical Introduction to English Law and its Institutions* (4th Edn) (London: Sweet and Maxwell Ltd, 1958)
C Sappideen et al, *Macken's Law of Employment* (7th Edn) (Pyrmont: Law Book Co, 2011)
The Shorter Oxford Dictionary on Historical Principles (3rd Ed) (Volume 1) (Oxford: Clarendon Press, 1973)

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	D'ADAMO NOMINEES PTY LTD
File Number:	PEG 60 of 2010

Judgment of:	Judge Antoni Lucev
Hearing date:	12 April 2013
Date of Last Submission:	12 April 2013
Delivered at:	Perth
Delivered on:	8 May 2015

REPRESENTATION

Counsel for the Applicant:	Mr A J Power
Solicitors for the Applicant:	Mark Davidson, Office of the Fair Work Ombudsman
Counsel for the Respondent:	Mr D Howlett
Solicitors for the Respondent:	Westmont Legal

ORDERS

(1) That the application be dismissed.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT PERTH

PEG 60 of 2010

FAIR WORK OMBUDSMAN
Applicant

And

D'ADAMO NOMINEES PTY LTD
Respondent

REASONS FOR JUDGMENT

Introduction and issues

1. The applicant, the Fair Work Ombudsman,[1] alleges that the respondent, D'Adamo Nominees Pty Ltd,[2] employed Steven Motherwell in an electrical contracting business under the terms of the *Electrical Contracting Industry Award 1978* (WA),[3] which, under the provisions of the *Workplace Relations Act 1996* (Cth),[4] became a Notional Agreement Preserving a State Award,[5] with effect from 27 March 2006. The FWO alleges that Mr Motherwell:

    a) commenced employment as an electrical assistant with D'Adamo Nominees on 20 August 2007;

    b) became an apprentice with D'Adamo Nominees on 4 February 2008 until 30 January 2009;

[1] "FWO".
[2] "D'Adamo Nominees".
[3] "*ECI Award*".
[4] "*WR Act*".
[5] "NAPSA".

c) was employed both as an electrical assistant and an apprentice under the terms of the *ECI Award*; and

d) was underpaid various wages and entitlements by D'Adamo Nominees during the period of his employment, in the adjusted sum of $8992.88.

2. In *Fair Work Ombudsman v D'Adamo Nominees Pty Ltd (No. 2)*[6] the Federal Magistrates Court dismissed a no case to answer submission by D'Adamo Nominees, other than with respect to the first two weeks of Mr Motherwell's employment at D'Adamo Nominees from 20 August 2007 to the close of business on 31 August 2007.

3. Liability is the only issue presently to be considered by the Court. In determining issues of liability, many of the same issues arise as arose in *D'Adamo Nominees (No. 2)*, and it has been necessary to address many of those matters again given the necessity to determine whether or not the FWO has proven its case.

Basic legislative scheme

4. Under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)[7] the *WR Act* continues to apply to conduct that occurred before 1 July 2009.[8]

5. The FWO has standing to bring the current proceedings under the *WR Act*, as the FWO is a Fair Work Inspector by force of s.701 of the *Fair Work Act 2009* (Cth),[9] and pursuant to s.717(1) of the *WR Act* when read together with the *FW Transitional Act*, Schedule 18, Item 13(1), Fair Work Inspectors are able to make applications as Workplace Inspectors under the *WR Act* could have done.

6. The FWO has standing to apply to the Court for penalties and remedies for contraventions of applicable provisions.[10] An Applicable Provision for relevant purposes includes a term of the Australian Fair Pay and Conditions Standard,[11] including s.182 of the *WR Act*,[12] as well as a

[6] [2012] FMCA 1217 ("*D'Adamo Nominees (No. 2)*").
[7] "*FW Transitional Act*"
[8] *FW Transitional Act*, Sch.2, Item 11(1).
[9] "*FW Act*".
[10] *WR Act*, ss.717-718 ("Applicable Provision").
[11] "AFPCS".

term of a collective agreement (a NAPSA may be enforced as if it is a collective agreement).[13] If the alleged contraventions are made out the Court is empowered to make declarations, orders and impose penalties.[14]

Some basic matters

7. Mr Motherwell was born on 22 August 1989.

8. In August 2007 Mr Motherwell approached Luigi D'Adamo, the sole director of D'Adamo Nominees, in relation to commencing an apprenticeship in electrical mechanics. Mr Motherwell was initially employed on a trial basis for a period from 20 August 2007. In *D'Adamo Nominees (No. 2)* the Court found that the period from 20 to 31 August 2007 was a period during which there was no evidence capable of sustaining a case that Mr Motherwell was employed as an electrical assistant under the *ECI Award*, because there was no evidence that he was directly assisting another employee covered by the *ECI Award*.[15]

9. There does not appear to be any dispute that D'Adamo Nominees is a constitutional corporation, and an employer,[16] which carried on business and had a registered office in, and carried on business within, the State of Western Australia trading as L & A Electrics. Whether D'Adamo Nominees trading as L & A Electrics "carried on the business of supplying domestic electrical wiring services for households", as pleaded by the FWO[17] and denied by D'Adamo Nominees,[18] and whether, the business is an electrical contracting business, is in dispute in these proceedings.

The interpretation of statutes and industrial awards and instruments

10. In dealing with the issues in these proceedings the Court will be required to interpret both Commonwealth and State statutes and

---

[12] *WR Act*, s.717(a)(ii).
[13] *WR Act*, Sch.8, cl.43.
[14] *Federal Circuit Court of Australia Act 1999* (Cth), s.16 ("*FCCA Act*"); *WR Act*, ss.719(6) and 722.
[15] *D'Adamo Nominees (No. 2)* at [56]-[59] per Lucev FM.
[16] *WR Act*, ss.4(1) and 6(1).
[17] Statement of Claim, para.4.
[18] Defence, para.5.

industrial awards and instruments. In relation to the interpretation of statutes and awards and instruments the following principles apply.

Statutes

11. In interpreting a statute to determine its true meaning a court begins with a consideration of the text, which must be read in context and having regard to the statutory purpose or object.[19] The central task is to discern the meaning of the legislative text, and give effect to the identified purpose, if it is one which is reasonably open on the text. The interpretation best open on the text which achieves the purpose or object of the statute is to be preferred to each other interpretation (even if the purpose or object is not expressly stated in the text).[20]

Industrial awards and instruments

12. Industrial awards and instruments are not themselves laws, but once made, their provisions are given the force of law by the terms of the statute which authorises their making.[21]

13. An industrial award or instrument made by a body invested with statutory authority to do so. In this case the *ECI Award* was made by the Western Australia Industrial Relations Commission[22] under the *Industrial Relations Act 1979* (WA).[23] The *ECI Award* has then been converted into a NAPSA, which is a federal instrument,[24] by the provisions of the *WR Act*,[25] and so attracts the application of the *Acts Interpretation Act* for the purposes of its interpretation.[26]

14. An industrial award or instrument is to be given its plain and ordinary meaning, and construed in context having regard to the subject matter

---

[19] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* [2009] HCA 41; (2009) 239 CLR 27 at [46]-[47] per Hayne, Heydon, Crennan and Kiefel JJ; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.
[20] *Acts Interpretation Act 1901* (Cth), s.15AA ("*Acts Interpretation Act*").
[21] *Ex parte McLean* (1930) 43 CLR 472 at 479 per Isaacs and Starke JJ; *Byrne & Frew v Australian Airlines Limited* (1995) 185 CLR 410 at 425 per Brennan CJ, Dawson and Toohey JJ ("*Byrne & Frew*"); *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813; (2006) 153 IR 426 ("*City of Wanneroo*").
[22] "WAIRC".
[23] "*IR Act*".
[24] "*ECI Award NAPSA*".
[25] *WR Act*, Sch.8, Pt.3, Div.1, cl.31 ("Schedule 8").
[26] *City of Wanneroo* at [53]-[57] per French J.

and text of the instrument as a whole.[27] In an oft quoted passage in *Kucks v CSR Limited*[28] the Industrial Relations Court of Australia observed that:

> *It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon.*[29]

15. An industrial award or instrument probably never deals with or affects all aspects of the contract of employment, and there must be a contract of employment before an industrial award or instrument can apply.[30]

Industrial Training Act 1975 (WA)[31]

16. The *IT Act*, and whether it has any application at all, and, if so, to what extent, is a central issue in controversy in these proceedings. The provisions of the *IT Act* most relevant to this matter are set out hereunder.

17. In s.4 – Interpretation of the *IT Act* it is provided that unless the contrary intention appears in the *IT Act* the following definitions have the following meanings:

> ***apprentice*** *means any person pursuant to this Act bound apprentice to an employer … in an apprenticeship trade by an agreement or by assignment of an agreement;*
>
> ***apprenticeship agreement*** *means an agreement under which a person is bound as an apprentice;*

---

[27] *Construction, Forestry, Mining & Energy Union v John Holland Pty Ltd* [2010] FCAFC 90; (2010) 186 FCR 88; *Amcor Ltd v Construction, Forestry, Mining & Energy Union* [2005] HCA 10; (2005) 222 CLR 241 at [2] per Gleeson CJ and McHugh J and [30] per Gummow, Hayne and Heydon JJ ("*Amcor*"); *City of Wanneroo* at [53]-[57] per French J.
[28] (1996) 66 IR 182 ("*Kucks*").
[29] *Kucks* at 184 per Madgwick J.
[30] *Amalgamated Collieries of WA Ltd v True* (1938) 59 CLR 417 at 423 per Latham CJ ("*True*"); *Byrne & Frew* at 421-422 per Brennan CJ, Dawson and Toohey JJ; *Visscher v Giudice & Ors* [2009] HCA 34: (2009) 239 CLR 361 at [71] per Heydon, Crennan, Kiefel and Bell JJ ("*Visscher*").
[31] "*IT Act*". The *IT Act* was repealed by s.50 of the *Training Legislation Amendment and Repeal Act 2008* (WA) with effect from 10 June 2009. Apprenticeship regulation now falls under the *Vocational Education and Training Act 1996* (WA) ("*VET Act*").

apprenticeship trade *means a trade prescribed as an apprenticeship trade under this Act;*

Department *means the department of the Public Service of the State known as the Department of Labour and Industry or if there is no department of that name the department that is responsible for assisting the Minister in the administration of this Act;*

Director *means the person for the time being holding or acting in the office of Director of Industrial Training under this Act;*

probationer *means a person who is employed on probation pursuant to section 29;*

industrial trainee *means a person, other than an apprentice, who undertakes a course of training in an industrial training trade;*

Registrar *means the Registrar of Industrial Training appointed under this Act;*

trade *includes occupation and any branch or branches of a trade or occupation.*

18. Section 7 of the *IT Act* deals with the administration of the *IT Act* and provides as follows:

> *Subject to the Minister, this Act shall be administered by the chief executive officer of the Department.*

19. The *IT Act* provides for the appointment of a Registrar and the maintenance of a Register of Apprentices in ss.19 and 20 which provide as follows:

> *s.19*
>
> *(1) There shall be appointed in the Division and under and subject to Part 3 of the* Public Sector Management Act 1994*, a Registrar of Industrial Training.*
>
> *(2) The Registrar shall have such duties and functions as are conferred on him by this Act, and as are conferred on him or directed to be performed by him by the Director.*
>
> *s.20*
>
> *(1) The Registrar shall —*

(a) maintain a Register of Apprentices and a Register of Industrial Trainees ...;

(b) make provision for the examination and testing of apprentices and industrial trainees in accordance with the regulations.

(2) The Register of Apprentices and the Register of Industrial Trainees shall be in the form approved by the Director.

(3) A register referred to in this section, and any certified copy of or extract from such a register, shall be prima facie evidence of the facts stated therein.

(4) A certificate that any person is or is not or was or was not registered as an apprentice or industrial trainee as the case requires under this Act shall, if signed by the Registrar, be prima facie evidence of the facts stated therein.

20. Part IV of the *IT Act* deals with trade training.

21. Section 21 of the *IT Act* provides that:

> *The Governor may, by regulation prescribe a trade or a group of traces [sic] as an apprenticeship trade or industrial training trade, or as both an apprenticeship trade and an industrial training trade for the purposes of this Act.*

22. Section 22 of the *IT Act* provides that:

> *The provisions of this Act apply to training in any trade or group of trades so long as the regulation prescribing that trade or group of trades as —*
>
> *(a) an apprenticeship trade; or*
>
> *(b) an industrial training trade,*
>
> *or both, as the case may be, remains in force.*

23. Section 24 of the *IT Act* provides as follows:

> *An agreement with respect to training in a trade that is prescribed under this Act as an apprenticeship trade or an industrial training trade shall if it is in force on the date that that trade is so prescribed be lodged for registration with the Registrar within one month of that date.*

24. Part V of the *IT Act* deals with the employment and training of apprentices.

25. Section 29 of the *IT Act* deals with employment on probation and provides as follows:

> *Except as provided by this Act, a person who desires to be employed as an apprentice or industrial trainee in a trade to which this Act applies shall be employed in the first instances on probation for a period of 3 months or such additional period, not exceeding 3 months, as the Director may, on application by the employer approve, for the purpose of determining his fitness to be so employed, and in the event of his becoming an apprentice or industrial trainee in that trade the period of probation shall be counted as service under his apprenticeship agreement or an industrial training agreement.*

26. Section 29A of the *IT Act* deals with the employment of probationers, and relevantly provides as follows:

> *(1) No employer shall employ a probationer unless the Director has approved of the employer and the employment of the probationer.*
>
> *(2) An employer shall within 14 days after he first employs a probationer notify the Registrar in writing of that fact and make application to the Director for approval to establish an apprenticeship or period of industrial training.*
>
> *(3) On receipt of an application pursuant to subsection (2) the Director shall cause to be made such enquiries as are prescribed as to whether approval should be given to the application and may approve of the application or make such order as he considers appropriate in the particular case, including an order that the probationer be no longer employed by the applicant, and shall notify the applicant of his decision.*

27. Section 30 of the *IT Act* is a critical provision. It contains general provisions as to apprenticeship agreements, and relevantly provides as follows:

> *(1) The following provisions apply with respect to every apprenticeship agreement and every industrial training agreement —*

(a) the term of the apprenticeship or period of industrial training shall be as prescribed;

(b) the agreement shall be in the prescribed form;

(c) except as otherwise provided by this Act, the parties to the agreement shall be the employer, the apprentice or industrial trainee and the parent or guardian of the apprentice or industrial trainee but if the Director is satisfied that it is in the interest of the employer and the apprentice or industrial trainee the Director may by endorsement on the agreement consent to it being executed only by the employer and the apprentice or industrial trainee;

(d) the agreement shall not be deemed to be invalid by reason only of not being under seal;

(e) the agreement duly executed shall be lodged with the Registrar for registration as required by this Act and the Registrar shall retain the agreement during the term of the agreement;

(f) 3 copies of the agreement as executed shall be prepared by the Division, one of which shall be given to the employer and one to the apprentice or industrial trainee and one to the parent or guardian.

28. Section 31 of the *IT Act* deals with the registration of apprenticeship agreements and provides as follows:

(1) Subject to the provisions of sections 32 and 32A, a person shall be deemed not to be employed as an apprentice or industrial trainee in a trade to which this Act applies unless the apprenticeship or industrial training agreement entered into by that person is registered as required under this Act.

(2) Application for the registration of an agreement shall be made to the Registrar within 14 days of the execution of the agreement.

29. Section 32 of the *IT Act* deals with the commencement of service under an apprenticeship agreement and provides as follows:

Service under an apprenticeship or industrial training agreement commences on the day that the apprentice or industrial trainee commences employment as such.

30. Section 33 of the *IT Act* deals with apprentices attending classes to obtain instruction and the obtaining of instruction by correspondence as prescribed, as well as the requirement of the employer to grant the apprentice leave of absence without deduction of wages to enable the apprentice to attend to classes and instruction by correspondence, and the training of apprentices by an employer in accordance with an accredited course or skills training programme.[32]

31. Section 34 of the *IT Act* deals with the transfer of employment of apprentices and relevantly provides as follows:

> *(1) Where all parties agree, the employment of an apprentice or industrial trainee may be transferred from one employer to another employer.*
>
> *(2) Where any party to a proposed transfer of the employment of an apprentice or industrial trainee from one employer to another is not willing to consent to enter into a formal assignment the Director may authorize the transfer.*
>
> *(3) Where the transfer of the employment of an apprentice or industrial trainee from one employer to another and the assignment of the apprenticeship or industrial training agreement is authorized by the Director, and the employment of that apprentice or industrial trainee is transferred from the first to the second employer but an assignment is not executed within one month after the apprentice or industrial trainee is transferred, the Director may execute an assignment on behalf of the party in default, and any such person shall thereupon for the purposes of this Act be deemed to have made and accepted the assignment.*
>
> *…*
>
> *(5) A transfer of employment in accordance with this section shall be registered with the Registrar.*

32. Section 37 of the *IT Act* provides as follows:

> *(1) Subject to subsection (2), no apprentice or industrial trainee shall be discharged from employment by an employer for alleged misconduct unless the parties to the relevant apprenticeship agreement or industrial training agreement consent to the dismissal or the agreement is cancelled by order of the Director on the application of the employer.*

[32] *IT Act*, s.33(1), (2) and (3).

(2) An employer may suspend an apprentice or industrial trainee for alleged misconduct but shall, within 7 days of the date of suspension, apply to the Director for suspension or cancellation of the relevant apprenticeship agreement or industrial training agreement.

(3) Upon an application by an employer under subsection (1) or subsection (2) the Director may, after following the procedure prescribed, —

(a) suspend the operation of the agreement for such period and on such conditions as he thinks fit;

(b) cancel the agreement; or

(c) order the employer to reinstate the apprentice or industrial trainee and make such order as to the payment of wages to the apprentice or industrial trainee during any period of suspension as he thinks fit.

33. Section 37C of the *IT Act* provides as follows:

> *A person aggrieved by a decision of the Director in the exercise of the jurisdiction conferred upon him by sections 29A, 34(2) and (3), and 37 may appeal to the Commission.*

34. Section 42(1) of the *IT Act* contains a general power vested in the Governor to make such regulations as are necessary or expedient for the purposes of giving effect to the provisions or objects of the *IT Act*, and without limiting that general power also prescribes in s.42(2) of the *IT Act* that regulations may be made in relation to the following matters:

> *(a) provide for the registration of apprentices or industrial trainees;*
>
> *(b) prescribe trades as apprenticeship trades or industrial training trades for the purposes of this Act;*
>
> *…*
>
> *(ea) provide for the variation by the Director of the prescribed period of apprenticeship;*
>
> *(f) provide for the extension, variation, suspension and cancellation of apprenticeship … agreements;*

(g) provide for the transfer of apprenticeship … agreements;

…

(ib) prescribe, in relation to a particular place of employment, the maximum number of apprentices or industrial trainees who may be employed by an employer in an apprenticeship trade or industrial training trade in proportion to the number of tradesmen employed by that employer in that trade and provide that where the training facilities of a particular employer are adequate for the purpose the Director may approve the employment by that employer of a greater number of apprentices or industrial trainees than would otherwise be permitted.

IT Act – whether an excluded State industrial law

35. As indicated above a central issue in this matter is whether the *IT Act* applies, at all, or if so, to what extent.

36. At paragraph 12 of the Defence D'Adamo Nominees submits that:

> *b. At the date that the Employee [Mr Motherwell] commenced employment the … [IT Act] and associated Regulations had no application to the employment of the Employee because of the effect of s 16 of the … [WR Act] which was to apply the provisions of the … [WR Act] to the exclusion of the … [*IT Act*] so far as it would otherwise apply in relation to an employee or employer.*

For the purposes of this aspect of the argument whether Mr Motherwell entered into an apprenticeship (if he entered into one at all) to which the *IT Act* might have applied, and the date on which he did so, is immaterial.

37. D'Adamo Nominees' argument, as it was developed in final submissions, was that s.16 of the *WR Act* applied to the exclusion of a State or Territory industrial law so far as it would otherwise apply in relation to an employee or employer, and that a State or Territory industrial law was one which applied to employment generally and deals with leave other than long-service leave, and also State laws providing for the variation or setting aside of rights and obligations arising under a contract of employment. D'Adamo Nominees says that:

a) s.31 of the *IT Act* provides for the registration of apprenticeship agreements;

b) s.33(2) of the *IT Act* deals with leave of absence for attendance at educational and training programmes;

c) s.34 of the *IT Act* provides for the transfer of apprenticeships, and, therefore, the transfer of employment; and

d) s.37 of the *IT Act* provides for the referral of disputes to the WAIRC.

38. D'Adamo Nominees also submitted that s.4(1)(a)(iii) of the *WR Act* which provides for an act of a State or Territory that applies to employment generally, and has one or more of the following as its main purpose or one of its main purposes, namely, regulating workplace relations, including industrial matters, industrial disputes and industrial action within the ordinary meaning of those expressions, meant that:

a) s.29A of the *IT Act* dealing with the employment of probationers;

b) s.29B of the *IT Act* dealing with the part-time employment of apprentices;

c) s.33(2) of the *IT Act* dealing with leave of absence without deduction from wages for educational and training purposes;

d) s.34 of the *IT Act* dealing with the transfer of apprenticeships;

e) s.37 of the *IT Act* dealing with dispute resolution and referral to the WAIRC; and

f) s.42 of the *IT Act* permitting regulations to be made, and in particular, in s.42(2)(c) dealing with the minimum number of hours of employment for a probationer, apprentice or industrial trainee and extends to the *Industrial Training (General Apprenticeship) Regulations 1981* (WA),[33] which D'Adamo Nominees says are made under s.42(2)(c) of the *IT Act*,

[33] "*IT General Apprenticeship Regulations*".

and were all provisions caught by s.4(1)(a)(iii) and therefore s.16(1) of the *WR Act*.

39. D'Adamo Nominees also relies on s.4(1)(c) of the *WR Act*, and of the definition of "State" or "Territory" industrial law as covering the regulations made under the *IT Act* as instruments of a legislative character, applying generally to employees and employers and to all of their apprentices and trainees throughout the State, and excluding the class or otherwise of non-apprentices for the purposes of the definition of "applies to employment generally" under s.4(1) of the *WR Act*.

40. D'Adamo Nominees further submitted that s.16(2)(b) of the *WR Act*, which excludes from the operation of s.16(1) of the *WR Act* any law prescribed by the *Workplace Relations Regulations 2006* (Cth) ("*WR Regulations*"), had no relevant effect because the *WR Regulations* only applied to the extent of a remedy arising from the suspension, cancelation or termination of an apprenticeship agreement in circumstances contrary to law or relating to the arrangements under the agreement, but, that otherwise, the *IT Act* was excluded from applying to Mr Motherwell for all other purposes.

41. D'Adamo Nominees submits that the *IT Act* matters relating to apprentices are not listed in the non-excluded matters in s.16(3) of the *WR Act*.

42. D'Adamo Nominees submits that s.17 of the *WR Act* providing that an award or workplace agreement (which does not include a NAPSA), prevails over State or Territory laws, with certain exceptions, does not apply. In relation to the exception, D'Adamo Nominees submits that the exception for State or Territory laws dealing with training arrangements, and that awards are subject to a law of a State or Territory dealing with training arrangements does not have any effect because the *IT Act* (which it is conceded is a law with respect to training arrangements) has already been excluded to the extent of any inconsistency.

43. D'Adamo Nominees submits that there is nothing under the *ECI Award*, or otherwise under federal law, that requires the registration of an apprentice under the *IT Act*. Therefore D'Adamo Nominees argues that if the Court finds that Mr Motherwell was an apprentice it can only

be by operation of a common law contract of apprenticeship. That therefore means that there is no need to find that he was an electrical assistant, for Mr Motherwell being an electrical assistant only arises in the context of the non-registration of the apprenticeship agreement. D'Adamo Nominees submits that there is a direct inconsistency, articulated at paragraph 12(d) of the Defence which provides that Mr Motherwell was an apprentice due to the contract between him and D'Adamo Nominees at common law, and between either the *WR Act* or the *ECI Award NAPSA* and the *IT Act*. Therefore, it is submitted that the *IT Act* is directly inconsistent with the *WR Act*, or the *ECI Award NAPSA*, or the relevant APCS, and for those reasons the *IT Act* cannot operate to invalidate the agreed employment as an apprentice under the application of Commonwealth laws, and cannot be used to nullify the employment contract made under the *WR Act* and instruments created by the *WR Act*, including the *ECI Award NAPSA* which contains a classification of apprentice.

44. The FWO submits that in relation to the *IT Act*, and whether or not it applies to Mr Motherwell's employment:

a) the *WR Act* applies to the exclusion of "*State or Territory industrial laws*";[34]

b) "*State or Territory industrial law*" is relevantly defined to include "*an Act of a State or Territory that applies to employment generally*" and has one of the purposes listed in s.4 of the *WR Act* as one of its main purposes;[35]

c) a State law "*applies to employment generally, if it applies to all employers and employees in the State (or all employers and employees with identified exceptions)*";[36]

d) the *IT Act* applies only to apprentices and industrial trainees in Western Australia, and employers of apprentices and industrial trainees;

e) the *IT Act* is therefore not a State or Territory industrial law excluded by the *WR Act*;

[34] *WR Act*, s.16(1)(a).
[35] *WR Act*, s.4(1), para.(b) of the definition of "*State or Territory industrial law*".
[36] *WR Act*, s.4(1).

f) further, the *WR Act* provides for the continued operation of State laws in relation to training arrangements;[37] and

g) the *IT Act* continued to regulate apprenticeships in electrical mechanics (the course done by Mr Motherwell) in Western Australia after 27 March 2006. Electrical mechanics was prescribed as an "apprenticeship trade" for the purposes of the *IT Act*.[38]

45. Relevantly, ss.16 and 17 of the *WR Act* provided as follows:

> *16 (1) This Act is intended to apply to the exclusion of all the following laws of a State or Territory so far as they would otherwise apply in relation to an employee or employer:*
>
> *(a) a State or Territory industrial law;*
>
> *(b) a law that applies to employment generally and deals with leave other than long service leave;*
>
> *(c) ...*
>
> *(d) a law providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair;*
>
> *(e) ...*
>
> *(2) **State and Territory laws that are not excluded** However, subsection (1) does not apply to a law of a State or Territory so far as:*
>
> *a) ...*
>
> *(b) the law is prescribed by the regulations as a law to which subsection (1) does not apply; or*
>
> *(c) the law deals with any of the matters (the **non-excluded matters**) described in subsection (3).*
>
> *(3) The non-excluded matters are as follows:*
>
> *(a) superannuation;*

[37] *WR Act*, s.17(2).
[38] *Industrial Training (Apprenticeship Training) Regulations 1981* (WA), Sch.1.

(b) workers compensation;

(c) occupational health and safety (including entry of a representative of a trade union to premises for a purpose connected with occupational health and safety);

(d) matters relating to outworkers (including entry of a representative of a trade union to premises for a purpose connected with outworkers);

(e) child labour;

(f) long service leave;

(g) the observance of a public holiday, except the rate of payment of an employee for the public holiday;

(h) the method of payment of wages or salaries;

(i) the frequency of payment of wages or salaries;

(j) deductions from wages or salaries;

(k) industrial action (within the ordinary meaning of the expression) affecting essential services;

(l) attendance for service on a jury;

(m) regulation of any of the following:

(i) associations of employees;

(ii) associations of employers;

(iii) members of associations of employees or of associations of employers.

(4) ***This Act excludes prescribed State and Territory laws*** *This Act is intended to apply to the exclusion of a law of a State or Territory that is prescribed by the regulations for the purposes of this subsection.*

(5) To avoid doubt, subsection (4) has effect even if the law is covered by subsection (2) (so that subsection (1) does not apply to the law). This subsection does not limit subsection (4).

(6) ***Definition*** *In this section:*

this Act *includes the Registration and Accountability of Organisations Schedule and regulations made under it.*

17 (1) An award or workplace agreement prevails over a law of a State or Territory, a State award or a State employment agreement, to the extent of any inconsistency.

(2) However, a term of an award or workplace agreement dealing with any of the following matters has effect subject to a law of a State or Territory dealing with the matter, except a law that is prescribed by the regulations as a law to which awards and workplace agreements are not subject:

(a) ...

(b) ...

(c) training arrangements;

(d) a matter prescribed by the regulations for the purposes of this paragraph.

(3) ...

46. The *WR Act* also defines the following terms in s.4(1):

***applies to employment generally** : a law of a State or Territory applies to employment generally if it applies (subject to constitutional limitations) to:*

(a) all employers and employees in the State or Territory; or

(b) all employers and employees in the State or Territory except those identified (by reference to a class or otherwise) by a law of the State or Territory.

For this purpose, it does not matter whether or not the law also applies to other persons, or whether or not an exercise of a power under the law affects all the persons to whom the law applies.

***award** means a pre-reform award.*

***notional agreement preserving State awards** has the meaning given by clause 1 of Schedule 8.*

***pre-reform award** means an instrument that has effect after the reform commencement under Item 4 of Schedule 4 to the Workplace Relations Amendment (Work Choice) Act 2005.*

***State or Territory industrial law** means:*

(a) any of the following State Acts:

….

(iii) the Industrial Relations Act 1979 of Western Australia;

….

(b) an Act of a State or Territory that applies to employment generally and has one or more of the following as its main purpose or one or more of its main purposes:

(i) regulating workplace relations (including industrial matters, industrial disputes and industrial action, within the ordinary meaning of those expressions);

(ii) providing for the determination of terms and conditions of employment;

(iii) providing for the making and enforcement of agreements determining terms and conditions of employment;

(iv) providing for rights and remedies connected with the termination of employment;

(v) ...

(c) an instrument made under an Act described in paragraph (a) or (b), so far as the instrument is of a legislative character; or

(d) a law that:

(i) is a law of a State or Territory; and

(ii) is prescribed by regulations for the purposes of this paragraph.

***State or Territory training authority** means a body authorised by a law or award of a State or Territory for the purpose of overseeing arrangements for the training of employees.*

***training arrangement** means a combination of work and training that is subject to a training agreement or a training contract between the employee and employer that is registered:*

(a) with the relevant State or Territory training authority; or

(b) under a law of a State or Territory relating to the training of employees.

workplace agreement *means:*

(a) an ITEA; or

(b) a collective agreement;

and includes a document that the Court has ordered under section 412A is to have effect as a workplace agreement.

The Court notes that for the purposes of the definition of "workplace agreement" the following definitions are relevant:

ITEA*: see individual transitional employment agreement.*

individual transitional employment agreement or ITEA *has the meaning given by section 326.*

collective agreement *means:*

(a) an employee collective agreement; or

(b) a union collective agreement; or

(c) an employer greenfields agreement; or

(d) a union greenfields agreement; or

(e) a multiple-business agreement.

The definition of "*individual transitional employment agreement or ITEA*" in s.326 of the *WR Act* does not take the matter further.

47. Section 16(1)(a) of the *WR Act* does not define the *IT Act* as a State or Territory law, and therefore does not exclude the *IT Act*. It does exclude the *IR Act*, but the *IR Act* is only important for:

a) historical reasons related to whether apprentices are employees in Western Australia; and

b) issues related to the scope of coverage of the *ECI Award* up to and including 26 March 2006, that is, prior to the *WR Act* taking effect,

as set out below in these Reasons for Judgment.

48. Section 16(1)(b) of the *WR Act* has two elements. The first is that the law to be excluded must be a law that "*applies to employment*

generally", and the second is that it "*deals with leave other than long service leave*". The use of the conjunctive "*and*" indicates that both elements must be met before the law to which it is sought to be applied is excluded.

49. In order to be a law of a State or Territory that "*applies to employment generally*", the law must:

    a) apply to all employers and employees in the State concerned; or

    b) apply to all employers and employees in the State concerned except those identified, by reference to a class or otherwise, by the State law.

50. In this case the *IT Act* does not apply to all employers and employees in Western Australia. Specifically, it only applies to employees who are apprentices and industrial trainees. It therefore does not meet the definition in paragraph (a) of "*applies to employment generally*" in s.4(1) of the *WR Act*. Nor does the *IT Act* apply to all employers and employees except for those identified by reference to a class or otherwise. The only class or classes identified in the *IT Act* are "*apprentices*" and "*industrial trainees*", and they are clearly not all employees in Western Australia. The *IT Act* does not also specifically identify any exceptions to the limited application that it has. It is plain that the exceptions referred to must be exceptions from the "*all employers and employees in the State*" to which paragraph (b) of the definition of "*applies to employment generally*" applies. D'Adamo Nominees' argument that the definition applied because the *IT Act* applied to apprentices and industrial trainees and then identified a class, being non-apprentice or industrial trainee employees in Western Australia, is a reversal of the relevant test. The definition applies first to all employers and employees in the State, and the exception is an exception to that, not the other way around.

51. In the above circumstances there is no scope for the application of s.16(1)(b) of the *WR Act* to exclude the *IT Act*.

52. In relation to s.16(1)(d) of the *WR Act*, the *IT Act* is not a law thereby excluded, because the *IT Act* does not provide for the variation or setting aside of rights and obligations in relation to apprentices (who

for reasons set out below in these Reasons for Judgment are at least covered by the phrase "another arrangement for employment") that a court or Tribunal finds is "unfair". Firstly, whatever powers the Director of Industrial Training under the *IT Act* has, or whatever powers the tribunal, in this case the WAIRC, are given under the *IT Act*, those powers are not predicated on any finding of unfairness. The Director is not a court or tribunal, but rather a person holding office under the *IT Act*: see definition of "*Director*" in s.4(1) of the *IT Act*. The WAIRC is a "tribunal" with limited powers on appeal from a decision by the Director. That power is granted under s.37C of the *IT Act* which provides that a person aggrieved by a decision of the Director exercising jurisdiction under ss.29A, 34(2) and (3) and 37 may appeal to the WAIRC.

53. The criterion for the appeal to the WAIRC is not unfairness, but rather that the person affected by the decision of the Director is "aggrieved". Whether a person is "aggrieved" is to be determined objectively by reference to the decision of the Director.[39] A person may be aggrieved where the relevant Act directly affects their professional or vocational interests.[40] It may be that the person who is aggrieved is aggrieved as a consequence of an act of unfairness, but that is not the basis upon which the *IT Act* deals with the right to appeal the decision of the WAIRC, and the *IT Act* does not expressly provide for the variation or setting aside of rights and obligations arising in respect of an apprentice's or industrial trainee's employment by the WAIRC, either at all, or on the basis of unfairness. Section 16(1)(d) of the *WR Act* does not therefore exclude the operation of the *IT Act*.

54. The *IT Act* is not expressly prescribed by the *WR Regulations* as a law to which subsection (1) does not apply under s.16(2)(b) of the *WR Act*. Nor are any of the non-excluded matters referred to in s.16(3) applicable so as to exclude the application of s.16(1) of the *WR Act* under s.16(2)(c) of the *WR Act*.

[39] *Cameron v Human Rights and Equal Opportunity Commission & Anor* (1993) 46 FCR 509 at 515 and 519 per Beaumont and Foster JJ (with whom French J agreed at 519-520).
[40] *Ogle & Anor v Strickland & Ors* (1987) 13 FCR 306.

55. Section 17 of the *WR Act* is not relevant because it only applies to awards or workplace agreements, and the *ECI Award NAPSA* is neither of those.[41]

IR Act

56. The *IR Act* is an excluded State law for the purposes of s.16(1) of the *WR Act*. The *IR Act*, and its predecessor the *Industrial Arbitration Act 1912* (WA),[42] are only of interest in these proceedings insofar as they provided, up until the time that the *WR Act* took effect, that apprentices were deemed to be employees for the purposes of the *IR Act*, and previously, the *IA Act*, and made provision with respect to the scope of coverage of awards made by the WAIRC. Those issues are dealt with further below in these Reasons for Judgment.

WR Act – creation of NAPSA

57. Under Schedule 8 of the *WR Act* a NAPSA is an agreement that is taken to come into operation under cl.31 of Schedule 8. Clause 31 of Schedule 8 of the *WR Act* provides as follows:

> *If, immediately before the reform commencement, the terms and conditions of employment of one or more employees in a single business or a part of a single business:*
>
> *(a) were not determined under a State employment agreement; and*
>
> *(b) were determined, in whole or in part, under a State award (the **original State award**) or a State or Territory industrial law (the **original State law**):*
>
> *a **notional agreement preserving State awards** is taken to come into operation on the reform commencement in respect of the business or that part of the business.*

58. Clauses 32 and 33 of the *WR Act* deal with who is bound by, and whose employment is subject to, a NAPSA, in the following terms:

> ***Who is bound by a notional agreement preserving State awards?***

[41] *WR Act*, s.17(1).
[42] "*IA Act*".

32 *(1)* ***Current employees*** *Any person who:*

(a) immediately before the reform commencement, was bound by, or a party to, the original State award or original State law; and

(b) is one of the following:

(i) an employer in the business, or that part of the business;

(ii) an employee who is employed in the business, or that part of the business, who was so employed immediately before the reform commencement, who was not bound by, or a party to, a State employment agreement at that time and whose employment was not subject to such an agreement at that time;

…

is bound by the notional agreement.

(2) ***Future employees*** *If:*

(a) a person is employed in the business or that part of the business after the reform commencement; and

(b) under the terms of the original State award or the original State law, as in force immediately before the reform commencement, the person would have been bound by that award or law; and

(c) the person is not bound by a preserved State agreement;

the person is bound by the notional agreement.

Whose employment is subject to a notional agreement preserving State awards?

33 *(1)* ***Current employees*** *The employment of a person in the business or that part of the business is subject to the notional agreement, if:*

(a) that employment was, immediately before the reform commencement, subject to the original State award or the original State law; and

(b) that employment was not subject to a State employment agreement at that time.

> *(2)* ***Future employees*** *If:*
>
> *(a) a person is employed in the business, or that part of the business, after the reform commencement; and*
>
> *(b) under the terms of the original State award or the original State law, that employment would have been subject to that award or that law; and*
>
> *(c) that employment is not subject to a preserved State agreement;*
>
> *that employment is subject to the notional agreement.*

59. It is not in dispute in these proceedings that the effect of Schedule 8 of the *WR Act* was to convert the *ECI Award* as at 26 March 2006 into the *ECI Award NAPSA* as at 27 March 2006.

Was Mr Motherwell an employee of D'Adamo Nominees?

60. Whether Mr Motherwell was an employee of D'Adamo Nominees is now said to be in dispute in these proceedings.

D'Adamo Nominees' arguments

61. D'Adamo Nominees argued in closing submissions that:

a) despite the Defence admitting that Mr Motherwell was an employee of D'Adamo Nominees, that was now open to doubt, as there was insufficient evidence to find that Mr Motherwell was an employee of D'Adamo Nominees; and

b) on the evidence it was possible that Mr Motherwell was an employee of Mr Zampogna (who was an electrician with whom Mr Motherwell worked), or a company operated by Mr Zampogna, during the time that Mr Motherwell worked with Mr Zampogna. Further, that that possibility was not inconsistent with Mr Motherwell also being a notional employee of D'Adamo Nominees, albeit dormant, whilst he was "working" with Mr Zampogna.

Pleadings

62. At paragraph 7 the Statement of Claim pleads that:

*Steven Motherwell (**Employee**) was employed by the Respondent [D'Adamo Nominees] from 20 August 2007 to 30 January 2009 (**Employment**).*

63. At paragraph 9 the Statement of Claim pleads that:

From 20 August 2007 to 3 February 2008 the Employee [Mr Motherwell] was employed by the Respondent [D'Adamo Nominees] in the role of Electrical Assistant.

Particulars

Under Clause 5 of the NAPSA, "Electrical Assistant" means an employee directly assisting any other employee covered by the Award.

The Employee's duties included accompanying a qualified electrician on site and providing assistance as required, carrying out some basic wiring under supervision, collecting and delivering wiring and other supplies, and basic sweeping and tidying tasks.

64. At paragraph 10 the Statement of Claim pleads that:

From 4 February 2008 to 30 January 2009 the Employee [Mr Motherwell] was employed by the Respondent [D'Adamo Nominees] as an apprentice in the trade of electrical mechanics.

Particulars

Pursuant to section 31 of the Industrial Training Act 1975 (WA) ***(IT Act)**, a person shall not be deemed to be employed as an apprentice in a trade to which that Act applies unless the apprenticeship agreement is registered as required under the Act.*

*The Respondent and the Employee executed an apprenticeship agreement on 30 April 2008 (**Agreement**).*

It was registered with the Department of Education and Training on 5 May 2008.

The Agreement stated that the Employee was to learn the trade of electrical mechanics for a term of 48 months, commencing on 4 February 2008.

The trade of electrical mechanics is listed in the Industrial Training (Apprenticeship Training) Regulations 1981 (WA) *as a trade to which the IT Act applies.*

65. In response to paragraph 7 of the Statement of Claim paragraph 8 of the Defence pleads that:

> *The Respondent [D'Adamo Nominees] admits paragraph 7 of the SOC [Statement of Claim]*.

66. In response to paragraph 9 of the Statement of Claim the Defence denies each and every allegation contained in paragraph 9, save to say that the definition of "Electrical Assistant" was in the terms pleaded in paragraph 9 of the Statement of Claim.

67. In response to paragraph 10 of the Statement of Claim paragraphs 12 and 13 of the Defence plead that:

> *12. Save to say that the operation of section 31 of the* Industrial Training Act 1975 (WA) *("ITA") is subject to sections 32 and 32A of the ITA, and is otherwise in the terms pleaded, the Respondent denies each and every allegation in paragraph 10 of the SOC and further says:*
>
> *a. The Respondent intended to employ the Employee as an apprentice;*
>
> *b. At the date that the Employee commenced employment the ITA and associated Regulations had no application to the employment of the Employee because of the effect of section 16 of the WRA which was to apply the provisions of the WRA to the exclusion of the ITA so far as it would otherwise apply in relation to an employee or employer.*
>
> *c. The Employee was not an Apprentice for the purposes of the ITA.*
>
> *d. If the Employee was an Apprentice it was due to the contract between the Employee and Respondent at common law and not the operation of the ITA.*
>
> *13. Further and in the alternative, even if the ITA did have application (which is denied):*
>
> *a. The Apprenticeship Agreement ("AA"), as pleaded, had no effect because the Employee's mother did not execute it as she was required by law to do by s30(1)(c) of the ITA and it was not duly executed for the purposes of s30(1)(e) of the ITA;*

b. Further and in the alternative, even if the AA did have effect (which is denied) it had effect from the day that the employee commenced employment with the respondent because of the provisions of sections 31 and 32 of the ITA and not from the date that the AA was registered or executed or alternatively 4 February 2008.

c. Further and in the alternative, even if the AA did not have effect from the commencement of the employment but did have effect (which is denied) the probation period was included in the term of the Apprenticeship by virtue of the combined operation of sections 29 and 29A of the ITA and Regulation 10 of the Industrial Training (General Apprenticeship) Regulations 1981 ("Regulations") and that was earlier than 4 February 2008 as pleaded.

68. The Defence therefore admits that Mr Motherwell was an employee of D'Adamo Nominees, but denies that he was employed:

a) as an electrical assistant in the period from 20 August 2007 to 3 February 2008. By reason of the judgment in *D'Adamo Nominees (No. 2)* the Court is now only concerned with the period 3 September 2007 to 3 February 2008;[43] and

b) at all, as an apprentice.

69. In summary, the Defence admits that Mr Motherwell was an employee of D'Adamo Nominees during the periods under consideration, but denies that he was employed as an electrical assistant or an apprentice.

Pleadings – withdrawal of an admission

70. The purpose of pleadings is to narrow and define the issues, so that parties know the real issues to be decided at hearing.[44]

71. The question of whether Mr Motherwell was or was not an employee of D'Adamo Nominees was not in dispute when evidence was taken at

[43] *D'Adamo Nominees (No. 2)* at [56]-[57] and [79] per Lucev FM.

[44] *Banque Commerciale SA (in liq) v Akhill Holdings Ltd* (1990) 169 CLR 279 at 287-288 per Brennan J; *McKellar v Container Terminal Management Services Ltd* [1999] FCA 1101 at [21] per Weinberg J. This has been the purpose of the system of pleadings, as it has been understood, since at least shortly after the introduction of the judicature system: *Thorp v Holdsworth* [1876] 3 Ch D 637 at 639 per Jessell MR, and probably as long ago as the 16th Century when the system of written pleadings began to replace the practice of oral pleading: see ALR Kiralfy, *Potter's Historical Introduction to English Law and its Institutions* (4th Edn) (London: Sweet and Maxwell Ltd, 1958) pages 335 and 342.

hearing. Thus it was unnecessary for the FWO to lead evidence that Mr Motherwell was an employee of D'Adamo Nominees, although, in the course of proving other issues, there was (as outlined below) evidence led by the FWO that he was an employee of D'Adamo Nominees. The admission in the Defence was specifically drawn to the attention of the parties, and relied upon by the Court, in *D'Adamo Nominees (No. 2)*.[45]

72. D'Adamo Nominees:

a) at no stage sought to withdraw the admission made in the Statement of Claim, either formally or informally, even after it was adverted to in the no case to answer submissions, and then the judgment in *D'Adamo Nominees (No. 2)*; and

b) never made an application to amend the Defence, to assert that Mr Motherwell was not an employee of D'Adamo Nominees. Even after the Court observed in *D'Adamo Nominees (No. 2)* that the submission that Mr Motherwell was not an employee of D'Adamo Nominees was "*utterly without merit*"[46] the issue of Mr Motherwell not being an employee was raised again in D'Adamo Nominees' closing submissions on liability, without any endeavour being made to amend the pleadings.

73. Rule 15.30 of the *Federal Circuit Court Rules 2001* (Cth)[47] provides as follows:

> *If an admission is made by a party, the Court may, on the application of another party, make an order to which the party applying is entitled on the admission.*

Effectively, what the FWO now seeks are orders which rely, in part, on the admission made by D'Adamo Nominees that Mr Motherwell was an employee of D'Adamo Nominees.

74. Withdrawal of an admission is not dealt with in the *FCC Rules*, but was dealt with in the *Federal Court Rules 1976* (Cth)[48] where O.22 r.4(2) of

[45] *D'Adamo Nominees (No. 2)* at [54] per Lucev FM.
[46] *D'Adamo Nominees (No. 2)* at [54] per Lucev FM.
[47] "*FCC Rules*". At the time of the liability hearing the *FCC Rules* were the *Federal Magistrates Court Rules 2001* (Cth) ("*FMC Rules*"). For present purposes there is no relevant difference between the *FCC Rules* and the *FMC Rules*.
[48] "*FC Rules 1976*".

the *FC Rules 1976* provided that a party could not withdraw an admission operating for the benefit of another party without the consent of that other party or the leave of the Court. Rule 26.11 of the *Federal Court Rules 2011* (Cth)[49] provides as follows:

> *(1) A party may, at any time, withdraw a plea raised in the party's pleading by filing a notice of withdrawal, in accordance with Form 47.*
>
> *(2) However, a party must not withdraw an admission or any other plea that benefits another party, in a defence or subsequent pleading unless:*
>
> *(a) the other party consents; or*
>
> *(b) the Court gives leave.*
>
> *(3) The notice of withdrawal must:*
>
> *(a) state the extent of the withdrawal; and*
>
> *(b) if the withdrawal is by consent -- be signed by each consenting party.*

75. The effect of both the former O.22 r.4(2) of the *FC Rules 1976* and r.26.11 of the *FC Rules 2011* is that a party must specifically obtain the leave of the Court or the consent of the other party to withdraw an admission to which those rules applied.[50] Rule 26.11 of the *FC Rules 2011* applied at the time of the liability hearing, and can be applied by this Court by reason of r.1.05(2) of the *FCC Rules* which provides that if the *FCC Rules* are, relevantly, "insufficient", the Court may apply the *FC Rules* in whole or in part and modified or dispensed with as necessary. In this case, where the *FCC Rules* do not provide for the withdrawal of an admission, they are insufficient, and it is therefore necessary, in dealing with an attempt to withdraw an admission, to apply r.26.11 of the *FC Rules 2011*.

76. Before granting leave for an admission to be withdrawn the Court must be satisfied that:

---

[49] "*FC Rules 2011*".
[50] *Forbes Engineering (Asia) Pty Ltd v Forbes (No. 3)* [2007] FCA 1637 at [9] per Collier J.

a) an error or mistake by or on behalf of the party seeking to withdraw the admission has been demonstrated;

b) there is a sensible explanation for the making of the admission, and that explanation has been provided, based on evidence of a solid and substantial character; and

c) no injustice will be occasioned to the other party by the withdrawal of the admission, other than hardship by delay or costs which can be accommodated by an appropriate order for costs.[51]

77. In *Murran Investments* the second applicant swore two affidavits asserting the relevant admission had been made in error and seeking to explain how the admission came to be made in error.[52] The Federal Court found that:

a) the applicants had established that the factual allegations had been made in error on the basis of a misunderstanding by the second applicant as to the performance of the franchise business;

b) the misunderstanding was explained by the second applicant's limited role in the business prior to her husband's sudden death.[53]

78. Moreover, in *Murran Investments* the Federal Court found that there was no particular injustice to the respondents if the admission was withdrawn.[54] In that case pleadings were not closed and there was no suggestion that a hearing of the matter was imminent.[55]

79. In *Deangrove Pty Ltd (Receivers and Managers appointed) v Commonwealth Bank of Australia*[56] it was sought, after three days of hearing, to withdraw an admission that a director had executed a guarantee of the company's obligations under a bill discount facility provided by the respondent bank. The withdrawal arose because the director did not recognise the signature on the guarantee when it was

[51] *Murran Investments Pty Ltd v Aromatic Beauty Products Pty Ltd* [2000] FCA 1732; (2000) 191 ALR 579 at [44] per Mansfield J ("*Murran Investments*"), referring to *Celestino v Celestino* (unreported, Full Court of Federal Court of Australia, Spender, Miles and von Doussa JJ, 16 August 1990) at pages 8-10.
[52] *Murran Investments* at [47] per Mansfield J.
[53] *Murran Investments* at [51] per Mansfield J.
[54] *Murran Investments* at [51] per Mansfield J.
[55] *Murran Investments* at [3]-[20] per Mansfield J.
[56] [2003] FCA 268 ("*Deangrove*").

put to him in cross-examination, and ultimately he denied that the signature purporting to be his on the guarantee was in fact his signature.[57]

80. In *Deangrove* the Federal Court comprehensively canvassed the principles relating to the withdrawal of an admission in the following paragraphs, which this Court, with respect, adopts:

> *29 The principles relating to the circumstances in which a party should be given leave to withdraw an admission were addressed by Rogers CJ Comm D in Coopers Brewery Ltd v Panfida Foods Ltd [1992] 26 NSWLR 738. In that case, admissions were made by the defendant's legal representatives after consent orders were made requiring the defendant either to admit certain matters or to serve an expert's report in support of a denial of those matters. Rogers CJ rejected (at 746) the approach taken in H Clark (Doncaster) Ltd v Wilkinson [1965] Ch 694, as the product of "another age and ... other circumstances". In Clark v Wilkinson, Lord Denning MR had said this (at 703):*
>
> *" An admission made by counsel in the course of proceedings can be withdrawn unless the circumstances are such as to give rise to an estoppel. If the other party has acted to his prejudice on the faith of it, it may not be allowed to be withdrawn ... . But otherwise an admission can be withdrawn. For example, an admission is often made by error in a pleading. It can be withdrawn if the other party has not been prejudiced, or, indeed, if any prejudice can be cured by compensation in costs."*
>
> *Rogers CJ, by contrast, said (at 750) that an admission made by counsel in the proceedings*
>
> *"should not be permitted easily to be withdrawn so as to make the procedure [requiring a party, in certain circumstances, to make admissions] meaningless".*
>
> *On the other hand, his Honour recognised a countervailing policy, namely that parties should not be discouraged from making admissions out of fear that, once give, the admissions cannot be withdrawn.*
>
> *30 Later cases have given weight to the observations made by Rogers CJ in Coopers Brewery v Panfida. In Ridolfi v Rigato*

[57] *Deangrove* at [3] and [5]-[19] per Sackville J.

Farms Pty Ltd [2000] 2 Qd R 455, for example, the Queensland Court of Appeal upheld the refusal of the trial judge to allow the defendant in a personal injuries case to withdraw admissions deemed to have been made by reason of a failure to dispute a notice to admit facts. de Jersey CJ, with whom McPherson JA and Williams J agreed, observed (at 459) that:

"There is no principle that admissions made, or deemed to have been made, may always be withdrawn `for the asking', subject to payment of costs. The discretion is broad and unfettered, as exemplified by [Coopers Brewery v Panfida]".

Williams J noted that counsel had referred to the passage of Bowen LJ in Cropper v Smith. His Honour said (at 460):

"That statement, while made over 100 years ago, is still relevant, and it encapsulates a principle which a judge must always take into consideration in determining whether or not it is appropriate, for example, to allow a party to withdraw an admission. Essentially it is no more than a recognition that courts will, so far as possible, ensure that a party has a fair trial. But, for example, where the detriment or prejudiced is self-induced, the party may not be entitled to relief".

Williams J went on to endorse the comment of Rogers CJ that the approach of Lord Denning in Clark v Wilkinson was the product of another age.

31 In Drabsch v Switzerland General Insurance Co Ltd, unreported, 16 October 1996, Supreme Court of New South Wales, Santow J in the context of an appeal from orders made on an application for leave to withdraw admissions in pleadings, summarised the relevant principles as follows:

"1. Where a party under no apparent disability makes a clear and distinct admission which is accepted by its opponent and acted upon, for reasons of policy and the due conduct of the business of the court, an application to withdraw the admission, especially at appeal, should not be freely granted ... .

2. The question is one for the reviewing judge to consider in the context of each particular appeal, with the general guidelines being that the person seeking on a review to withdraw a concession made should provide some good reason why the judge should disturb what was previously common ground or conceded ... .

3. Where a court is satisfied that admissions have been made after consideration and advice such as from the parties' expert and after full opportunity to consider its case and whether the admission should be made, admissions so made with deliberateness and formality would ordinarily not be permitted to be withdrawn ... .

4. It will usually be appropriate to grant leave to withdraw an admission where it is shown that the admission is contrary to the actual facts. Leave may also be appropriate where circumstances show that the admission was made inadvertently or without due consideration of material matters. Irrespective of whether the admission has or has not been formally made, leave may be refused if the other party has changed its position in reliance upon the admission ... .

5. Following Cohen v McWilliam & Anor [1995] 38 NSWLR 476, a court is not obliged to give decisive weight to court efficiency, such that a party who wishes to defend its claim is entitled to a hearing on the merits, with costs orders being available as a means of compensating the other party for any costs thereby unnecessarily incurred or not fairly visited on the other party".

32 Some care must be taken in applying the principle stated in Coopers Brewery v Panfida. Rogers CJ clearly gave great weight to efficient case management and the importance of avoiding disruption to court lists. His Honour may also have been influenced by the fact that the admission was made in response to a consent order in the proceedings. Since Coopers Brewery v Panfida was decided, the High Court, in Queensland v J L Holdings Pty Ltd (1997) 189 CLR 146, has reaffirmed the principle stated by Bowen LJ in Cropper v Smith as applied in Clough and Rogers v Frog. In that case, the majority (Dawson, Gaudron and McHugh JJ) observed (at 154) that

"Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim."

Later, their Honours said (at 155):

"Case management, involving as it does the efficiency of the procedures of the court, was in this case a relevant

consideration. But it should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence, thus precluding the determination of an issue between the parties."

33 In Hanave Pty Ltd v LFOT Pty Ltd [1997] FCA 218, Moore J took account of the observations in Queensland v J L Holdings in granting leave to an applicant " at the concluding stages of...protracted litigation" to withdraw a concession made on its behalf by counsel. The concession concerned the scope of a representation pleaded in the statement of claim. His Honour granted leave for the applicant to adopt a broader construction of the pleadings, notwithstanding that an adjournment was apparently required in order to allow the respondents to adduce further evidence required by the expansion of the issues in the case.

34 It seems to me that, having regard to the reasoning in Queensland v J L Holdings, questions of case management (in the sense of efficient court administration and use of court time), although not irrelevant, should not play a decisive or paramount role in determining whether or not to grant leave to a party to withdraw an admission. I do not, however, read the High Court's decision as entitling a party to raise a fresh issue in litigation at any time of its choosing, regardless of the basis on which the litigation has been conducted or the stage the proceedings have reached. It must be remembered that in Queensland v J L Holdings, the application to amend the pleadings was made six months prior to the scheduled date of the trial and, according to the majority, the amendment raised no complex factual issues. The High Court was not concerned with an application in the course of a hearing to withdraw an admission made on a factual question within the knowledge of the party making the admission.

35 Consistent with what was said by Santow J in Drabsch v Switzerland Insurance, a party who makes a clear and distinct admission on a factual question, which is accepted and acted upon by the opponent, should not be permitted freely to withdraw that admission. Whether or not it is appropriate to grant leave will depend upon the particular circumstances of the case and an assessment of the interests of justice. The relevant circumstances include the nature of the admission, how it came to be made (for example, whether it was made deliberately or inadvertently),

when and why the party seeks to withdraw the admission and the impact of any withdrawal on the other parties to the litigation.[58]

81. In refusing leave to withdraw the admission the Federal Court in *Deangrove* had regard to the following considerations:

a) that a grant of leave would open up fresh issues which would need to be determined at hearing;[59]

b) that an adjournment of the hearing (which had already run for three days) would be necessary;[60]

c) that it was not the first time that the proceedings had had to be adjourned or vacated, and that the "lamentable history of the litigation" was "virtually wholly attributable" to the party seeking to withdraw the admission;[61]

d) that another delay would work unfairness to the respondent bank, notwithstanding that it was well resourced and because of the prospect of further and possibly irrecoverable costs;[62]

e) the history of the litigation, and having regard to that history, that there "must come a point at which the interests of justice demand that a party to litigation take responsibility for his own conduct";[63] and

f) that no satisfactory explanation of the making of the admission had been made, especially in circumstances where the director had sworn on three separate occasions that he had signed as guarantor.[64]

82. Consistent with there being no formal, or indeed informal, application for the withdrawal of the admission in the Defence that Mr Motherwell was an employee, there was no evidence led or sought to be led, and no affidavit filed, to support any such application for withdrawal, if it had been made. Following determination of its no case to answer

[58] *Deangrove* at [29]-[35] per Sackville J.
[59] *Deangrove* at [40]-[41] per Sackville J.
[60] *Deangrove* at [42] per Sackville J.
[61] *Deangrove* at [43] per Sackville J.
[62] *Deangrove* at [44] per Sackville J.
[63] *Deangrove* at [44] per Sackville J.
[64] *Deangrove* at [45] per Sackville J.

application in a case, D'Adamo Nominees elected not to lead any evidence. The liability hearing was thus run on the basis that there was an admission by D'Adamo Nominees that Mr Motherwell was its employee, and without there being any evidence from D'Adamo Nominees, at all, or contrary to the admission. Further, in the circumstances of this case, for reasons set out further below, Mr Motherwell was, in any event, an employee of D'Adamo Nominees.

83. The Court observes that there is no evidence which would indicate why what is now said to be an erroneous admission was made following a consideration of the relevant factual and legal material available to D'Adamo Nominees' lawyer as at 13 July 2010. It is relevant to observe that the evidence in the case for the FWO was filed after the Defence was filed, but is entirely consistent with the case advanced in the Statement of Claim, and consistent with the admission made in the Defence, as to Mr Motherwell being an employee of D'Adamo Nominees. D'Adamo Nominees has been represented by lawyers throughout these proceedings, and the Defence is accompanied by a Form 15B Certificate, pursuant to O.11 r.18 of the then *FC Rules 1976*, indicating that the lawyer representing D'Adamo Nominees had, on the factual and legal material available to him at the time the Defence was filed, a proper basis for each allegation in the pleading. There is no evidence, nor indeed any assertion, of any error or mistake in the pleading as filed. Given the manner in which D'Adamo Nominees has fought these proceedings the Court doubts, and there is no assertion that, the admission was inadvertent or made without due consideration.

84. If the Court were to have regard to the assertion that there is no, or no sufficient evidence, of Mr Motherwell being an employee of D'Adamo Nominees there would be significant effects in terms of prejudice to the FWO and in relation to case management. The prejudice to the FWO arises from the fact that the case has run to closing submissions on liability on the basis that there was an admission by D'Adamo Nominees which was not withdrawn, or sought to be withdrawn, and if the Court were now to entertain a submission that that admission was not correct, fairness would inevitably require an opportunity for the FWO to respond because the FWO has never had to lead evidence

concerning whether or not Mr Motherwell was an employee because that fact was admitted.

85. Following the Court's decision in *D'Adamo Nominees (No. 2)* it might have been expected that this would no longer be an issue in these proceedings. But, the matter was raised by D'Adamo Nominees in closing submissions on liability. In terms of case management a withdrawal of the admission would be most inconvenient given that both parties have run their cases, and especially so in circumstances where the FWO's case has been run on the basis of an admission on this issue, and D'Adamo Nominees' case has been run on the basis of an election not to lead evidence following the outcome of the no case to answer submission. It also needs to be borne in mind that there have been three days of hearing prior to the no case to answer judgment in *D'Adamo Nominees (No. 2)*, an earlier hearing in relation to objections to subpoenas, and a fourth day of hearing proper for the hearing of submissions in relation to liability. In those circumstances, general principles of case management, militate against any application to withdraw an admission at the final stage of the liability proceedings.

86. The admission which is sought to be withdrawn here, after the case has closed, is an admission made on a factual question within the knowledge of the party making the admission. That weighs heavily against the admission being allowed to be withdrawn at this stage of the proceedings.

87. In the above circumstances, and having regard to the interests of justice, case management factors, the nature of the admission and the lateness of the attempted withdrawal of the admission, and the fundamental impact of the admission in terms of a central underlying issue, that is whether Mr Motherwell is employed, and therefore whether the *ECI Award NAPSA* applies, the Court is not persuaded that leave ought to be granted to withdraw the admission made by D'Adamo Nominees in paragraph 8 of the Defence that Mr Motherwell was an employee of D'Adamo Nominees at the relevant times.

Evidence of employment

88. Mr Motherwell's evidence concerning his employment during the period 20 August 2007 to 3 February 2008 (relevantly, that period is now 3 September 2007 to 3 February 2008), was as follows:

> *4. I came to be aware of L&A Electrics in 2006, when I undertook unpaid work experience with the business (one day a week for about ten weeks) during my final year of school at Prendiville High School.*
>
> *5. In mid-August 2007, I telephoned Luigi D'Adamo (commonly known as Gino) (**D'Adamo**) and left a voicemail message enquiring about starting an electrical apprenticeship with L&A Electrics. I had not met D'Adamo during my work experience with L&A Electrics, but I was aware that he was the boss and the person to ask about apprenticeships. I also called about five other electrical contracting businesses.*
>
> *6. D'Adamo called me back the next day and said that I should come in the next Monday for a two week trial.*
>
> *7. I commenced work on Monday 20 August 2007, two days before my 18th birthday.*
>
> *8. On the first day of work, D'Adamo said to me words to the effect, "You will be working with Mark, digging trenches". I worked with Mark helping him to dig trenches for underground electrical mains to be laid for the whole of the initial two week trial period. During this time, we worked at different work sites, but Mark and I were the only people from L&A Electrics at each site.*
>
> *9. While I worked with Mark, he explained to me that L&A Electrics primarily did underground electrical mains work and wiring of residential houses. As far as I am aware, L&A Electrics's business continued in this way for the entire period I worked there.*
>
> *10. On or about Monday 27 August 2007, in the second week of the trial, D'Adamo told me to bring in my bank details because I would be paid for the trial period. I gave my bank details to D'Adamo the following day or the day after. I was paid at apprentice rates for the two week trial period.*

11. *On or about Friday 31 August 2007, D'Adamo gave me a piece of paper with an address and the name, Joe Zampogna (**Zampogna**) and said that I would be working with Zampogna from Monday at the address. I do not remember the exact address.*

12. *For about the next nine months, I basically worked every day with Zampogna and two apprentices: Joshua Houlihan (**Josh**), who was a 4th year apprentice, and Anthony, who was a 2nd year apprentice. I do not know Anthony's surname.*

13. *Soon after I started working with him, Zampogna told me that he had been working in the trade as an electrician for about 30 years.*

14. *While I was working with Zampogna, I would normally meet Zampogna and the other apprentices at Zampogna's house at approximately 7am. Zampogna would then drive us all to the work site for the day in a L&A Electrics van. The work site was always a partly built residential house. It was our job to do the wiring of the house. We would do the initial wiring of the houses, then the plasterers (from another company) would do the plastering and we would come back to the house a few weeks later to do the light fittings.*

15. *As far as I was aware, Zampogna provided his own tools for work. L&A Electrics provided supplies to be used on the job, such as cables and light fittings.*

16. *For about the first 3 months, Zampogna would specifically direct me what to do. After that time, I had learned what my tasks involved, and generally worked without Zampogna telling me exactly what to do. Josh and Anthony also told me what to do. For at least the first 5 months, I was doing fairly basic work because Zampogna also had the two other electrical apprentices (Josh and Anthony) working for him.*

17. *While working with Zampogna, my duties involved loading up the van with supplies, taking the electrical cabling from the van on to the site, taking tools and ladders from the van on to the site, chiselling out light switch fittings, drilling into brick walls, feeding cabling through cavity walls, finishing power points, cleaning the van and generally cleaning up after Zampogna, Josh and Anthony.*

18. *Josh and Anthony did more advanced work. Josh was a 4th year apprentice and basically did all the tasks a qualified*

electrician would do, such as installing fittings and wiring. Josh and Anthony would do the wiring for power points, lights and light switches. They would also fit the light switches and light fittings.

19. We would normally finish work at 3pm, but sometimes we would need to work overtime past then. If that happened, Zampogna would ask me and the other apprentices if we could stay to work overtime. I think this happened about once per week on average.

20. I filled out a timesheet every day, recording the hours I worked. Zampogna checked the timesheet at the end of each week.

*21. Approximately once a week, Zampogna, Josh and Anthony and I would attend the L&A office/workshop at 54 Achievement Way, Wangara in Western Australia (**the Workshop**) to pick up supplies, drop off timesheets to the office and pick up our payslips.*

22. Apart from when I attended the Workshop on these occasions, while I worked with Zampogna, I had almost no contact with anyone from L&A Electrics other than Zampogna, Anthony and Josh.[65]

89. Mr Motherwell also gave evidence that "*For the entire period of my employment with L & A Electrics, I was paid about $6.70 when I started to about $8 per hour by the time I finished work with the company.*"[66]

90. Mr Motherwell's oral evidence was that:

a) Mr Zampogna, and the apprentices Joshua Houlihan and Anthony Rossi, wore L & A Electrics tee-shirts to work every day;[67]

b) he was told by Mr Zampogna that he (Mr Zampogna) was an employee, and was one of the tradesman that worked for D'Adamo Nominees, and that he was told this not long after he had started working under Mr Zampogna's supervision;[68]

[65] Affidavit of Steven Robert Motherwell, affirmed 20 September 2010, paras.4-22 ("Mr Motherwell's Affidavit").
[66] Mr Motherwell's Affidavit, para.49.
[67] Transcript, 16 November 2010, pages 17-18.
[68] Transcript, 16 November 2010, page 19.

c) he travelled in an L & A Electrics work ute for which Mr Zampogna used an L & A Electrics fuel card to purchase petrol for the vehicle;[69]

d) otherwise, his work included driving, loading and unloading of the van, low level and simple jobs including cleaning and carrying;[70]

e) they drove the "work car" to and from work each day from Mr Zampogna's house;[71]

f) Mr Zampogna had his own electrical business, and that at least on one occasion, Mr Motherwell went with him to a job which was "separate to L & A Electrical's";[72] and

g) he was told that Mr Zampogna was initially a contractor and later became an employee of L & A Electrics.[73]

91. In re-examination when asked what sort of things Mr Zampogna would direct him to do Mr Motherwell said:

> *Just very basic things. That's when I had first started. So I was just cleaning, carrying out cable, getting tools as we needed them, loading up the van, unloading the van when we get to jobs, just floating around and asking, like, the rest of the guys if you need a hand and stuff.*[74]

92. Asked to identify who the "guys" were Mr Motherwell identified the other two apprentices, Anthony, and Josh Houlihan, and went on to indicate that he would work with them. He gave as an example that he would be directed to work with Anthony whilst Anthony chiselled along a wall for two metres and Mr Motherwell would go along behind him and sweep up.[75] Mr Motherwell also gave evidence that he was given specific directions by Mr Zampogna to assist the other two apprentices, for example by going and obtaining tools, and that he assisted them by fitting a light switch, a task he described in some

[69] Transcript, 16 November 2010, pages 19-20.
[70] Transcript, 16 November 2010, page 28.
[71] Transcript, 16 November 2010, page 47.
[72] Transcript, 16 November 2010, pages 48-49.
[73] Transcript, 16 November 2010, pages 53-54.
[74] Transcript, 16 November 2010, page 72.
[75] Transcript, 16 November 2010, page 72.

detail in his evidence.[76] The fitting of the light switch related to the wiring which had been done by the other two apprentices to the point at which there was a light switch to be fitted.[77]

93. D'Adamo Nominees, on L & A Electrics' letterhead, produced to the FWO Mr Motherwell's "*payslips, which show pay, holiday entitlements accrued at 2.9 hours per week and any overtime worked*."[78] As part of the documents produced, and tendered in evidence, there are pay advices for Mr Motherwell from "D'Adamo Nominees P/L T/as L & A Electrics" for the period in which he was alleged to have been an electrical assistant, which set out his hours, base hourly rate, amount paid, and where appropriate, overtime, as well as a tool allowance, and the amount of PAYG withholding tax deducted and the amount of the superannuation guarantee charge paid on Mr Motherwell's behalf.[79] The documents are admissible as business records,[80] and as admissions of fact – that Mr Motherwell was paid by D'Adamo Nominees t/as L & A Electrics and accrued holiday entitlements – are relevant to whether or not Mr Motherwell was an employee.[81]

94. During the period from about 3 September 2007 to 3 February 2008, it is apparent that Mr Motherwell carried out work with Mr Houlihan and Anthony, and Mr Zampogna, in connection with the installation, primarily in residential housing, of wiring of electric and electronic installations and equipment, which was work carried out for D'Adamo Nominees trading as L & A Electrics.

95. Section 4(1) of the *WR Act* provided that, unless the contrary intention appears, "employee has a meaning affected by s.5." Section 5 of the *WR Act* defined "employee" as follows:

> *(1)* ***Basic definition*** *In this Act, unless the contrary intention appears:*
>
> ***employee*** *means an individual so far as he or she is employed, or usually employed, as described in the*

[76] Transcript, 16 November 2010, pages 73-74.
[77] Transcript, 16 November 2010, page 74.
[78] Affidavit of Georgina Kate Mayman Rosendorff, affirmed 21 September 2010, Annexure H ("Ms Rosendorff's September 2010 Affidavit").
[79] Ms Rosendorff's September 2010 Affidavit, Annexure H.
[80] *Evidence Act 1995* (Cth), s.48(1)(e)(i) ("*Evidence Act*").
[81] *Evidence Act*, s.48(1)(a).

*definition of **employer** in subsection 6(1), by an employer, except on a vocational placement.*

(2) ***References to employee with ordinary meaning*** However, a reference to employee has its ordinary meaning (subject to subsections (3) and (4) if the reference is listed in clause 2 of Schedule 2. This does not limit the circumstances in which a contrary intention may appear for the purposes of subsection (1).

(3) In this Act, unless the contrary intention appears, a reference to employee with its ordinary meaning includes a reference to an individual who is usually an employee with that meaning.

(4) In this Act, unless the contrary intention appears, a reference to employee with its ordinary meaning does not include a reference to an individual on a vocational placement.

96. For present purposes, there is no dispute that D'Adamo Nominees is an employer as defined in s.6 of the *WR Act*.

97. Essentially, the question is whether Mr Motherwell was an employee, or usually an employee, under s.5(1) of the *WR Act*?

98. In order to create a contract of employment various elements must be present, namely:

a) an intention between the parties to create an enforceable legal relationship;

b) an offer by one party and its acceptance by the other;

c) a contract supported by valuable consideration;

d) the legal capacity to make the contract;

e) genuine consent to the terms of the contract; and

f) that the contract must not be rendered ineffective by reason of conduct illegal or contrary to public policy.[82]

[82] See C Sappideen et al, *Macken's Law of Employment* (7th Edn) (Pyrmont: Law Book Co, 2011) page 96 at [4.40] ("*Macken's Law of Employment*").

99. Whether a person is an employee or not is a question of law,[83] and there are many factors which may point to a contract being a contract of employment, with their relative importance varying with the circumstances. Control of the employee exercisable by the employer is a prominent factor, but not the sole criterion, and is one of a number of possible indicia of employment, including but not limited to "the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and the provision of holidays, the deduction of income tax and the delegation of work by the putative employee".[84] Payment of wages by a third party is not fatal to the existence of a contract of employment between an employee and an employer,[85] and employees may have so-called host employers.[86] The rendering of invoices "is quite foreign to an ordinary employment relationship".[87]

100. D'Adamo Nominees suggested that there was no evidence of a contract of employment at all, or as an electrical assistant, between it and Mr Motherwell. The Court is in no doubt that there was a contract of employment between Mr Motherwell and D'Adamo Nominees. Mr Motherwell was offered employment, and accepted it, initially on the basis of a trial, for which he was paid. Subsequently, that contract was replaced or varied from 3 September 2007, and Mr Motherwell was again offered work, and accepted and went to work, at the direction of D'Adamo Nominees with Mr Zampogna. The precise nature of that work, and in particular whether Mr Motherwell worked as an electrical assistant or apprentice, is dealt with further below in these Reasons for Judgment. Whatever the nature of that work Mr Motherwell was paid, accrued holiday entitlements, had PAYG withholding tax deducted from his pay, and had contributions made on his behalf to superannuation in accordance with the superannuation

---

[83] *ACT Visiting Medical Officers Association v Australian Industrial Relations Commission* [2006] FCAFC 109; (2006) 153 IR 228 ("*Visiting Medical Officers Association*"); *Damevski v Giudice & Ors* [2003] FCAFC 252; (2003) 133 FCR 438 ("*Damevski*").

[84] *Stevens v Brodribb Sawmilling Company Proprietary Limited* (1986) 160 CLR 16 at 24 per Mason J (with whom, on this point, Brennan and Deane JJ agreed at 47 and 49 respectively) ("*Brodribb Sawmilling*"); *Hollis v Vabu Pty Ltd* [2001] HCA 44; (2001) 207 CLR 21 at [43]-[45] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ ("*Vabu*"); *Visiting Medical Officers Association* at [19] per Wilcox, Conti and Stone JJ.

[85] *Building Workers Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104; *Damevski*.

[86] *Damevski* at [76] per Marshall J.

[87] *Climaze Holding Pty Ltd v Dyson & Anor* (1995) 13 WAR 487 at 495 (see also 497) per Steytler J (with whom Malcom CJ at 489 and Rowland J at 489 agreed) ("*Climaze*").

guarantee charge. There were, for the relevant periods, pay advices for Mr Motherwell to the above effect from D'Adamo Nominees. Mr Motherwell was subject to the control of Mr Zampogna (who for reasons set out below was an employee of D'Adamo Nominees on the evidence adduced in this case), and D'Adamo Nominees apprentices, Mr Houlihan and Anthony. Mr Motherwell gave evidence that he obeyed orders that he was given to do certain things in relation to the work being carried out by D'Adamo Nominees trading as L & A Electrics, and the evidence also discloses that he was part of D'Adamo Nominees' organisation being transported to and from work in a vehicle marked L & A Electrics and fuelled by L & A Electrics, and wearing clothing identifying him as being from L & A Electrics (as did Messrs Zamponga, Houlihan and Anthony). *Macken's Law of Employment* has observed:

> *In the employment context, if the putative employee is subject to control relating to the work, wages and leave entitlements are paid, superannuation contributions are made, and taxation is deducted, it will be difficult to argue contrary to the objective facts that there is no intention to create a legal relationship.*[88]

Thus, there was intention, offer and acceptance, and valuable consideration by reason of payment and service or work in return. Mr Motherwell was, as at 3 September 2007, over 18 years of age and there is no evidence of legal incapacity on his part to make a contract, and a contract could be entered into by D'Adamo Nominees as a corporation. There is no evidence of any illegality or matter contrary to public policy which would render the contract ineffective.

101. D'Adamo Nominees argued that there was not genuine consent to the terms of the contract, as both Mr Motherwell and D'Adamo Nominees (through its sole director Mr D'Adamo), and either Mr Motherwell individually or Mr D'Adamo individually, thought that they were entering into an apprenticeship arrangement. For reasons set out below an apprentice is, in any event, an employee. There can be no doubt, however, that there was an intention on the part of both Mr Motherwell and D'Adamo Nominees to enter into a contract of employment. It is no objection to the validity of that contract of employment that the

[88] *Macken's Law of Employment*, page 96 at [4.50] and see the cases cited at fn.22.

minutiae of terms have not been spelled out.[89] If there had been a mistake or misunderstanding as to the precise capacity in which Mr Motherwell was employed, that mistake would not have been so fundamental as to vitiate the fact that there was a contract of employment. Indeed, such "mistakes" have been a regular blot on the Australian industrial law landscape for more than a century, and the cause of innumerable proceedings of this type. In *Richardson v Sedemuda Pty Ltd (T/as South West Ceramics)*[90] the Western Australian Industrial Appeal Court[91] having found an apprenticeship to be void ab initio, still found an employment relationship in a capacity covered by a State building trade award.[92] But in the Court's view there was no such mistake in the present proceedings.

102. It is open to infer on the evidence that Mr D'Adamo employed Mr Motherwell and then led him to believe that he was already an apprentice, in circumstances where Mr D'Adamo must have known, because of the employment of other apprentices (for example, Mr Houlihan and Anthony, or any of the eleven apprentices referred to at Q.36 of Mr Motherwell's Apprenticeship Probation Application),[93] that for a person to be employed as an apprentice required that the apprenticeship be registered (a matter which is further explained below). Further, no such mistake for the period from 3 September 2007 to 3 February 2008 is pleaded by D'Adamo Nominees, and no misrepresentation is relied upon to avoid the contract by Mr Motherwell who, on the evidence, may have had it represented to him by Mr D'Adamo that he was already an apprentice during that period. Either way, and for reasons set out below, an apprentice is an employee, and there was an employment relationship in place during this period, as is admitted by D'Adamo Nominees in the Defence, and by reason of its business records, notably its payroll records.

103. For all of the above reasons, the Court is satisfied on the evidence that there was an employment relationship between Mr Motherwell and

[89] *Macken's Law of Employment*, page 99 at [4.90].
[90] (1985) 65 WAIG 2229; (1985) 17 IR 418 ("*South West Ceramics*").
[91] The Western Australian Industrial Appeal Court ("Industrial Appeal Court") is a court composed of three Western Australian Supreme Court Justices to sit on appeals from the Full Bench of the WAIRC: *IR Act*, s.85.
[92] *South West Ceramics* IR at 420-421 per Brinsden J; 423-424 per Kennedy J; 430 per Olney J.
[93] "Apprenticeship Probation Application": see the affidavit of Georgina Kate Mayman Rosendorff, affirmed 12 November 2010, Annexure A ("Ms Rosendorff's November 2010 Affidavit").

D'Adamo Nominees commencing on 3 September 2007 and enduring thereafter to 30 January 2009.

Was there an apprenticeship and, if so, from when did it commence?

104. The FWO alleges that from 4 February 2008 until his employment terminated on 30 January 2009 Mr Motherwell was employed by D'Adamo Nominees as an apprentice under an apprenticeship agreement entered into and registered under the *IT Act*. D'Adamo Nominees denies the FWO's allegation.

105. From the time of the commencement of his employment with D'Adamo Nominees until February 2008, Mr Motherwell made repeated requests to Mr D'Adamo that his "apprenticeship" be officially registered. Mr Motherwell says that on these occasions Mr D'Adamo told him that he was already an apprentice.[94]

106. On 4 February 2008, Mr Motherwell and Mr D'Adamo on behalf of D'Adamo Nominees executed an Apprenticeship Probation Application which provided for a three month probation period.[95] Present at that meeting was a representative of the State entity said to be responsible for apprenticeships, ApprentiCentre WA,[96] part of the then Department of Education and Training.[97]

107. The FWO submits that it was from 4 February 2008, the date of the Apprenticeship Probation Application, that Mr Motherwell's putative apprenticeship was registered.[98]

108. On 30 April 2008, Mr Motherwell and Ms Millington on behalf of D'Adamo Nominees executed an apprenticeship agreement which was registered by ApprentiCentre on 5 May 2008.[99] The apprenticeship agreement was not signed by a parent or guardian of Mr Motherwell.

---

[94] Mr Motherwell's Affidavit, paras.23 and 26.
[95] Mr Motherwell's Affidavit, paras.27-28; Ms Rosendorff's November 2010 Affidavit, Annexure A.
[96] "ApprentiCentre".
[97] Transcript, 18 November 2010, page 2.
[98] Affidavit of Georgina Kate Mayman Rosendorff, affirmed 21 September 2010, para.17 ("Ms Rosendorff's September 2010 Affidavit"); affidavit of Ashley Paul Chapple, affirmed 21 September 2010, para.10 ("Mr Chapple's September 2010 Affidavit").
[99] Mr Chapple's September 2010 Affidavit, Annexure F; see also Ms Rosendorff's September 2010 Affidavit, Annexure H.

Commencement date of apprenticeship

109. Mr Motherwell's affidavit evidence was that:

> *23. The first time I attended the Workshop after I started work with Zampogna was about two weeks after I had started working with Zampogna. At that time, I asked D'Adamo if I was going to be signed up as an apprentice. D'Adamo responded to me with words to the effect, "You were an apprentice the day you started".*
>
> *24. At that time, I wasn't sure about the formal requirements of registering an apprenticeship. I asked Josh and Anthony about it a week or so after talking to D'Adamo. One of them told me (I can't remember which one) that all apprentices have a 3 month probation and that I was on a 3 month probation. For the next 3 months, I believed that I was on probation, so I did not raise the issue of being signed up for an apprenticeship with D'Adamo during this time.*
>
> *25. After 3 months, in early December 2007, I asked Zampogna about whether I was going to be signed up as an apprentice. He responded to me with words to the effect, "It's not my call – you need to talk to Gino". I remember asking Zampogna about this a couple of times in December 2007.*
>
> *26. After this, I asked D'Adamo whether I was going to be signed up as an apprentice. I asked him 5 or 6 times because I thought that I needed to be signed up officially. All of these conversations took place at the Workshop, during my weekly visits to the Workshop. During each of these conversations, D'Adamo said to be words to the effect, "You're signed up" and "you're already an apprentice". There were always other people present in the Workshop when I had these conversations with D'Adamo, but I don't know if they were paying attention to the conversation.*
>
> *27. In February 2008, D'Adamo organised for a woman from the Apprenticeship Board to come in to the Workshop. On or about 4 February 2008, we had a meeting at the workshop with this woman, four or five other apprentices who had recently started with L&A Electrics and D'Adamo. The woman explained about the apprenticeship. She said that there was a 3 month probation period, and that if your employer decides to keep you after the end of the probation period, your apprenticeship gets backdated to the start of*

the probation period. The woman did not ask any of us when we had started work with L&A Electrics.

28. *We were all given documents to sign at the meeting. I knew that the document I signed said that my probation period started that day (4 February 2008). I did not say anything at the meeting about working for L&A Electrics for the previous six months because I thought that I would get in trouble from D'Adamo if I did. No-one at the meeting said anything about the time that they had already worked for L&A Electrics. I don't think that D'Adamo said anything at all at the meeting.*

29. *About one month later, in early March 2008, I asked D'Adamo whether he could backdate my apprenticeship to include the first six months I had worked for L&A Electrics. He told me that we could talk about it at the end of the 3 month probation.*[100]

36. *On or about 30 April 2008, at the Workshop, D'Adamo called me over to the front desk, gave me a document and said "sign your apprenticeship papers". The document appeared to be my Apprenticeship Agreement. I signed it. D'Adamo did not say anything about my parents needing to sign it.*

37. *When I signed the document, I asked D'Adamo if he was going to backdate my apprenticeship to the date that I started working for L&A Electrics. He told me that he was not going to backdate the apprenticeship, and said words to the effect, "No, that will not be happening".*[101]

41. *On or around 30 May 2008, my mother and I typed a letter for D'Adamo to sign, saying that he agreed to backdate my apprenticeship to 3 September 2007 (the date I started work after my initial two week trial period). I signed it and both of my parents signed it. Annexed to this affidavit and marked "A" is a copy of the unsigned letter I printed off my computer today. I think that this copy is dated 10 September 2008 because we changed the date on the computer ahead of another conversation with D'Adamo about backdating my apprenticeship later in 2008.*

42. *The next work day (I think this was Monday 2 June 2008) I gave the letter to D'Adamo to sign. I told him that all he had*

[100] Mr Motherwell's Affidavit, paras.23-29.
[101] Mr Motherwell's Affidavit, paras.36-37.

to do was sign it and give it to me and I would send it in to the Apprenticeship Board. D'Adamo told me that he would not sign it, but then he said that he would keep the letter and think about it. He took the letter off me.

43. About a week later, my father came in to the Workshop again to ask D'Adamo if he still refused to sign the letter. I was present for the conversation. D'Adamo said that he would not sign the letter.

44. I asked D'Adamo again about one month later if he would sign the letter. He said words to the effect, "Definitely, no. Stop asking me".

45. In the second half of 2008, I started looking for an apprenticeship somewhere else because I was frustrated that D'Adamo refused to backdate my apprenticeship to include the first six months that I worked. Then I found out that if I left L&A Electrics to work for another electrician, I would not get any credit for any time worked with L&A Electrics, unless D'Adamo consented. D'Adamo had previously told me, "if you leave, I'll cancel your apprenticeship".[102]

110. Mr Motherwell gave two weeks' notice that he was leaving L & A Electrics in January 2009, and worked out his notice period.[103]

111. Cross-examined Mr Motherwell gave evidence that:

a) he signed an apprenticeship agreement on 4 February 2008;[104]

b) Mr D'Adamo organised for a woman from the "apprenticeship board" to come to the workshop in February 2008 which was when he signed his apprenticeship papers;[105]

c) he saw a piece of paper indicating that his three months' probation under his apprenticeship agreement had come to an end;[106] and

d) he made attempts to get Mr D'Adamo to back-date his apprenticeship.[107]

[102] Mr Motherwell's Affidavit, paras.41-45.
[103] Mr Motherwell's Affidavit, para.47.
[104] Transcript, 16 November 2010, page 22.
[105] Transcript, 16 November 2010, page 38.
[106] Transcript, 16 November 2010, page 46.
[107] Transcript, 16 November 2010, page 58.

112. Evidence was given by Marion Taylor, a public servant with the Department of Training and Workforce Development in Western Australia.[108] Ms Taylor worked within a division known as ApprentiCentre (which was a marketing name) which was a part of the Department of Training responsible for administering Part 7 of the *VET Act*. Previously, the Department of Training had administered the *IT Act*. The Department of Training has delegated responsibilities under Part 7 of the *VET Act* in relation to training contracts in Western Australia.[109] Ms Taylor identified, by reference to both Ms Rosendorff's September 2010 Affidavit and the original Department of Training file:

a) a copy of Mr Motherwell's Apprenticeship Probation Application;

b) Mr Motherwell's Training Plan Outline; and

c) Mr Motherwell's Mutual Cancellation of Apprenticeship Agreement.[110]

113. Ms Taylor gave evidence about the training records system maintained by the Department of Training which holds all of the records and all of the information and data relating to all apprenticeships in Western Australia. Ms Taylor gave evidence that when an apprenticeship application is signed it is entered into the training records system through one of the Australian Apprenticeship Centres, which are bodies contracted by the federal government to enter data, and the data is then interfaced with the Department of Training's training records system, which enables the Department of Training to receive the data. Every apprentice, on approval of their apprenticeship (or now training contracts), is given an identification number, which when inputted enables the Department of Training to bring up all of the records on that particular apprentice. The system remains, in that regard, the same as the system which was maintained under the *IT Act*.[111]

[108] "Department of Training".
[109] Transcript, 18 November 2010, pages 2-3.
[110] Transcript, 18 November 2010, pages 3-5.
[111] Transcript, 18 November 2010, page 6.

114. Ms Taylor produced an apprenticeship extract for Mr Motherwell, which was exhibited.[112]

115. Ms Taylor was cross-examined, at some length, and it emerged that by reason of grants payable to employers the federal government controls the nature of the forms upon which an application for apprenticeship is made, and the inputting of the data into the training records system upon which the Department of Training relies. Ultimately, nothing turns upon those issues which are issues of form for apprenticeship applications and financial incentives for employers employing apprentices.

116. Under cross-examination Ms Taylor indicated that:

a) in her view, Mr Motherwell's guardian had to be a party to the apprenticeship agreement at the time that he signed it because the *IT Act* required a guardian for anyone under 21 years of age; and

b) because the number of apprentices engaged by L & A Electrics exceeded the supervision ratio of one-to-one, and was in fact closer to two-to-one, Mr Motherwell's apprenticeship agreement should not have been approved, at least without further inquiry as to whether or not there was adequate supervision.[113]

Ms Taylor's views on these matters are strictly irrelevant, as the determination of these issues are matters for the Court.

117. There was before the Court documentary evidence of:

a) the Apprenticeship Probation Application for Mr Motherwell for an apprenticeship commencing on 4 February 2008 with D'Adamo Nominees, who are said therein to be in the business of being electrical contractors;[114]

b) an apprenticeship agreement for Mr Motherwell signed on 30 April 2008;[115]

[112] Exhibit 9.
[113] Transcript, 18 November 2010, pages 16-17.
[114] Ms Rosendorff's November 2010 Affidavit, Annexure A.
[115] Mr Chapple's September 2010 Affidavit, Annexure F.

c) a copy of a letter from the co-ordinator of the ApprentiCentre to Mr D'Adamo at L & A Electrical advising that the apprenticeship agreement with Mr Motherwell had been registered;[116]

d) an application to cancel an apprenticeship by mutual agreement for the apprenticeship of Mr Motherwell to L & A Electrical with effect from 30 January 2009 on the basis that the employer (L & A Electrical) refuses to transfer the apprenticeship, or would not grant a transfer of the apprenticeship, signed by both the employer and the apprentice;[117] and

e) an "Extract of Apprenticeship", admitted without objection, indicating that Mr Motherwell's apprenticeship in electrical mechanics with L & A Electrics commenced on 4 February 2008 and was cancelled with effect from 30 January 2009.[118]

Each of the above documents is admissible as a business record.[119]

118. With respect to the commencement date of the alleged apprenticeship the FWO argues that:

a) Part V of the *IT Act* established a legislative scheme for the employment and training of apprentices and industrial trainees;

b) the procedure for commencing employment as an apprentice under Part V of the *IT Act* was as follows:

i) the person to be employed as an apprentice is first employed on probation for three months, as a probationer;[120]

ii) the employer of the probationer must notify the Registrar in writing within 14 days, and seek approval from the Director to establish an apprenticeship;[121]

iii) the employer must not employ a probationer unless it has the approval of the Director to do so;[122]

[116] Ms Rosendorff's September 2010 Affidavit, Annexure V.
[117] Ms Rosendorff's September 2010 Affidavit, Annexure U.
[118] Exhibit 9.
[119] *Evidence Act*, s.48(1)(e)(i).
[120] *IT Act*, s.29.
[121] *IT Act*, s.29A(2). "Director" and "Registrar" are defined terms in s.4(1) of the *IT Act*: see [x] above.
[122] *IT Act*, s.29A(1).

iv) as soon as possible after the three month probation period has ended, the employer must enter into an apprenticeship agreement with the probationer;[123]

v) if an apprenticeship agreement is entered into the three month probation period is counted towards the apprenticeship;[124] and

vi) the employer is obliged to lodge the apprenticeship agreement for registration within 14 days of its execution;[125]

c) section 31 of *IT Act* provides that a person shall be deemed not to be employed as an apprentice unless the apprenticeship agreement entered into by that person is registered as required under the *IT Act*;

d) section 32 of the *IT Act* provides that service under an apprenticeship commences "*on the day that the apprentice ... commences employment as such*";

e) the FWO says that the effect of s.32 of the *IT Act* is not to automatically back-date any apprenticeship to the date the parties subjectively intended Mr Motherwell to commence as an apprentice, regardless of when the apprenticeship or probationary period was registered, because that construction would have the consequence of making redundant the entire registration scheme under Part V of the *IT Act*. Rather, the FWO submits that s.32 of the *IT Act* enables:

i) the apprenticeship agreement itself to list a retrospective date for the commencement date of the apprenticeship (most commonly this would be the start of the probation period); and

ii) the employee to be counted as an apprentice for the 14 day notification period, after the apprenticeship agreement has been executed but before it has been registered;

[123] *Industrial Training (General Apprenticeship) Regulations 1981* (WA), reg.10(1) ("*IT General Apprenticeship Regulations*").
[124] *IT Act*, s.29.
[125] *IT Act*, s.30(1)(e); *IT General Apprenticeship Regulations*, reg.10(4).

f) Mr Motherwell's probation period commenced on 4 February 2008;[126] and

g) in accordance with the procedure under Part V of the *IT Act*, D'Adamo Nominees' representative, Ms Millington, and Mr Motherwell executed Mr Motherwell's apprenticeship agreement in the last week of his three month probation period, on 30 April 2008. Consistent with the FWO's submissions, Mr Motherwell's apprenticeship agreement retrospectively dated the commencement of the apprenticeship to 4 February 2008, to include the three month probation period.

119. The FWO therefore submits that Mr Motherwell was employed by D'Adamo Nominees as an apprentice in the trade of electrical mechanics for the period from 4 February 2008 to 30 January 2009.

120. The FWO also submitted that Mr Motherwell's repeated requests to Mr D'Adamo for his "apprenticeship" to be registered needs to be considered in context, namely:

a) that Mr Motherwell was 18 years old and, on the evidence, unaware of the official requirements for registering apprenticeship agreements, and was therefore reliant on D'Adamo Nominees or Mr D'Adamo to register any apprenticeship agreement correctly;[127]

b) Mr Motherwell was misled, and believed that he was an apprentice from the time he started employment with D'Adamo Nominees;[128]

c) in April 2008 Mr Motherwell signed his apprenticeship agreement, and requested that his apprenticeship be back-dated, but Mr D'Adamo advised that he would not back-date it,[129] and "*made it very clear that it would be happening*";[130]

[126] Ms Rosendorff's November 2010 Affidavit, Annexure A (Apprenticeship Probation Application).
[127] Mr Motherwell's Affidavit, para.24.
[128] Mr Motherwell's Affidavit, paras.23-24.
[129] Mr Motherwell's Affidavit, paras.35-36; Transcript, 16 November 2010, page 16, lines 9-19.
[130] Transcript, 16 November 2010, page 16, line 14.

d) when Mr Motherwell asked Mr D'Adamo about back-dating the apprenticeship Mr D'Adamo had a "*big frown on his face and the tone of his voice ... was ... pretty harsh*";[131]

e) under cross-examination, Mr Motherwell reaffirmed that he had requested that his apprenticeship be back-dated to his commencement date;[132]

f) Mr Motherwell's father appeared to understand that his son was not an apprentice until he entered into an apprenticeship agreement;[133]

g) Mr Motherwell gave evidence that his father and Mr D'Adamo had a conversation in which Mr D'Adamo said that the apprenticeship would be back-dated, but this did not eventuate;[134] and

h) evidence was led that a letter was signed by Mr D'Adamo, eventually, to back-date the apprenticeship, but that this letter was never received by ApprentiCentre.[135]

121. The FWO submitted that there was ample evidence that Mr Motherwell was an apprentice, and apprenticed to D'Adamo Nominees trading as L & A Electrics, and therefore entitled to be paid as an apprentice under the *ECI Award NAPSA*.

122. In relation to the alleged apprenticeship D'Adamo Nominees submitted that:

a) when, in compliance with an award, an employer and an apprentice enter into a contract of apprenticeship mutual rights and duties arise between them, but those rights and duties rest entirely in contract and do not spring from the award;[136]

b) there was no compliance with clause 10 of the *ECI Award NAPSA* in relation to the ratio of apprentices to tradespersons;

---

[131] Transcript, 16 November 2010, page 16, lines 16-19.
[132] Transcript, 16 November 2010, page 58, lines 10-13.
[133] Transcript, 16 November 2010, page 80, line 47.
[134] Transcript, 16 November 2010, page 61, lines 7-13.
[135] Transcript, 16 November 2010, page 63, line 10, page 75, line 5 and page 78, line 15, and Transcript, 17 November 2010, page 192, line 25 and page 196, line 17.
[136] Citing *Long v Chubbs Australian Co Ltd* (1935) 53 CLR 143 ("*Chubbs Australian*").

c) the contract of apprenticeship remains a distinct entity known to the common law, the first purpose of which is training, and the secondary purpose of which is the execution of work for the employer;[137]

d) Mr Motherwell gave evidence that he was being taught;[138]

e) if the Court finds that Mr Motherwell was an apprentice it can only be because of the contract at common law by which Mr Motherwell agreed with D'Adamo Nominees to be an apprentice. It cannot be by operation of State laws because, despite it purportedly being registered, the apprenticeship agreement could not and should not have been registered. Statutory conditions for registration had not been complied with, notably, the ratio of tradespersons to apprentices had been exceeded by double at the time Mr Motherwell's apprenticeship was purportedly registered. Further, Mr Motherwell's parent or guardian's consent, which was a mandatory requirement, was not given;[139] and

f) furthermore, State laws do not operate to condition the operation of the *ECI Award NAPSA*;

g) if the Court finds that Mr Motherwell was an apprentice then he must have been so from the commencement of his employment;

h) it is open for the Court to find that Mr Motherwell was neither an apprentice nor an electrical assistant, and to characterise him, for example, as a labourer. The Court does not need to find a place to fit Mr Motherwell within the context of the *ECI Award NAPSA*, and if the Court finds that Mr Motherwell was not an apprentice and not an electrical assistant, the duties he did may not come within the parameters of the *ECI Award NAPSA* at all;

i) the FWO relied on the advice and opinion of ApprentiCentre as to the start date of Mr Motherwell's apprenticeship;[140]

---

[137] Citing *Construction, Forestry, Mining and Energy Union (Construction and General Division) v Master Builders Group Training Scheme Inc* [2007] FCAFC 165; (2007) 168 IR 164 [14] per Branson, Finn and Gyles JJ ("*Group Training Scheme*").
[138] Transcript, 16 November 2010, pages 28, 73 and 74.
[139] See Exhibit 4, annexure F, folios 20 and 21.
[140] Exhibit 4, Annexure C, folio 4; Transcript, 17 November 2010, page 209.

j) Ms Taylor said in her evidence that Mr Motherwell's apprenticeship should not have been approved;[141]

k) all of the evidence was that Mr Motherwell intended to be and was an apprentice, and insofar as he may be found not to have been an apprentice, he was employed as a labourer;

l) the evidence was that Mr Motherwell did apprentice tasks and duties because:

i) Mr Motherwell's Affidavit indicates that he was doing fairly basic work because Mr Zampogna had Mr Houlihan and "Anthony" working for him;

ii) the fact that Mr Motherwell was doing fairly basic work suggests that he was working separately, or at least not as directly involved in the work of Mr Zampogna, Mr Houlihan and Anthony, and that is because Mr Motherwell was an apprentice;

iii) Mr Motherwell's job was primarily to learn rather than to do;

iv) Mr Motherwell was not employed to assist; and

v) Mr Motherwell may have occasionally assisted, including directly, and he may have indirectly assisted, but the major and substantial part of his job, at least initially, was to do basic tasks and learn, and that situation remained up until at least 4 February 2008; and

m) D'Adamo Nominees submitted that there was no evidence that the document relied on as the apprenticeship agreement was executed properly or fully or as required by law, and therefore there was no evidence of when the apprenticeship started.

123. D'Adamo Nominees argued that apprentices were not employees at common law, and therefore not employees able to be covered by the *ECI Award NAPSA*. Whatever the common law position might have been with respect to apprentices it was changed by statute in Western

[141] Transcript, 18 November 2010, page 17.

Australia in 1912. Under the *IA Act* "*worker*" was defined to include an apprentice.[142] The then Court of Arbitration had jurisdiction to settle and determine "*any industrial dispute*",[143] with "*Industrial dispute*" being defined to mean a dispute in relation to "*industrial matters*" which was defined to include the "*terms and conditions of apprenticeship*".[144] Likewise, the *IR Act* defines an "*employee*" to mean "*any person employed by an employer to do work for hire or reward including an apprentice.*"[145] There is nothing in the definition of "*employee*" or "*employer*" in ss.5 and 6 of the *WR Act* which excludes apprentices, and the definition of "*employment*" in s.7 of the *WR Act*, likewise, does not exclude apprentices. Indeed, bearing in mind that apprentices have been employees by reason of statute in Western Australia for a century, they meet the criterion of "*usually employed*" in s.5 of the *WR Act*, and there is no dispute that D'Adamo Nominees is a constitutional corporation employer for the purposes of s.6 of the *WR Act*.[146]

124. When the *ECI Award*, prior to it becoming the *ECI Award NAPSA*, sets out pay rates for apprentices and conditions for employees generally, it did so on the basis that apprentices were employees for both industrial (*IR Act*) and employment and training purposes (*IT Act*).

125. D'Adamo Nominees relies upon *Chubbs Australian* and *Group Training Scheme* as cases supporting its argument concerning the nature and existence of an apprenticeship relationship between it and Mr Motherwell.

126. *Chubbs Australian* was a case in which it was alleged that an employer had committed a breach of a federal industrial award by engaging a minor in an occupation specified in the award otherwise than under a contract of apprenticeship framed in conformity with the award. The award fixed the proportion of apprentices to tradesman that an employer may take. There was no dispute that the employer engaged a minor in a manner contrary to the clause. The substance of the dispute which found its way to the High Court was that the clause related to

[142] *IA Act*, s.4.
[143] *IA Act*, s.58.
[144] *IA Act*, s.4.
[145] *IR Act*, s.7(1) – definition of "*employee*".
[146] Statement of Claim, para.3; Defence, para.4.

apprentices who were not members of an employee organisation, and therefore, dispute or no dispute, it was a matter beyond the jurisdiction of the then Commonwealth Court of Conciliation and Arbitration to make an award in the relevant terms, because the apprentices were not members of an employee organisation.[147] The High Court framed its answer to the issue in terms of the rights and duties of the parties to the award, observing that the only rights given by the relevant clause were given to the employee organisation and its members, and the only duties imposed were upon the employers insofar as the employee organisation demanded that they should deal with all apprentices in a manner prescribed by the award.[148] The High Court found that where the interests of one set of disputants was directly affected by the relations which the other set of disputants habitually enters into with strangers to the dispute (in this case apprentices), an award may regulate their entry into those relations (in this case apprenticeships) if it assumes to do no more than confer rights and impose duties upon the disputants and present and future members of an employee organisation party to the dispute. Thus, it was held that the power to make an award restricting the employment of minors to those who were apprentices under an award provision was valid.[149]

127. The High Court observed that:

> *… when, in compliance with the award, an employer and an apprentice enter into a contract of apprenticeship, mutual rights and duties will arise between them. But these rights and duties will rest entirely in contract. They will not spring from the award.*[150]

128. It may have been true in Sydney in the 1930s that the relationship between an apprentice and an employer arose from the contract initially made between them. What *Chubbs Australian* demonstrates, however, is that pursuant to statute, in that case the *Conciliation and Arbitration Act 1904* (Cth), conditions can be imposed upon the terms under which an employer employs an apprentice under a federal industrial award, if those terms are in dispute between the employer and an employee organisation representing its non-apprentice members

[147] *Chubbs Australian* at 149 per Rich, Dixon, Evatt and McTiernan JJ.
[148] *Chubbs Australian* at 150 per Rich, Dixon, Evatt and McTiernan JJ.
[149] *Chubbs Australian* at 151-152 per Rich, Dixon, Evatt and McTiernan JJ.
[150] *Chubbs Australian* at 150 per Rich, Dixon, Evatt and McTiernan JJ.

in the workplace. *Chubbs Australian* is not authority for the proposition that the only rights that arise between an apprentice and employer are common law rights arising from any contract made between them. Nor is *Chubbs Australian* authority for the proposition that those common law rights are not capable of being altered. *Chubbs Australian* did not, and did not have to deal with, the regulation of apprenticeships by State legislatures.

129. Setting aside, for the moment, the provisions of the *WR Act* and *WR Regulations* and their effect, there is no doubt that State parliaments have power to enact legislation with respect to apprenticeships and training. In *South West Ceramics* one member of the Western Australian Industrial Appeal Court, having referred to a leading text on the law of master and servant, observed that it was formerly of some importance to determine whether the parties intended to create a relationship of master and apprentice or master and servant, and that if the former then the contract was considered one of apprenticeship, and if imperfectly formed it could be treated as a relationship of master and servant. Justice Brinsden went on to observe that the text was "*speaking of a common law apprenticeship and the cases in support were mainly decided before industrial legislation had such a foothold.*"[151] Having set out a brief history of apprenticeships in Western Australia Justice Brinsden found that a purported apprenticeship breached the terms of the *IT Act*, as it was not registered, and was void ab initio.[152]

130. The notion that a common law contract of apprenticeship, and that a State law, such as the *IT Act*, could not operate to impinge upon common law rights, is wrong and not consistent with authority. In *South West Ceramics*, Justice Kennedy observed that:

> *Notwithstanding the mutual intention that Mustica should be embarking upon an apprenticeship, he was not an apprentice for the purposes of the Industrial Training Act, and therefore he was not an apprentice for the purposes of the Industrial Relations Act or the award, because he was not, pursuant to the Industrial Training Act, "bound" to an industrial training advisory board in an apprenticeship trade by an agreement or by assignment of an*

[151] *South West Ceramics* IR at 419-420 per Brinsden J (the quote is from 420).
[152] *South West Ceramics* IR at 420 per Brinsden J.

agreement, and, by virtue of s 31 of that Act, he was deemed not to be employed as an apprentice, because no agreement was registered as required.[153]

Thus, notwithstanding what might otherwise be characterised as a "common law contract of apprenticeship", the State law (the *IT Act*) overrode that "common law contract of apprenticeship", and deemed the "notional apprentice" not to be an apprentice at all, because of a failure to comply with the *IT Act*.

131. In *South West Ceramics* Justice Olney, having traced the history of apprenticeships in Western Australia to an 1873 colonial Western Australian Act applying laws then in force in England, and through various industrial relations and industrial training legislation into the 1980s observed that:

> *… the IT Act does represent an attempt to codify the law relating to apprentices in this State subject only to the limited authority given to the Industrial Relations Commission in respect of the matters last referred to. The whole of the legislative history in relation to apprentices and apprenticeship has proceeded on the assumption that an apprentice is properly to be regarded as a person working under a contract of service with his master. There is no longer any scope for the consideration of an apprenticeship outside of the law as declared by the IT Act.*
>
> *… in this respect s 31 of the IT Act is relevant to the extent that it provides that*
>
> > *"… a person shall be deemed not to be employed as an apprentice or industrial trainee in a trade to which this Act applies unless the apprenticeship or industrial training agreement entered into by that person is registered as required under this Act."*
>
> *… By s 30 of the IT Act certain provisions apply with respect to every apprenticeship agreement including requirements that the agreement be in a prescribed form and executed in triplicate. There is, in my opinion, no scope for the recognition of what has been referred to in argument as a "common law" apprenticeship.*[154]

[153] *South West Ceramics* IR at 423-424 per Kennedy J.
[154] *South West Ceramics* at 430 per Olney J.

132. The effect of the *IT Act*, which emerges clearly from *South West Ceramics*, is that a person is not employed as an apprentice unless the apprenticeship "*is registered as required under this [IT] Act*".[155]

133. *Group Training Scheme* was a case particularly concerned with the meaning of the phrase "*employed on work*" in a building and construction award under which an allowance was payable where an employee was required to work, or reported for work or the allocation of work, in particular circumstances. The issue arose as to whether an apprentice in South Australia was entitled to the fares and travel patterns allowance on a day when the apprentice was at trade school. There was no dispute that the apprentices concerned were required to enter into contracts of training as an express terms of their contracts of employment and consequently to attend trade school.[156] The Full Court of the Federal Court observed that the critical question was whether or not in attending trade school the apprentices were "*employed on work*" for the purposes of the relevant clause of the award.[157] The Full Court of the Federal Court did not take issue with the fact that attendance at trade school was part of the work of an apprentice, and it was not in dispute that attendance at trade school was required under the contract of employment.[158] The Full Court of the Federal Court observed that apprenticeship involved both training and work, referring to both English and Australian authority for that proposition, noting that the distinction was reflected in the definition of "*training arrangement"* in s.4 of the *WR Act* which describes a training arrangement as a *"combination of work and training that is subject to a training agreement or a training contract between the employee and employer that is registered"* with the relevant State or Territory training authority or under a law of a State of Territory relating to the training of employees.[159] Essentially, what the Full Court of the Federal Court decided in *Group Training Scheme* was that "*employed on work*" for the purposes of payment of the relevant fares and travel patterns allowances required an employee to be working, to put it colloquially, "*on the job*" or "*on site*" rather than being at trade school. It is a judgment limited to the particular circumstances of that case, and does

[155] *IT Act*, s.31(1).
[156] *Group Training Scheme* at [1] and [4] per Branson, Finn and Gyles JJ.
[157] *Group Training Scheme* at [13] per Branson, Finn and Gyles JJ.
[158] *Group Training Scheme* at [13] per Branson, Finn and Gyles JJ.
[159] *Group Training Scheme* at [14]-[16] per Branson, Finn and Gyles JJ.

not address nor purport to establish wider general principles about apprentices and their work

134. A similar conclusion to that in *Group Training Scheme* was reached by the Federal Magistrates Court in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd*[160] where in relation to a national training wages schedule in a telecommunications services award the Federal Magistrates Court held that:

> *58 By deeming time spent in training to be time worked and by not deeming training to be work, cl E.6.3 recognises and maintains the distinction between training and work considered in … [Group Training Scheme]. Therefore, it has nothing to say about how the word "work" is to be construed where it appears elsewhere in the Award.*
>
> *59 For these reasons, cl E.6.3 of Schedule E does not alter the meaning of "work" where it appears in cl 17.1(e)(i) such that it comprehends training. Consequently, while cl 17.1(e)(i) may apply to work performed by trainees in a location distant from their home, it does not apply to training in a distant location.*[161]

135. In *Bell v Gillen Motors Pty Ltd*[162] the Federal Court held that "*service*" of a person under an award, for the purposes of computing a "*period of continuous service*" included services both as an apprentice and as a tradesperson. The Federal Court observed that the contract of employment was conceptually different to the relationship engendered by an indenture of apprenticeship, and also that there were special restrictions upon the termination of an apprenticeship in the relevant award which were intended exhaustively to cover the termination of the relationship between an apprentice and a master.[163] No authority was cited for the proposition that the contract of employment and an indenture of apprenticeship were then conceptually different in New South Wales, but, in any event, *Gillen Motors* is distinguishable as it did not involve, as Mr Motherwell's case must involve, a consideration of the *IT Act*, and a century of legislative intervention, in the nature of apprenticeships under Western Australian legislation. Furthermore, it is

[160] [2012] FMCA 621; (2012) 224 IR 99 ("*Excelior*").
[161] *Excelior* at [58]-[59] per Cameron FM.
[162] (1989) 24 FCR 77; (1989) 27 IR 324 ("*Gillen Motors*").
[163] *Gillen Motors* FCR at 83 per Wilcox J.

not consistent with, other, more considered, Federal Court, federal industrial tribunal, and State Supreme Court authority referred to below, which is to be preferred to the judgment in *Gillen Motors*.

136. In *Rowe v Capital Territory Health Commission*[164] the Federal Court at first instance observed that:

> *As long ago as R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co. (1910) 11 C.L.R. 1, at p. 32 the High Court dealt with prohibition proceedings relating to claims brought before the Arbitration Court as to the rate of wages of apprentices—and did not suggest that apprentices are not "employees" within the Act. In John Heine & Sons Ltd. v. Pickard (1921) 29 C.L.R. 592 the High Court upheld the conviction of an employer for failing to pay to an employee, who was apprenticed to it by articles of apprenticeship, an amount prescribed by an award in respect of apprentices. In Fletcher v. A. H. McDonald & Co. Pty. Ltd. (1927) 39 C.L.R. 174 the High Court dealt with an award which prescribed the minimum rate of wages to be paid to apprentices. In Culbert v. Clyde Engineering Co. Ltd. (1936) 54 C.L.R. 544, at p. 551 the High Court held that an employer committed a breach of a federal award "in that it did ... apprentice a certain boy and did not apprentice him in accordance with the provisions of the award". In my view those four decisions of the High Court give support to the principle in the Junior Constables case (1943) 17 S.A.I.R. 334 that the fact that an apprentice (or other person) is performing duties under a contract, the primary purpose of which is to teach that person an occupation, does not prevent that person from being an employee. As Mr. Ryan pointed out, s 52 of the Act expressly contemplates the Arbitration Commission determining disputes "in which the rates of pay ... applying to apprentices ... are in question".*

137. *Rowe – Federal Court* was affirmed on appeal in *Rowe v Capital Territory Health Commission*.[165]

138. In *Australian Railways Union & Ors v Public Transport Corporation (Vic) & Ors*[166] an experienced Full Bench of the then Australian Industrial Relations Commission, having reviewed various authorities, including *South West Ceramics*, *Rowe – Federal Court* and *Rowe – Federal Court Appeal*, observed as follows:

---

[164] 1982) 62 FLR 383; (1982) 1 IR 133; FLR at 403 ("*Rowe – Federal Court*").
[165] (1982) 2 IR 27 ("*Rowe – Federal Court Appeal*").
[166] (1993) 47 IR 119 at 129 per Munro J, Williams DP, O'Shea C ("*Australian Railways Union*").

> *The history of arbitral involvement in industrial matters related to apprenticeship recited in Mills and Sorrell (Federal Industrial Law, 5th Ed, 1975 at par 184) is long standing and persuasive. Indeed the weight of both authority and practice is so overwhelmingly consistent with an acceptance that an apprentice is an employee that it would seem in the context of this case almost perverse to contend otherwise.*[167]

139. In *Coxon v Kat*[168] the Full Court of the Supreme Court of South Australia dealt with the case of a trainee hairdresser who had entered into a contract for training under the *Vocational Education, Employment and Training Act 1994* (SA)[169] which was transferred to the respondent who conducted a hairdressing business, and then transferred again to a company incorporated by the respondent to own and operate the hairdressing business. Having cited *Rowe – Federal Court* it was observed that:

> *An apprentice may therefore be an employee. It does not follow that the apprentice has a separate contract of employment. Contracts of apprenticeship or contracts of training, as they are now known under the … [VET (SA) Act], are carefully regulated …*[170]

140. Under the *VET (SA) Act* an employer could not undertake training of a person in a trade except under a contract of training, and the contract of training had to be in a particular form for the trade to which it related, and the contract of training was to provide for the employment of the trainee to be trained under the contract.[171] The *VET (SA) Act* was said to be "*replete with the language of a contract of employment or service*."[172] The Court observes that the scheme of engagement of apprentices under the *VET (SA) Act* is conceptually very similar to that under the *IT Act*.

141. The Full Court of the Supreme Court of South Australia held that there was only one contract between the trainee and the employer, which provided, as required by the *VET (SA) Act* that the employer employ and teach and instruct the trainee. All of the obligations under a

---

[167] *Australian Railways Unions* at 126 per Munro J, Williams DP and O'Shea C.
[168] [2009] SASC 28; (2009) 103 SASR 301 ("*Coxon*").
[169] "*VET (SA) Act*".
[170] *Coxon* at [22] per Bleby J (with whom Duggan J at [2] and White J at [28] agreed).
[171] *Coxon* at [22] and [23] per Bleby J, quoting ss.30 and 37(1) of the *VET (SA) Act*.
[172] *Coxon* at [24] per Bleby J.

contract of training were transferred to the respondent, including the obligation to employ.[173]

142. Apprentices were employees at the relevant time under the *IT Act* which specifically provided for the employment of apprentices, as follows:

a) s.29 – " … *employed as an apprentice … shall be employed in the first instances on probation for a period of three months*";

b) s.29A(1) – "*No employer shall employ a probationer unless the Director has approved of the employer and the employment of the probationer*";

c) s.30(1)(c) – "*... the parties to the agreement shall be the employer, the apprentice ...*";

d) s.32A(1) – "… *where a person who has been employed by an employer as a probationer after application duly made by that employer has been employed by that employer ...*"; and

e) s.34(1) – "*... where all parties agree, the employment of an apprentice or industrial trainee may be transferred from one employer to another employer*."

143. All of the relevant indicators point to Mr Motherwell's alleged apprenticeship giving rise to a contract of employment, or, at least, a contract which incorporated his being an employee of D'Adamo Nominees. In particular:

a) the authorities: *Rowe – Federal Court*; *Australian Railways Union*; *South West Ceramics* and *Coxon*, show that in Australia apprentices have historically been considered to be employees, or, at least, in an employment relationship;

b) the history of apprenticeships in Western Australia under the *IA Act* and the *IR Act* shows that apprentices have been deemed to be employees in Western Australia for more than a century;

[173] *Coxon* at [26] per Bleby J.

c) the *IT Act* expressly provides that apprentices are employees, and in that respect goes further than the *VET (SA) Act* considered in *Coxon*, which nevertheless found that apprentices were employed;

d) the *WR Act* which refers to persons so far as they are employed or usually employed, and as the history of apprenticeships in both Australia and Western Australia indicates, apprentices are persons who are employed or usually employed as such; and

e) both the *ECI Award* and *ECI Award NAPSA* contained a wage rate provision, and other provisions, concerning apprentices. Under both the *IR Act* for the *ECI Award*, and the *WR Act* for the *ECI Award NAPSA*, an apprentice has to be an employee before the *ECI Award* or the *ECI Award NAPSA* could apply.[174]

144. D'Adamo Nominees' assertion that, when, in compliance with an award (or industrial instrument) an employer and an apprentice enter into a contract of apprenticeship mutual rights and duties arise between them, but those rights and duties rest entirely in contract and do not spring from the award, citing *Chubbs Australian*, is, for reasons set out above, not consistent with what was said in *Chubbs Australian*, and *Chubbs Australian* is distinguishable in any event because in that case the High Court did not have to deal with the overlay of industrial training legislation such as the *IT Act*. Cases such as *Rowe – Federal Court*, *South West Ceramics*, *Australian Railways Unions* and *Coxon* make it plain that apprentices are employees, and that the rights and duties as between an apprentice and their employer, arise firstly, from any applicable industrial training legislation, here the *IT Act*, secondly, an employment relationship arising because of the application of the *IT Act*, and, thirdly, any relevant award or industrial instrument, in this case the *ECI Award NAPSA*.

145. The assertion that Mr Motherwell could only have been an apprentice by reason of a common law contract, and not because of the operation

[174] *True* at 423 per Latham CJ; *Byrne & Frew* at 421-422 per Brennan CJ, Dawson and Toohey JJ; *Visscher* at [71] per Heydon, Crennan, Kiefel and Bell JJ.

of State laws, is also wrong. A person becomes an apprentice when their apprenticeship is registered under s.31(1) of the *IT Act*.[175]

146. D'Adamo Nominees' assertion that the *IT Act* does not operate to condition the operation of the *ECI Award NAPSA*, ignores the fact that State laws continue to operate unless inconsistent with a law of the Commonwealth (which for these purposes includes the *ECI Award NAPSA*), but only to the extent of the inconsistency.[176] There is here no relevant inconsistency because the *ECI Award NAPSA* can only apply to an apprentice once the apprentice is employed. As the authorities such as *Rowe – Federal Court*, *South West Ceramics*, *Australian Railways Unions* and *Coxon* demonstrate, whether an apprentice is employed depends upon whether or not the apprenticeship is registered under a State law, in this case the *IT Act*, and it is only then that the *ECI Award NAPSA* has effect in relation to the terms and conditions, including the payment of wages, overtime and leave, for such an apprentice. In that regard, D'Adamo Nominees has failed to establish any inconsistency relevant to the alleged contraventions between the *IT Act* and the *ECI ECI Award NAPSA*. Finally, the *ECI Award NAPSA* would, in any event prevail, over any common law contracts, whether of employment or apprenticeship, entered into between D'Adamo Nominees and Mr Motherwell, if they existed in relation to the alleged apprenticeship (which they do not for reasons set out above).

147. The suggestion that Mr Motherwell was an apprentice from the time that he commenced employment with D'Adamo Nominees has no merit. A person becomes an apprentice upon registration of the apprenticeship agreement, and subject to the serving of the relevant probationary period, the apprenticeship commences on the day that the apprentice commences employment "as such" under s.32 of the *IT Act*. The reference to commencing employment "as such" is, when the section is read as a whole, plainly a reference to the day upon which the apprentice commences as an apprentice, which cannot, for reasons set out above, ordinarily be a date earlier than the date of registration of the apprenticeship agreement or the commencement of the probationary period.

---

[175] *South West Ceramics* at 423-424 per Kennedy J and 426-427 and 430 per Olney J; and see *Coxon* at [22]-[26] per Bleby J for the equivalent South Australian position.
[176] *Constitution*, s.109.

148. The real question which emerges from D'Adamo Nominees' submissions is whether or not Mr Motherwell was in fact registered, or validly registered, as an apprentice, and therefore employed as an apprentice. In this regard D'Adamo Nominees points to two critical factors, as follows:

a) that Mr Motherwell's apprenticeship agreement was not signed by one of his parents; and

b) the ratio of apprentices to tradespersons at the time that Mr Motherwell purported to enter into an apprenticeship agreement was greater than that provided for by cl.10 of the *ECI Award NAPSA*.

149. It is convenient to first deal with the issue of whether or not non-compliance with the provisions of the *ECI Award NAPSA* invalidates the alleged apprenticeship agreement.

150. Clause 10 – Apprentices of the *ECI Award NAPSA*[177] provides as follows:

> *Apprentices may be taken in the ratio of one apprentice for every one or two tradesperson and shall not be taken in excess of that ratio unless –*
>
> *a) The industrial union of employees so agrees; or*
>
> *b) The … [WAIRC] so determines.*

151. There is no evidence of agreement by the industrial union of employees concerned, nor is there evidence that the WAIRC has made any relevant determination, that apprentices may be taken in excess of the relevant ratio.

152. Ms Taylor was cross-examined and it was put to her that the ratio was one to one, and on that basis with 11 people (presumably tradespersons, the contrary not being put or suggested by D'Adamo Nominees) able to supervise, and 20 apprentices, the ratio was exceeded. Ms Taylor acceded to this proposition.[178] Ms Taylor further conceded that the ratio was exceeded by double and that

[177] The *ECI Award NAPSA* is Exhibit 6.
[178] Transcript, 18 November 2010, pages 16-17.

Mr Motherwell's apprenticeship agreement should not have been registered.[179]

153. Whilst the numbers of persons able to supervise, and the numbers of apprentices, as put to Ms Taylor were accurate, Counsel's suggestion that the ratio was one to one, was not. As can be seen from cl.10 of the *ECI Award NAPSA* the ratio is a somewhat imprecisely phrased "one apprentice for every one or two tradesperson". Thus, if the outer limits of the suggested ratio are taken, that is one apprentice for every two tradespersons, 20 apprentices to 11 people able to supervise does not exceed a two to one ratio.

154. The factual foundation for the proposition that the ratio has been exceeded has not therefore been made out, and this aspect of D'Adamo Nominees' Defence cannot be made out.

155. The Court now turns to the issue of the signing of the apprenticeship agreement.

156. It is convenient to begin with s.30 of the *IT Act*. It sets out provisions that "*applied ... to every apprenticeship agreement*". Section 30(1)(c) of the *IT Act* provides for a tripartite employer, apprentice and parent or guardian agreement, save where the Director is satisfied that it is in the interests of the employer and the apprentice that the Director may by endorsement on the agreement consent to it being executed only by the employer and the apprentice. Under s.30(1)(d) of the *IT Act* an apprenticeship agreement is not deemed to be invalid by reason only of it not being under seal. Section 30(1)(e) of the *IT Act* provides that the agreement "duly executed" is to be lodged with the Registrar for registration.

157. It is not in dispute that the apprenticeship agreement is not signed by Mr Motherwell's parents or a guardian. Nor has the Director endorsed the apprenticeship agreement in any way, and certainly not endorsed it to consent to it being executed only by D'Adamo Nominees and Mr Motherwell. Section 30(1)(c) of the *IT Act* has therefore not been complied with. The question now is whether that is sufficient to invalidate the apprenticeship agreement.

[179] Transcript, 18 November 2010, page 17.

158. Section 31 of the *IT Act* provides that a person is "*deemed not to be employed as an apprentice … unless the apprenticeship … entered into by that person is registered as required under this Act.*"

159. Section 20 of the *IT Act* contains "prima facie evidence" provisions with respect to the register of apprentices and a certificate of registration, so that a certified copy of or extract from the register of apprentices is deemed to be prima facie evidence of the facts stated therein,[180] and a certificate that a person was registered as an apprentice, if signed by the Registrar, is prima facie evidence of the facts stated in the certificate.[181]

160. The "prima facie evidence" provisions of the *IT Act* give rise to the question as to whether they validate an apprenticeship agreement by reason of the apprenticeship agreement's registration.

161. In *Federated Engine-Drivers & Firemen's Association of Australasia v The Broken Hill Proprietary Company Limited*[182] the High Court of Australia dealt with certificates given by a Registrar under the *Commonwealth Conciliation and Arbitration Act 1904* (Cth)[183] concerning the existence of the registration of an organisation and as to whether a dispute relating to industrial matters was an industrial dispute extending beyond the limits of one State. It was held that the certificates were not conclusive evidence of either the validity of the registration of an organisation or the existence of the relevant industrial dispute extending beyond the limits of one State. The Chief Justice, Sir Samuel Griffith, said that:

> *The notion that a certificate by the Registrar, which is a mere ministerial act, should have the effect of validating a thing which the law does not allow to be done is prima facie improbable.*[184]

162. Justice Barton opined that:

> *The certificate of the Registrar is conclusive that all things required by the Act to be done by an association claiming to be*

[180] *IT Act*, s.20(3).
[181] *IT Act*, s.20(4).
[182] (1911) 12 CLR 398 ("*Federated Engine-Drivers*").
[183] "*C & A Act*".
[184] *Federated Engine-Drivers* at 413 per Griffith CJ, citing *In re National Debenture & Assets Corporation* [1891] 2 Ch 505 and *Carroll & Ors v Shillinglaw* (1906) 3 CLR 1099 at 1108 per Griffith CJ ("*Shillinglaw*").

> *registered have been duly done. But it has no greater effect. The Statute does not give unto an officer of the Court power to validate anything which is void ab initio, such as the registration of an association which was in its very essence incapable of being made an organization by the fact of registration.*[185]

163. Justice O'Connor, although dissenting in the ultimate outcome, said that:

> *The Registrar's certificate under sec. 57 cannot cure the defect. The certificate is conclusive evidence of the fact of registration, and it complies with what are called in sec. 55 the prescribed conditions, but it affords no evidence that the association is an association entitled to be registered under the Act.*[186]

164. Justice Isaacs expressed it this way:

> *Sec. 57 does not get over the difficulty. It makes the Registrar's certificate conclusive evidence of two facts in connection with the association, namely, registration and compliance with the prescribed conditions preliminary to registration. But that leaves untouched the question of whether the association prior to registration was one of the description required by sec. 55. That is at the root of the matter, and if the foundation goes, the edifice cannot stand.*[187]

165. Justice Higgins, although expressing some doubt, concurred with the views expressed above.[188]

166. In *Shillinglaw* a rule of a Victorian friendly society purporting to authorise the sale of medicines to purchasing members was held to be invalid as a violation of another State act, notwithstanding a certificate of registration authorising the rule by the Registrar of Friendly Societies.

167. In *Australian Workers' Union & Anor v Shop Distributive and Allied Employees' Association & Ors*[189] a powerful New South Wales Court of Appeal dealt with the question of the validity of registration of a body called the "Australian Workers' Union" under the *Trade Union*

---

[185] *Federated Engine-Drivers* at 424 per Barton J.
[186] *Federated Engine-Drivers* at 440 per O'Connor J.
[187] *Federated Engine-Drivers* at 451 per Isaacs J.
[188] *Federated Engine-Drivers* at 459 per Higgins J.
[189] [1978] 1 NSWLR 387 ("*Australian Workers' Union*").

Act 1881 (NSW)[190] and the *Industrial Arbitration Act 1940* (NSW)[191] upon a purported amalgamation with another association registered under both the *TU Act* and the *IA (NSW) Act*. In relation to the proposed amalgamation there was a conclusive evidence provision in s.14(5) of the *TU Act* which provided that upon registering a trade union the Registrar of Trade Unions was to issue a certificate of registry which unless proved to have been withdrawn or cancelled was conclusive evidence that the regulations under the *TU Act* with respect to registry had been complied with.[192]

168. In a lengthy, but helpful, passage the majority of the New South Wales Court of Appeal in *Australian Workers' Union* observed as follows:

> *If it is assumed, for present purposes, that there is no legislative provision which precludes consideration of the validity of an act, whether by providing that an entry in a register or a certificate shall be conclusive as to certain matters, or by any other legislative device, attention must perforce be turned to an inquiry as to whether those things upon which validity depends have been done and done in the manner required.*
>
> *Whether validity depends upon the fulfilment of the conditions precedent depends in turn upon the legislative intention, i.e. it is a matter of statutory construction.*
>
> *It is trite law that, where the legislature authorizes an act and indicates procedures and requirements to be followed or fulfilled antecedently to that act, it may evince an intention that, if one or all of those procedures are not followed, the act shall be invalid. On the other hand, it may indicate an intention that only a failure to conform to the main or substantial requirements shall bring about invalidity, or that total failure to conform shall, nevertheless, not work an invalidity.*
>
> *It has long been accepted that, in determining the question where the statute is silent upon it, the scope and object of the statute furnish the only guides. Of course, these guides have only to be called in aid where the statute does not expressly state the consequence of non-compliance. If it does, the task of statutory construction is simple indeed. It is obvious that, if the statute states in terms that non-compliance shall render the act void,*

[190] "*TU Act*".
[191] "*IA (NSW) Act*").
[192] Section 14 of the *TU Act* is set out in full in *Australian Workers' Union* at 409 per Moffitt P, Reynolds, Glass and Samuels JJA.

> *invalid or nugatory, no argument as to the manifest inconvenience of the result or as to the scope and object of the statute can prevail. One way to state this is to say that the resultant act shall not be effected, or achieved, or take place, unless or except certain requirements are first met. In the same way, the statute may expressly declare that failure to comply with procedural requirements shall not invalidate the act.*
>
> *These somewhat obvious propositions have been expressed, because the problem of statutory construction can be obscured by unduly focusing attention on the body of case law concerned with the difference between statutory requirements which are directory (or permissive) or imperative (or mandatory).*[193]

169. The majority in *Australian Workers' Union* observed that if there was a valid certificate:

> *The question would then arise whether the effect of that certificate is to provide the absent foundation upon which the whole edifice is built, namely the appropriate vote or resolution.*[194]

170. Following further consideration of issues particular to the case, the majority in *Australian Workers' Union* made the following general observation:

> *A consideration of the cases shows that registration in like circumstances does not of itself make valid that which is invalid. They further show that a certificate or acknowledgment of registration does not operate to validate the invalid; that, whilst the law may make provisions for registration or a certificate as to registration to regularize all that went before, as in the case of the Companies Act, 1961, it requires clear language to confer upon the Registrar or a like official a power by ministerial act to validate a thing which the law does not allow to be done.*[195]

and subsequently observed:

> *... we have come to the conclusion that there is nothing in the section which indicates that the statute has inferentially given to the Registrar power to validate anything which is void ab initio,*

---

[193] *Australian Workers' Union* at 409-410 per Moffitt P, Reynolds, Glass and Samuels JJA.
[194] *Australian Workers' Union* at 413 per Moffitt P, Reynolds, Glass and Samuels JJA.
[195] *Australian Workers' Union* at 416 per Moffitt P, Reynolds, Glass and Samuels JJA: reference is then made to *Shillinglaw* and *Federated Engine-Drivers*.

merely by causing an entry to be made in a register. The whole trend of judicial authority points in the opposite direction.

171. The Court notes that the Extract of Apprenticeship for Mr Motherwell has been certified pursuant to s.60F(7) of the *VET Act*. The *VET Act* does not contain prima facie evidence provisions equivalent to s.20 of the *IT Act*. For present purposes, however, the Court will assume that the Extract of Apprenticeship is prime facie evidence of the fact of the apprenticeship.

172. In *South West Ceramics* an employee and an employer in the construction industry agreed that the employee would commence an apprenticeship agreement for a term of five years. No application was however made for approval to employ the employee as a probationer or for approval of an apprenticeship as was required under the *IT Act*. The employee was in a so-called "special trade" for the purposes of the then s.26 of the *IT Act*.[196] In relation to a special trade, which was defined to mean "the building trade" and any other trade or trades prescribed as special trades,[197] the then s.26(3) of the *IT Act* provided as follows:

> *(3) In relation to a special trade –*
>
> *(a) …;*
>
> *(b) a person shall not be employed as an apprentice or industrial trainee in the trade otherwise than as prescribed by this section and the regulations made for the purposes of this section;*
>
> *(c) a person who is indentured as an apprentice or industrial trainee in the trade shall be indentured in the form prescribed for the purposes of this section.*
>
> *…*
>
> *(4) …*
>
> *(5) Any agreement entered into by an industrial training advisory board pursuant to this section shall be signed by the Director for and on behalf of the board appointed in relation to the trade to which the agreement relates.*

[196] *IT Act*, s.26(1).
[197] *IT Act*, s.26(1).

….

173. In *South West Ceramics* it was observed that:

> *Section 40 of the Industrial Training Act makes it an offence for a person to contravene or fail to comply with any provisions of the Act.*[198]

The Court observes that s.40 of the *IT Act* is still to the same effect.

174. In *South West Ceramics* it was further observed that:

> *Section 26 has the effect of making illegal any contract of employment of a person as an apprentice in the building trade otherwise than as prescribed by the section and the regulations. This is a case of an express prohibition by the Statute and it is irrelevant that the particular contract may have been entered into in good faith or with good intent by the parties (as was the case here): Cotton v Central District Finance Corp Ltd (1965) NZLR 992 at p.996. The legislation strikes at the very creation of a contract in breach of its terms and hence such a contract is void ab initio.*[199]

175. Section 31 of the *IT Act* is in the same form now as it was when *South West Ceramics* was decided. In *South West Ceramics* it was said that:

> *Section 31(1) of the Industrial Training Act (the ITA) provides, so far as it is relevant, that a person shall be deemed not to be employed as an apprentice or an industrial trainee in a trade to which the Act applies unless the apprenticeship or industrial training agreement entered into by the person is registered as required under the Act. It is common cause that the trade of tiler is a trade to which the ITA applies and that no apprenticeship or industrial training agreement was entered into between the respondent and Mustica, nor was any such agreement registered as required by the Act. The net effect of s 31 of the ITA and the definition of apprentice in the IRA is that for the purpose of the definition of employee in the latter Act, Mustica cannot be regarded as an apprentice. It follows, therefore, that the award can only bind the respondent in respect of Mustica if he were otherwise within the definition of employee, namely if he was a person employed by an employer to do work for hire or reward.*[200]

---

[198] *South West Ceramics* at 420 per Brinsden J.
[199] *South West Ceramics* at 420 per Brinsden J.
[200] *South West Ceramics* at 426-427 per Olney J.

176. The question which now arises is whether Mr Motherwell's apprenticeship agreement complied with the requirements of s.30 of the *IT Act*, the terms of that section applying to "every" apprenticeship agreement.

177. The terms of s.30(1)(c) of the *IT Act* set out a requirement for an apprenticeship agreement to be a tripartite agreement to which the parties are relevantly, the employer, the apprentice and the parent: in this case, D'Adamo Nominees, Mr Motherwell and one of Mr Motherwell's parents. There is an exception whereby the Director may endorse consent to the apprenticeship agreement being executed only by the employer and the apprentice, but that does not arise here as there is no evidence of such consent.

178. The nature of the tripartite agreement required by s.30(1)(c) of the *IT Act* is such that if, as here, the apprenticeship agreement is not signed by a parent, then it is not an agreement of a kind contemplated by the *IT Act*. This is reinforced by s.30(1)(e) of the *IT Act* which provides that only an apprenticeship agreement which is "duly executed" is to be lodged with the Registrar for registration. A "duly executed" agreement is a pre-condition to registration by the Registrar of an apprenticeship agreement. An apprenticeship agreement which is signed by only two of three parties is not an apprenticeship agreement which has been "duly executed". Furthermore, if one extends the failure to sign to other parties, the necessity for signature of each of the three parties referred to in s.30(1)(c) of the *IT Act* becomes obvious. If, for example, only the apprentice and a parent signed, an employer might be bound by an apprenticeship agreement of which he had no knowledge if it was subsequently registered by the Registrar. Likewise, if an employer and a parent caused the apprenticeship agreement to be signed by them, and it was not signed by the apprentice, an apprentice might be bound to an apprenticeship agreement which the apprentice did not agree to, merely because the apprenticeship agreement had been registered by the Registrar. If an apprenticeship agreement was signed by the employer and the apprentice, but not by the parent, a traditional safeguard (bearing in mind that apprentices were in times past often minors) to prevent coercion of a minor, and an important obligation traditionally falling upon the parent to ensure that the apprentice met the terms of the apprenticeship agreement, might be

avoided. That analysis demonstrates why it is necessary that all three parties sign an apprenticeship agreement.

179. The Court has before it evidence that the parties, at least from the date of the purported registration on 4 February 2008, conducted themselves as if an apprenticeship agreement existed. There was, however, an ongoing dispute between Mr Motherwell and D'Adamo Nominees, and Mr Motherwell's parents, as to whether the apprenticeship agreement was to be back-dated to the time at which Mr Motherwell had actually commenced employment with D'Adamo Nominees. Mrs Motherwell, who is named on the apprenticeship agreement as the parental party, but did not sign it, and did not give evidence. The Court does not know why Mrs Motherwell did not sign the apprenticeship agreement, but on the basis of the evidence of Mr Motherwell and his father, it might be inferred that she did not sign it because of the dispute concerning the operative date. Alternatively, it might be inferred that Mrs Motherwell did not sign the agreement because she never saw it: the evidence of the meeting on 30 April 2008 at which Mr Motherwell and D'Adamo Nominees apparently signed the apprenticeship agreement appears to indicate that the apprenticeship agreement was never forwarded to Mrs Motherwell for signature. In either event, it leads to the conclusion that there was no agreement by Mrs Motherwell in relation to the apprenticeship agreement, and that she did not sign it.

180. Section 31(1) of the *IT Act* does not have the effect of providing that if an apprenticeship agreement is registered by the Registrar then it is an apprenticeship agreement. The requirement to so register "as required under this [IT] Act", means that it must be "duly executed" as required by s.30(1)(e) of the *IT Act*, which in turn requires that it be signed by each of the employer, the apprentice and a parent.

181. In this case, whilst there was evidence that Mr Motherwell executed the apprenticeship agreement,[201] for the reasons set out above, the evidence ultimately proved that apprenticeship agreement was not registrable because it had not been "duly" executed by all of the required parties as required under the *IT Act*. The apprenticeship agreement was, therefore, in the Court's view, void ab initio. There was therefore no apprenticeship agreement. Mr Motherwell was therefore

[201] *D'Adamo Nominees (No. 2)* at [71] per Lucev FM.

not employed under an apprenticeship agreement during the period 4 February 208 to 30 January 2009, or at all.

182. Even if there is no evidence of an apprenticeship, and no case to answer on the basis that there is an apprenticeship, because Mr Motherwell was employed, and, given the nature of the duties that he says he performed during the period of the apprenticeship at L & A Electrics, there will still be an argument that absent an apprenticeship, he was an electrical assistant under the *ECI Award NAPSA*. In *South West Ceramics* the Industrial Appeal Court found that the apprenticeship was void ab initio because of a failure to comply with the provisions of the then s.26 of the *IT Act*, but that nevertheless the employee concerned was still entitled to certain entitlements as a "*junior worker*" under another clause of the relevant award.[202] In order for the Court to determine whether Mr Motherwell was employed as an electrical assistant under the *ECI Award NAPSA* it must first determine if the *ECI Award NAPSA* applied to, firstly, D'Adamo Nominees as an employer, and, secondly, Mr Motherwell as an employee.

Whether the *ECI Award* bound D'Adamo Nominees as at 26 March 2006

183. The question of whether or not D'Adamo Nominees is bound by the *ECI Award* depends upon the meaning of clause 3 – Area and Scope of the *ECI Award*.[203] The Scope clause provides as follows:

> *This award relates to the Electrical Contracting Industry within the State of Western Australia and to all work done by employees employed in the classification shown in the First Schedule – Wages and employed by the respondents in connection with the wiring, contracting, maintenance and the installation and maintenance of electrical light and power plants, and the installation of all classes of wiring, repair and maintenance of electric and electronic installations and equipment including switchboards and appliances carried out by the respondents as electrical contractors. Provided that the award shall not apply to the manufacturing section of the business of any of the respondents.*

[202] *South West Ceramics* IR at 421 per Brinsden J; 424 per Kennedy J and 426 and 430 per Olney J.
[203] "Scope clause".

184. Section 37(1) of the *IR Act* provides as follows:

> *(1) An award has effect according to its terms, but unless and to the extent that those terms expressly provide otherwise it shall, subject to this section —*
>
> *(a) extend to and bind —*
>
> *(i) all employees employed in any calling mentioned therein in the industry or industries to which the award applies; and*
>
> *(ii) all employers employing those employees;*
>
> *and*
>
> *(b) operate throughout the State, other than in the areas to which section 3(1) applies.*

185. The FWO submitted that D'Adamo Nominees was bound by the *ECI Award*, which became an *ECI Award NAPSA* on 27 March 2006. The FWO submitted that the *ECI Award* was an award of the WAIRC under the *IR Act*, having originally been made by the then WAIRC on 27 February 1979 under the *IA Act* ,which was deemed by s.117(1)(g) of the *IR Act 1979* to be an award made under the *IR Act*. Clause 3 of the *ECI Award* was amended to the form set out above in 1987. The FWO submitted that the *ECI Award* was a common rule award applicable to the electrical contracting industry in Western Australia. D'Adamo Nominees noted that the "*so called*"[204] common rule in Western Australia was created by statute, in that the *IA Act* contained common rule provisions for awards in s.78 (and associated ss.74 to 77). Section 78 of the *IA Act* was repealed by s.74 of the *Industrial Arbitration Act Amendment Act (No. 2) 1963*, which also saw a new s.85 introduced into the *IA Act* dealing with common rule provisions for awards. Section 85 of the *IA Act*, as introduced in 1963, was the immediate predecessor to s.37(1) of the *IR Act* which came into operation in 1980.

186. The FWO says that the *ECI Award* applied by common rule to the electrical contracting industry within the area and scope defined in the

[204] Respondents' Written Closing Submission on Liability, para.4(e).

Scope clause in Western Australia, pursuant to s.37(1) of the *IR Act*, prior to 27 March 2006.[205]

187. The FWO submits that immediately prior to 27 March 2006 D'Adamo Nominees employed more than one employee whose terms and conditions of employment were determined by the *ECI Award*. The FWO therefore says that by reason of cl.31 of Schedule 8 to the *WR Act* the *ECI Award NAPSA* applied to D'Adamo Nominees' business from 27 March 2006, continuing to Mr Motherwell's employment with D'Adamo Nominees terminating.

188. The FWO argued that *Shenton Enterprises* was correctly decided and that the Scope clause was a common rule to the extent that it applies to the electrical contracting industry, and to the extent that any employer was in that industry it would be bound by the *ECI Award*. In this respect the FWO argued that *Shenton Enterprises* indicates that there are two limbs to the operation of the Scope clause, namely, that the *ECI Award* relates to the given industry, and then to the work done by employees employed in the classifications in the *ECI Award* who are employed by the respondents within the qualified description of the electrical contracting industry in the *ECI Award*.

189. There is evidence that D'Adamo Nominees employed more than one employee engaged on "electrical work" from 25 March 2006 to 28 March 2006. It appears in the payroll records for employees of D'Adamo Nominees (trading as L & A Electrics), consisting of payroll advices to those employees.[206]

190. The evidence that D'Adamo Nominees was, immediately prior to 27 March 2006, and during Mr Motherwell's employment, engaged in the electrical contracting industry in Western Australia, includes:

    a) the nature of the work performed by Mr Motherwell, and those with whom he worked;

[205] Citing *Shenton Enterprises Pty Ltd trading as John Shenton Pumps v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch* (2000) 80 WAIG 2842; [2000] WAIRComm 148 ("*Shenton Enterprises*"), following *Electrical Trades Union of Workers of Australia (Western Australian Branch) Perth v Signlite Pty Ltd* (1989) 69 WAIG 2658 ("*Signlite*").
[206] Mr Chapple's September 2010 Affidavit at Annexures H and I.

b) advice from the Electrical Licensing Board that D'Adamo Nominees trading as L & A Electrics had held an electrical contractors licence (No. EC003836) issued under the *Electrical (Licensing) Regulations 1991 (WA)* since 1989 and between 26 March 2006 and 20 February 2009;[207]

c) a business name extract for "L & A Electrics" which shows that the business name was registered in 1995, and which describes the "Nature of Business" as "ELECTRICAL CONTRACTING";[208] and

d) an Apprenticeship Probation Application for Mr Motherwell dated 4 February 2008 which indicates that the industry or principal activity of the business in which Mr Motherwell was to serve his apprenticeship, namely D'Adamo Nominees trading as L & A Electrics, was "electrical contractors". The Apprenticeship Probation Application is signed by Luigi D'Adamo on behalf of D'Adamo Nominees.[209]

191. D'Adamo Nominees says that the Scope clause of the *ECI Award* applies only to respondents to the *ECI Award* named in the Second Schedule to the *ECI Award*. That is, it applies only to "*employees employed by the respondents*".[210] D'Adamo Nominees therefore says that the *ECI Award* never applied to it, and could not become a NAPSA or an APCS applying to D'Adamo Nominees.

192. D'Adamo Nominees argues that in *Airlite Cleaning Pty Ltd v The Australian Liquor, Hospitality & Miscellaneous Workers' Union, Western Australian Branch*[211] the Industrial Appeal Court dealt with a scope clause that read as follows:

> *This Award shall apply to:*
>
> *a) Cleaners who are employed by the named respondents in the industry of Contract Cleaning of Government Schools in the State of Western Australia; and*

[207] Mr Chapple's September 2010 Affidavit, Annexure M.
[208] Mr Chapple's September 2010 Affidavit, Annexure K.
[209] Ms Rosendorff's November 2010 Affidavit, Annexure A.
[210] *ECI Award*, cl.3.
[211] (2001) 103 IR 241; [2001] WASCA 19 ("*Airlite Cleaning*").

b) to all those employers employing those Cleaners.

193. D'Adamo Nominees argues that:

a) the reference to "… *the industry of Contract Cleaning* …" is similar to "… *the Electrical Contracting Industry* …" in the *ECI Award*;

b) the words "… *employed by the named respondents*…" in *Airlite Cleaning* are similar to "*employed by the Respondents*" in the *ECI Award*;

c) the respondents in the *ECI Award* are named and listed in the Second Schedule, and the parties are listed in the Third Schedule; and

d) D'Adamo Nominees is not listed as a Respondent to the *ECI Award* and is not a party.

194. D'Adamo Nominees argues that certain terms of the *ECI Award* indicate that the *ECI Award* was only intended to apply to the named respondents, including:

a) clause 38 of the *ECI Award* which deals with redundancy and states:

> *"Redundancy" means a situation where an employee ceases to be employed by an employer, respondent to this award, other than for reason of misconduct. "Redundant" has a corresponding meaning.*

b) clause 40 of the *ECI Award* deals with "Special Exemptions" for specified respondents listed, which would, in D'Adamo Nominees' submission, have been unnecessary if the *ECI Award* was a common rule award; and

c) there is a "Variation Record" at the end of the *ECI Award* that shows that respondents have been deleted, and possibly added, and this would not have been necessary if the *ECI Award* was common rule.

195. D'Adamo Nominees' case also focuses upon the meaning of the words "*unless and to the extent that those terms expressly provide otherwise*"

in s.37(1) of the *IR Act*. D'Adamo Nominees asserts that decisions of the Full Bench of the Western Australian Industrial Relations Commission in *Signlite* and *Shenton Enterprises* failed to consider the question of whether the *ECI Award* was expressly limited to the named respondents, and therefore "*expressly provide[d] otherwise*", and was, therefore, not a common rule award for the purposes of s.37(1) of the *IR Act*.

196. D'Adamo Nominees submitted that the mere reference to the "Electrical Contracting Industry", which was not defined in the *ECI Award*, does not mean that the *ECI Award* applies to that industry, whatever that industry is. It was argued that the rationale was the same as in *Airlite Cleaning* where the award referred to the "*industry of Contract Cleaning of Government Schools in the State of Western Australia*". D'Adamo Nominees says that the *ECI Award* expressly provides otherwise for the purposes of s.37 of the *IR Act* by making express reference to "*employed by the respondents*", who are listed and named, in the same way as in *Airlite Cleaning*, where there were seven listed respondents and one party who was the respondent in that case. D'Adamo Nominees relies upon *Airlite Cleaning* for its submission that the specific listing of the respondents in the *ECI Award* means that the *ECI Award* only applies to those respondents. It is further submitted that if the *ECI Award* applied to the electrical contracting industry then there would be no need to list any respondents unless to do so was to use the respondents as an aide in identifying or defining the electrical contracting industry. If that is so then it is said there is no evidence in relation to those respondents or what they did at the time the award was made in order to define what the electrical contracting industry is.[212] D'Adamo Nominees notes that with the exception of cll.1 and 3 the majority of references in the *ECI Award* to the electrical contracting industry are in cl.37 which deals with structural efficiency, and which was inserted into the *ECI Award* in December 1989. Further, D'Adamo Nominees says that there is no evidence that the drafters of the *ECI Award* intended to use the *Electricity Act 1945* (WA)[213] or *Electricity Regulations 1947* (WA) and *Electricity (Licensing) Regulations 1991*

[212] *Freshwest Corporation Pty Ltd v Transport Workers Union, Industrial Union of Workers, WA Branch* (1991) 71 WAIG 1746 at 1748 per Franklyn J ("*Freshwest*").
[213] "*Electricity Act*".

(WA)[214] as an aide to the interpretation of the *ECI Award*. D'Adamo Nominees submits that those regulations do not assist and should not be used in the interpretation of the *ECI Award*.

197. D'Adamo Nominees submitted that there was no evidence as to what the industry was or what the named respondents did on the date that the *ECI Award* began, namely, 27 February 1979, and that in accordance with the judgment of the Western Australian Industrial Appeal Court in *Freshwest* there needed to be such evidence to enable the industry to be determined by reference to the activity of the respondents at the time the *ECI Award* was made.

198. In *Freshwest* there was no identification of a specific industry, and in order to determine the scope of the award it was therefore necessary to determine which industries it applied to. Although the Scope clause in *Freshwest* referred to the "*transportation of goods and materials*" this was not the industry concerned, because the award in that case applied to "*workers ... employed in the industries carried on by the respondents to this award in connection with the transportation of goods and materials.*" It was, therefore, necessary to determine what industries were carried on by the respondents to the award in order to determine the scope of the award. In that respect *Freshwest* was a case like *Western Australian Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union of Workers v Glover*[215] in which the relevant industries were identified as "*the industries carried on by the respondents set out in the schedule*" and which therefore necessitated the ascertainment of the industries carried on by the respondents to the award at the time of the making of the award.[216] *Freshwest* distinguished *RJ Donovan & Associates Pty Ltd v Federated Clerks Union of Australia, Industrial Union of Workers, WA Branch*[217] on the basis that the relevant scope clause in *Donovan* referred to "*the industries set out in schedule A*", and in which the relevant industries were described by name.[218]

[214] "*Electricity Regulations 1947*" and "*Electricity Regulations 1991*" respectively.
[215] (1970) 50 WAIG 704 ("*Glover*").
[216] *Freshwest* at 1747-1748 per Franklyn J.
[217] (1977) 57 WAIG 1317 ("*Donovan*").
[218] *Freshwest* at 1748 per Franklyn J.

199. In this case, the *ECI Award* specifically identifies the relevant industry as the electrical contracting industry, qualified by reference to the relevant classifications in the wages schedule, and by reference to particular work within the electrical contracting industry, and to its being carried out by respondents as electrical contractors, but excludes from its scope the manufacturing section of the business of any of the respondents. *Freshwest* is therefore distinguishable, and inapplicable in the circumstance of this case.

200. In *Shenton Enterprises* the Full Bench of the WAIRC, unanimously, dismissed an appeal on a matter in relation to the Scope clause. In determining the appeal the Full Bench of the WAIRC made observations relevant to the Scope clause, and also referred to the judgment of the Full Bench of the WAIRC in *Signlite*.

201. The President of the Full Bench of the WAIRC in *Shenton Enterprises* observed as follows:

> *The appellant employer was not an employer named in the schedule and, therefore, the question for decision was whether it employed the employee named in the complaint in a calling mentioned in the award, in the industry to which the award applied. The scope clause is, as Fielding C, as he then was, observed in the Signlite Case, a Donovan clause (see R J Donovan & Associates Pty Ltd v FCU 57 WAIG 1317 (IAC)).*
>
> *I apply the ratio in the Signlite Case and make the following observations:-*
>
> *(a) A fact finding exercise is necessary to determine what the electrical contracting industry is.*
>
> *(b) The industry is defined as the electrical contracting industry.*
>
> *(c) The "industry" is not defined in the award by the enterprises carried on by the named respondents.*
>
> *(d) The award does not apply to the manufacturing section of the business of any respondents. That is an express exclusion.*
>
> *(e) The award applies to the classifications and the work done by the employees employed in those classifications, Mr Michel being so employed.*

(f) Since it is not evident, from the ordinary, natural meaning of the language of the award, what the electrical contracting industry is, then evidence is required and findings of fact are to be made.

(g) Whilst the award applies to persons who do certain work for the respondents as their employees, that part of the scope clause designates the employees as persons employed in connection with certain activities carried out by the respondents to the award, provided however that they are activities carried out by the respondents as electrical contractors.

(h) Thus, if those activities were not carried out by the respondents as electrical contractors, then the fact that they were performed by employees referred to in the classifications in the First Schedule would not mean that the award applied to the employees.

(i) The industry is clearly ascertainable only by the terms of the scope clause without reference to the activities of the named respondents to the award.

(j) Whether Mr Michel and the respondent are engaged in the same industry is to be determined by the common object which they seek to advance by their combined efforts (see Parker and Son v Amalgamated Society of Engineers [1926] 29 WAR 90).

I also refer to Freshwest Corporation Pty Ltd v TWU 71 WAIG 1746 (IAC) (hereinafter referred to as "the Freshwest Case"), particularly whether evidence as to the industry at the time when the award issued was required. That was a case where the industry could only be identified by ascertaining what were the industries carried on by the respondents.

At page 1748, His Honour, Franklyn J, said:-

"The clause speaks specifically of what might be called "the respondents' industries" and not generally of an industry or industries. (my underlining) Thus, for example, it is the industry or industries of a general carrier as carried on by the individually named respondents to which the award was directed and not a broad industry of general carrier which might include a business so different from those of the named respondents as not to be a relevant industry.

....

For the industries to which is [sic] applies to be determined with certainty - an essential to any award - it is necessary, in the absence of clear intention to the contrary, to define them by what they were at the date of the award."

The Freshwest Case was concerned with a clause which was entirely different and bears no relation to the scope clause in this case.

The scope clause in the Freshwest Case required the industry concerned to be ascertained in accordance with the industries carried on by named respondents.[219]

202. The Chief Commissioner of the WAIRC observed as follows:

The scope clause in the Award has a particularisation which limits its application to electrical contractors engaged in the electrical contracting industry within the State of Western Australia and to their employees employed in specific classifications set out in the Award who perform the kind of work identified in the clause; but it does not extend to work of that kind which is undertaken in connection with manufacturing.

As the Full Bench (Sharkey P and Negus C) in the Electrical Trades Union of Workers of Australia (Western Australian Branch) Perth v Signlite Pty Ltd 69 WAIG 2658 at 2659 ("the Signlite Case") noted the "classic rule of determining the industry under an award was laid down by Burt J in WA Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union of Workers v Terry Glover Pty Ltd 50 WAIG 704 at 705 ("Glover's case") -

"Each and every award must relate to an industry and what the industry is, is in every case primarily a question of construction of a particular award. It may be that the question is not only primarily but finally a question of construction and it may be that the award as a matter of construction fails to give the final answer and requires for that purpose that findings of fact be made."

Where is it necessary to make findings of fact, the particular course to be followed will be determined by the construction of the scope clause. In the circumstances of this Award the approach has already been considered by the Full Bench in the Signlite case. The electrical contracting industry means in plain

[219] *Shenton Enterprises* at 2844-2845 per Sharkey P.

words the industry involving those employers who contracted to do electrical work (op cit at 2660). As noted by Fielding C as he then was, it is solely identifiable by the terms of the scope clause without reference to the activities of the named respondents to the Award (op cit at 2661). Nothing determined by the Industrial Appeal Court in Freshwater [sic] Corporation Pty Ltd v Transport Workers' Union, Industrial Union of Workers, Western Australian Branch 71 WAIG 1746 ("the Freshwater [sic] Case") detracts from the approach taken by the Full Bench in the Signlite case. Indeed the distinction identified by the Industrial Appeal Court in the Freshwater [sic] Case (op cit at 1747) between ascertaining industries by reference to the "industries carried on by the respondents", "industries carried on by the respondents set out in the schedule" and those in which reference is made to "all workers employed ... by those employers named and engaged in the industry set out in Schedule A thereto" was recognised by the Full Bench in the Signlite case. The scope clause in the Electrical Contracting Industry Award was considered to be of the kind mentioned in the last category above and that type was reviewed in R.J. Donovan and Associates Pty Ltd v Federated Clerks Union of Australia, Industrial Union of Workers Western Australian Branch 57 WAIG 1317 ("Donovan's Case"). That was also the approach identified by the learned Industrial Magistrate in the first instance (Appeal Book p.10).[220]

203. Commissioner Smith (as she then was) said as follows:

The scope of the coverage of the Award was considered by the Full Bench in Electrical Trades Union of Workers of Australia (Western Australian Branch) Perth v. Signlite Pty Ltd 69 WAIG 2658 ("Signlite"). In the Signlite case the Full Bench at 2659-2660 and at 2661 held that the industry to which the Award relates is solely identifiable by the terms of the scope clause without reference to the activities of the named Respondents to the Award. The Full Bench also held:

(a) It is not clear from the Award what is the exact nature of the electrical contracting industry. That is largely a question of fact.

(b) It is not the status of the employer which is determinative of the industry, but rather the common object of the employer and employee.

Fielding C pointed out in Signlite that the scope clause is of the kind reviewed in RJ Donovan & Associates Pty Ltd v. Federated

[220] *Shenton Enterprises* at 2846-2847 per Coleman CC.

Clerks' Union of Australia, Industrial Union of Workers WA Branch 57 WAIG 1317 ("Donovan's case").

In the Donovan case the scope clause was in the following terms:

"This award shall apply to all workers employed in the clerical callings mentioned herein.....by those employers named and engaged in the industry set out in Schedule 'A' hereto."

...

There is nothing in the reasons for decision of the Industrial Appeal Court in Freshwest in relation to which it could be concluded that Signlite was wrongly decided. It is notable that Signlite was considered by the Court in Freshwest in that the decision is cited in the headnote, although the Court did not refer to Signlite in its reasons for decision.

The Industrial Appeal Court in the Freshwest case distinguished a scope clause of the kind identified in Donovan's case from a scope clause of the kind considered by the Industrial Appeal Court in Western Australian Carpenters and Joiners, Bricklayers and Stoneworkers' Industrial Union of Workers v. Terry Glover Pty Ltd 50 WAIG 704 ("Glover's case"). The scope clause in Glover's case identified Respondents by reference to "the industries carried on by the Respondents". In Freshwest the scope clause provided:

"This award shall apply to all workers following the vocations referred to in the wages schedule.....and are employed in the industries carried on by the respondent's to this award in connection with the transportation of goods and materials."

At page 1747 of Freshwest, Franklyn J observed that it was common ground that the task of the Industrial Magistrate when determining whether the employment of a worker to which the award applies involved:

"(1) identification of the industries carried on by the named respondents to the award (the named respondents); (2) identification of the industry in which Drage was employed by the appellant, and (3) identification of the industry in which he was so employed as one of the industries carried on by the named respondents."

In this matter the task of the learned Industrial Magistrate was different, as the scope clause in the Award is a Donovan clause. Consequently, in this matter the Industrial Magistrate was

> *required to determine whether the evidence before him established that the Appellant (Defendant) at the material time was engaged in the electrical contracting industry by carrying out electrical contracting in its Pool and Spa Service and Sales Division and/or in its Bore Service and Repair Division and employed Mr Michael in those divisions to perform work prescribed in an award classification.*[221]

204. Decisions of State industrial tribunals are not binding on this Court exercising the judicial power of the Commonwealth. In this instance however, a learned Full Bench of the WAIRC has examined the Scope clause, and by reference to judgments of the Industrial Appeal Court and the earlier decision another Full Bench of the WAIRC in *Signlite*, arrived at conclusions which, with respect, this Court agrees. The *ECI Award* is, therefore, not an award restricted to the named respondents.

205. D'Adamo Nominees appeared to argue that because the terms "electrical contracting industry" and "electrical contractor" are not defined in the *ECI Award* the scope of its coverage could not be determined. Whether a particular person (either natural or corporate) is an electrical contractor or in the electrical contracting industry, is, in this instance, a question of fact to be determined by the Court. The lack of a specific definition of the "electrical contracting industry" in the *ECI Award* does not therefore mean that this Court is unable to determine:

a) what the electrical contracting industry is;

b) whether D'Adamo Nominees is part of that industry;

c) whether D'Adamo Nominees is part of that industry as specifically qualified in the Scope clause; and

d) whether Mr Motherwell was employed in a classification under the *ECI Award*,

and to the relevant extent, similarly, with respect to the lack of a definition of "electrical contractor".

206. As to what the electrical contracting industry is the Court adopts what was so plainly said by Coleman CC in *Shenton Enterprises:*

[221] *Shenton Enterprises* at 2847-2848 per Smith C.

> *The electrical contracting industry means in plain words the industry involving those employers who contracted to do electrical work.*[222]

and further that the electrical contracting industry is "*solely identifiable by the terms of the scope clause*".[223]

207. D'Adamo Nominees submitted that there was no or insufficient evidence as to the nature of the business carried on by it, and therefore no evidence to form the basis for a conclusion that the *ECI Award* applied to D'Adamo Nominees. There is evidence concerning whether D'Adamo Nominees is in the electrical contracting industry. That evidence is:

a) the affidavit and oral evidence of Mr Motherwell as to the work performed by him, and others, which is more than sufficient to establish that D'Adamo Nominees carried on business as an electrical contractor, and that the work performed by Mr Motherwell when working with Mr Zampogna, and the apprentices Mr Houlihan and Anthony, when working for L & A Electrics (and irrespective of whether Mr Zampogna was an employee of, or contractor to, L & A Electrics), was work which was undertaken on behalf of an electrical contractor in the electrical contracting industry, and which was being undertaken for L & A Electrics;

b) a business name extract for L & A Electrics which is a business carried on by a corporation, namely D'Adamo Nominees, in respect of which from the date of commencement, 13 August 1995 and registration, 12 September 1995, and up until the last renewal date, 12 September 2010, the nature of the business was said to be "ELECTRICAL CONTRACTING";[224]

c) advice from the Electrical Licensing Board, part of the Department of Commerce in Western Australia, that D'Adamo Nominees trading as L & A Electrics has held an Electrical

[222] *Shenton Enterprises* at 2847 per Coleman CC (referring to *Signlite* at 2660 per Sharkey P and Negus C).
[223] *Shenton Enterprises* at 2847 per Coleman CC (referring to *Signlite* at 2661 per Fielding C).
[224] Mr Chapple's September 2010 Affidavit", Exhibit K. Admissible as a business record under s.48(1)(e) of the *Evidence Act*.

Contractor's Licence number from 5 October 1989, then current until 31 May 2011, and including confirmation that during the period between 26 March 2006 and 20 February 2009 L & A Electrics' licence was current to carry out electrical installing work under contract, and that Mr Luigi D'Adamo was registered as the person responsible for the management or conduct of the electrical contracting business, and was one of the electricians registered as a nominee authorised to sign Notices of Completion with respect to electrical installing work;[225] and

d) a copy of a current Electrical Contractor's Licence for L & A Electrics authorising L & A Electrics to carry on business as an electrical contractor in accordance with relevant regulations issued by the Electrical Licensing Board on 1 November 1991, being Licence No. EC 003836.[226]

208. The above evidence is more than sufficient to establish that D'Adamo Nominees trading as L & A Electrics was in the electrical contracting industry.

209. D'Adamo Nominees made submissions concerning the force and effect of the *Electricity Act*, *Electricity Regulations 1947* and *Electricity Regulations 1991*. It was asserted that the fact of the issue of a licence or licenses under the above legislation did not make the holder an electrical contractor or part of the electrical contracting industry for the purposes of the *ECI Award*. D'Adamo Nominees observed that the *Electricity Regulations 1947* were in force when the *ECI Award* was made on 27 February 1979 and when the Scope clause was changed on 1 April 1987, but that the *Electricity Regulations 1991* had not been made when the *ECI Award* was made or amended in 1979 and 1987 respectively.

210. D'Adamo Nominees notes that the *Electricity Regulations 1947* made no reference to the *ECI Award* and contain no definition of the terms "electrical contractor", "electrical contracting industry" or "electrical assistant". D'Adamo Nominees notes that the *Electricity Regulations*

[225] Mr Chapple's September 2010 Affidavit, Exhibit M. Admissible as a business record under s.48(1)(e) of the *Evidence Act*.
[226] Affidavit of Ashley Paul Chapple, affirmed 12 November 2010, attaching a copy of documents produced under subpoena by D'Adamo Nominees at Attachment A ("Mr Chapple's November 2010 Affidavit"). Admissible as a business record under s.48(1)(e) of the *Evidence Act*.

1947 distinguish between "electrical contractor" and "electrical worker", and makes separate arrangements for licensing of those two categories. D'Adamo Nominees suggests that the purpose of the *Electricity Regulations 1947* and *Electricity Regulations 1991* is primarily the protection of the public through a scheme of licensing various kinds of persons involved in electrical work.

211. D'Adamo Nominees' submissions that the terms of the various State electricity legislation does not assist with the interpretation of what constitutes an electrical contractor, or an electrical assistant, or the electrical contracting industry, is correct in this case, but only because those terms are not defined in that legislation. Were they so defined that would be of some assistance in determining what might have been meant by the framers of an award meant to apply to the electrical contracting industry, and the nature of work performed, and employees, in the electrical contracting industry. As it is, it appears to the Court that the FWO's reliance upon the *Electricity Regulations 1947* and *Electricity Regulations 1991* is for the quite proper purpose of demonstrating that D'Adamo Nominees is licensed as an electrical contractor in the State of Western Australia. Licensing as an electrical contractor is some evidence that D'Adamo Nominees may carry out electrical work as an electrical contractor in the State of Western Australia, which in turn may allow the Court to conclude that D'Adamo Nominees was engaged in the electrical contracting industry in Western Australia if there were, as there is in Mr Motherwell's evidence, evidence that it was actually performing such work.

212. D'Adamo Nominees submitted that the *ECI Award* did not "*expressly provide otherwise*" for the purposes of s.37(1) of the *IR Act*. D'Adamo Nominees suggested that the Court had not construed the words "*expressly provide otherwise*" in *D'Adamo Nominees (No. 2)*, and that other than to agree with the decision of the Full Bench of the WAIRC in *Shenton Enterprises*, did not determine the meaning of cl.3 of the *ECI Award*, and whether it did in fact "*expressly provide otherwise*".

213. The use of the word "expressly" in the phrase "expressly provide otherwise" adds an additional element because the *ECI Award* must not merely provide otherwise, but expressly so. It is sufficient however, if the relevant limitation or reservation is plainly, clearly or explicitly

indicated.[227] And, the *ECI Award* did provide expressly such an exception, in relation to the manufacturing section of the business of any of the respondents in the electrical contracting industry, as was pointed out in *Shenton Enterprises*.[228] It is plain that the drafters of the Scope clause have addressed their mind to what might be expressly provided otherwise, and have expressly provided for a limited exclusion, in relation to manufacturing, which is not one of the kind contended for by D'Adamo Nominees in these proceedings. Otherwise, it is not plain, clear or explicit that there was any other express provision otherwise of any kind contemplated by the Scope clause of the *ECI Award*.

214. D'Adamo Nominees also suggested that the specific listing of respondents meant that the *ECI Award* applied only to those respondents who were specifically listed. This was said to follow from the judgment in *Airlite Cleaning*. Further, it was said that there would be no need to list any respondents unless to do so was to use the respondents as an aid in identifying or defining the electrical contracting industry, but that there was no evidence in relation to those respondents or what they did at the time the award was made, citing *Freshwest*.

215. D'Adamo Nominees also argued that s.37(1) of the *IR Act* could have no operation for the reasons set out in *Airlite Cleaning*. *Airlite Cleaning*, however, concerned an award with a completely different area and scope clause to that in the *ECI Award*, and one which actually restricted coverage to those employees "*employed by the named respondents*" in the relevant industry, and the award was, therefore, not a common rule award.[229]

216. D'Adamo Nominees argued that variations to the *ECI Award* had been made removing respondents, and that this would be unnecessary if the *ECI Award* was a common rule award, and that this was an aid to interpretation. No evidence of the variations was tendered, but there is no reason to doubt that such variations occurred from time to time.[230]

---

[227] *Donnelly v Edelsten* (1992) 109 ALR 651 at 656 per Ryan J.
[228] *Shenton Enterprises* at 2845 per Sharkey P and 2847 per Coleman CC.
[229] *Airlite Cleaning* IR at [4] per Kennedy J and [30] per Parker J.
[230] *IR Act*, s.47.

217. Section 38 of the *IR Act* provides as follows:

> *(1) The parties to proceedings before the Commission in which an award is made, other than UnionsWA, the Chamber, the Mines and Metals Association and the Minister, shall be listed in the award as the named parties to the award.*
>
> *(1a) If after the commencement of section 12 of the Industrial Relations Amendment Act 1993 —*
>
> *(a) any party to proceedings in which an award is made, other than UnionsWA, the Chamber, the Mines and Metals Association and the Minister, is not listed in the award as a named party as required by subsection (1); and*
>
> *(b) the Commission has not ordered that the party is not to be a party to the award,*
>
> *the party is to be taken to be a named party to the award.*
>
> *(1b) ...*
>
> *(2) At any time after an award has been made the Commission may, by order made on the application of —*
>
> *(a) any employer who, in the opinion of the Commission, has a sufficient interest in the matter; or*
>
> *(b) any organisation which is registered in respect of any calling mentioned in the award or in respect of any industry to which the award applies; or*
>
> *(c) any association on which any such organisation is represented,*
>
> *add as a named party to the award any employer, organisation or association.*
>
> *(3) Where an employer who is added as a named party to an award under subsection (2) is, at the time of that addition, engaged in an industry to which the award did not previously apply and the scope of the award is varied by virtue of that addition, the variation shall for the purposes of section 37(1) be expressly limited to that industry.*
>
> *(4) An employer is not to be added as a named party to an award under subsection (2) if that addition would have the*

effect of extending the award to employees to whom another award already extends.

218. Whether a party is a named party to an award, and whether or not it is removed from an award, does not, in the Court's view, say anything about whether or not an award is a common rule award or not. All awards are potentially common rule awards, because this is the default position under s.37(1) of the *IR Act*, and only if, and then only, "*to the extent that those terms expressly provide otherwise*", are awards, not common rule awards. The naming of a party to an award is not an indicator that the award is not a common rule award. The reason is that s.38(1) of the *IR Act* provides that the parties to the proceedings in which an award is made "*shall be listed in the award as the named parties to the award*." The use of "*shall*" means that there is a mandatory obligation, a "*function*" which "*must be performed*",[231] for the parties to the proceedings in which an award is made to be the named parties, whether or not the award is a common rule award. Thus, if XYZ Pty Ltd is a party to the proceedings in which an award is made, it is a named party to the award. Subsequently, if XYZ Pty Ltd goes out of business and is deregistered as a company, it is open to the WAIRC, if it "*is of the opinion that a party to an award who is named as an employer is no longer carrying on business as an employer in the industry to which the award applies*"[232] to "*strike out that party as a named party to the award.*"[233] Further, at any time after an award has been made the WAIRC may by order add any employer as a named party to an award. Thus, if ABC Pty Ltd is a new company it may be added as a named party to an award by order of the Commission.[234] Further, an employer who is added as a named party in those circumstances, and who "*at the time of that addition, [is] engaged in an industry to which the award did not previously apply and the scope of the award is varied by virtue of that addition, the variation shall for the purposes of s37(1) be expressly limited to that industry.*"[235]

219. The deletion and addition of employer parties to an award of the WAIRC is, therefore, not determinative of whether or not an award is

[231] *Interpretation Act 1984* (WA), s.56(2); see also *Grunwick Processing Laboratories Ltd v Advisory, Conciliation & Arbitration Service* [1978] AC 655 at 690 per Lord Diplock and 698 per Lord Salmon.
[232] *IR Act*, s.47(2).
[233] *IR Act*, s.47(2).
[234] *IR Act*, s.38(2).
[235] *IR Act*, s.37(3).

or is not a common rule award, because parties can be added or deleted irrespective of the nature of the award.

220. D'Adamo Nominees also submitted that the parties to the *ECI Award* made it, and varied cl.3, with full knowledge of s.37(1) of the *IR Act* and its predecessor, s.85 of the *1912 IA Act.* D'Adamo Nominees suggests that if the parties to the *ECI Award* had wanted it to operate as a common rule it could have been done easily by drafting a Scope clause that let the *IR Act* operate to its fullest extent. This argument misses the point of s.37(1) of the *IR Act* in that it causes an award to operate as a common rule award as the default position unless the *IR Act* expressly provides otherwise. D'Adamo Nominees' submission inverts the legal position, and, for reasons set out above, the *ECI Award* does not expressly provide that it is not a common rule award.

221. The Court observes that even when allowance is made for the fact that the *ECI Award* may be the product of a non-professional draftsperson, it remains the case that if it had been, or was, intended to apply only to the named respondents:

a) the draftsperson would have drafted the Scope clause accordingly at the outset; and

b) the Scope clause might have been so amended at any time:

i) since 1979; or

ii) after the decisions of the Full Bench of the WAIRC in *Signlite* and *Shenton Enterprises.*

222. For the above reasons it is apparent that the *ECI Award* applied to D'Adamo Nominees as an electrical contractor in the electrical contracting industry as at 26 March 2006.

Whether the *ECI Award* applied to any employee of D'Adamo Nominees before 27 March 2006

223. Schedule 8 of the *WR Act* contains provisions which preserve State awards as NAPSAs as they existed at 26 March 2006, and which provide that a State award determining the terms and conditions of employment for one or more employees becomes a NAPSA, and is

taken to come into operation, on 27 March 2006.[236] There is no dispute that the *ECI Award* became the *ECI Award NAPSA* on 27 March 2006.

224. The *ECI Award* meets the definition of a "*State Award*" in s.4 of the *WR Act* as "*an award … of a State industrial authority*", in this case the WAIRC.

225. It follows from the provisions of cl.31 of Schedule 8 of the *WR Act* that the FWO must establish that the *ECI Award* applied to D'Adamo Nominees as at 26 March 2006, and that at that time D'Adamo Nominees had at least one employee to whom the *ECI Award* applied.

226. Clause 32 of Schedule 8 of the *WR Act* deals with who is "*bound by*" a NAPSA, and cl.33 of Schedule 8 of the *WR Act* deals with whose employment is "*subject to*" a NAPSA. Essentially, who is bound by a NAPSA and subject to a NAPSA depends upon who was bound by the relevant State award and subject to it as at 26 March 2006.

227. D'Adamo Nominees submits that because Mr Motherwell was not employed by it as at 26 March 2006 he cannot give evidence about the employment status of anyone connected to D'Adamo Nominees at that time. Likewise, it says that the FWO Inspectors have no direct knowledge about any of the employment or other business relationships entered into by D'Adamo Nominees at that time. Accordingly, D'Adamo Nominees says that the FWO has not proved that it was bound by, or subject to the *ECI Award* as at 26 March 2006. D'Adamo Nominees also argues that the FWO has not proved that Mr Motherwell would have been bound by, or subject to the *ECI Award NAPSA* after 26 March 2006,[237] and that because of the failure to prove the elements of cll.31 to 33 of Schedule 8 of the *WR Act* the FWO cannot prove the terms of the *ECI Award NAPSA*, or their effect.[238]

228. D'Adamo Nominees' further argument that s.37(1) of the *IR Act* has no operation beyond 27 March 2006 because of the provisions of s.16 of the *WR Act* is not relevant to this issue. The area and scope of the *ECI Award* has to be determined at 26 March 2006 because it is that scope of coverage which determines the relevant APCS for the employees

[236] *WR Act*, Sch.8, cl.31; *Sim v LUO Enterprise Pty Ltd (No. 2)* (2009) 191 IR 401; [2009] FMCA 1060.
[237] *WR Act*, Sch.8, cll.32(1) and (2) and 33(1) and (2).
[238] *WR Act*, Sch.8, cll.31, 32, 33, 34 and 38.

previously under the *ECI Award* at the time it became the *ECI Award NAPSA* on 27 March 2006, and at which time the relevant provisions in the *ECI Award* were preserved in an APCS, which has the same coverage as the award from which it is derived, in this case the *ECI Award*.[239]

229. D'Adamo Nominees argued that there was no evidence that there was at least one employee whose terms and conditions of employment were covered by the *ECI Award* as at 26 March 2006.[240]

230. The FWO says that this is a submission which is technical in the extreme, and that there is evidence of employees who were paid for the week ending 31 March 2006, and that the Court can properly infer that those employees were employed as at 26 March 2006.

231. The FWO also points to the employment of the apprentice, Mr Houlihan, and says that:

    a) there is evidence that:

        i) he was an apprentice whose term commenced on 12 February 2004;[241] and

        ii) Mr Houlihan was still employed as an apprentice, at the time that Mr Motherwell commenced in August 2007; and

    b) there is no evidence, and indeed no suggestion that the term of Mr Houlihan's apprenticeship was broken, or that during the term of his apprenticeship, Mr Houlihan was transferred elsewhere, and it is reasonable for the Court to infer that Mr Houlihan was a continuing employee, and therefore an employee as at 26 March 2006.

232. There is also evidence of electronic pay advices for various employees described in a letter from L & A Electrics to a representative of the FWO as being "*payslips for employees of L & A electrics between the*

[239] *WR Act*, ss.204(1) and 208(1), particularly para.(g).
[240] Statement of Claim, para.8.
[241] Ms Rosendorff's September 2010 Affidavit, Annexure W. Admissible as a business record: *Evidence Act*, s.48(1)(e).

dates for 25/3/2006 to 28/3/2006."[242] The copies of the electronic payslips attached are for 26 employees and are dated 5 April 2006 and are for the "Period Ending: 31/03/2006" and indicate that the employees concerned are "Paid: Weekly". For an employee who is a weekly employee paid for a period ending on 31 March 2006, that is, on the face of it, evidence that those persons were employed by D'Adamo Nominees for the week from 25 March 2006 to 31 March 2006. The fact that there were employees engaged in "electrical work", and for whom pay records indicate that were employed in the period or week ended 31 March 2006, does not advance the FWO's argument. That is because the pay records generally give no proper indication of what classification the employees concerned were employed in, and therefore cannot be related back to the relevant classification provisions in the *ECI Award*.

233. The evidence with respect to Mr Houlihan is, however, of a different nature. The pay advices include a pay advice for Mr Houlihan for this period, thereby strengthening the inference that he was employed as at 26 March 2006. In the case of Mr Houlihan the evidence is that he commenced with D'Adamo Nominees in 2004, was employed in the week ending 31 March 2006, and in August 2007 was described by Mr Motherwell as being a fourth year apprentice. For reasons otherwise set out above Mr Houlihan was, if he was an apprentice, an employee to whom the *ECI Award* applied. The payslips indicate that as at 26 March 2006 Mr Houlihan was paid the same base hourly rate of $11.04, and also paid a "Tool Allowance 3rd," indicating a third year tool allowance paid pursuant to the first schedule, clause 5(a) of the *ECI Award*. The weekly rate of pay for his base hours is $419.52, which is within 10c of the amount payable to third year apprentices pursuant to the first schedule, clause 4 of the *ECI Award* for a four year term apprenticeship. It can be inferred that Mr Houlihan was, as at 26 March 2006, a third year apprentice with D'Adamo Nominees, and the Court so finds. That is evidence that there was, at the very least, one continuing employee at D'Adamo Nominees as at 26 March 2006 namely, Mr Houlihan, and the Court so finds.

[242] Mr Chapple's September 2010 Affidavit, Annexure I. The letter and attached documents are admissible as business records: *Evidence Act*, s.48(1)(e); and the letter is also admissible as an admission of fact that there were the employees for whom payslips were provided, employed between 25 and 28 March 2006: *Evidence Act*, s.48(1)(a).

If the *ECI Award NAPSA* applied was Mr Motherwell an "electrical assistant"?

234. The FWO says that for the period before Mr Motherwell was registered as an apprentice on 4 February 2008, he was entitled to be paid as an "electrical assistant" under the NAPSA. The FWO notes that this Court has upheld the entitlement of workers purportedly taken on as apprentices, but not registered as such (and thus not at law retaining the status of apprentices), to be paid a full adult wage under the relevant NAPSA.[243]

235. The FWO submits that until Mr Motherwell was registered as an apprentice he was employed as an electrical assistant under the *ECI Award NAPSA*. The *ECI Award NAPSA* defines an electrical assistant as an employee "*directly assisting any other employee covered by ... [the ECI Award NAPSA]*".[244]

236. The FWO submits that the evidence indicates that from 3 September 2007 until May 2008, Mr Motherwell worked assisting Mr Zampogna, and a fourth year apprentice (at the time), Mr Houlihan, as well as a second year apprentice named Anthony.[245] The FWO submits that Mr Zampogna, whom Mr Motherwell assisted in the course of his employment, was a qualified electrician employed by D'Adamo Nominees. Mr Motherwell's duties whilst doing so included loading up the van with supplies, taking the electrical cabling from the van to the site, taking tools and ladders from the van onto the site, chiselling out light switch fittings, drilling into brick walls, feeding cabling through cavity walls, finishing power points, cleaning the van and generally cleaning up after Mr Zampogna and Mr Houlihan.[246] The Court accepts that those were Mr Motherwell's duties.

237. D'Adamo Nominees made extensive submissions in relation to whether or not Mr Motherwell was an electrical assistant during the period 3 September 2007 to 4 February 2008. D'Adamo Nominees maintains that there is no evidence that Mr Motherwell was employed

[243] Citing *Armstrong v Bigeni Contracting Pty Ltd* [2008] FMCA 485; *Jarvis v Imposete Pty Ltd (No. 2)* (2008) 169 IR 458; [2008] FMCA 101.
[244] *ECI Award*, cl.5(10).
[245] Mr Motherwell's Affidavit, paras.12-22.
[246] Mr Motherwell's Affidavit, para.17.

to be an electrical assistant, but rather the evidence is to the contrary and that he always considered himself to be an apprentice,[247] and that:

a) it was the FWO, through its officers, who told Mr Motherwell that he was an electrical assistant;[248]

b) Mr Motherwell was cross-examined and asked his job duties,[249] and said that when he was with Mr Zampogna he undertook cleaning, sweeping and carrying duties, as well as basic electrical apprentice tasks;[250] and

c) Mr Motherwell admitted he could not remember who he worked with on any given day, but indicated that towards the end of his time he was working with Mr Wilson.[251]

238. D'Adamo Nominees submits that the accepted test in relation to classification of employees is the "*major and substantial test*". It says that this test was not considered by the Court in arriving at the decision in *D'Adamo Nominees (No. 2)* that it was arguable that Mr Motherwell was an electrical assistant. D'Adamo Nominees says that in terms of the major and substantial things done by Mr Motherwell the evidence was as follows:

a) he spent a lot of time driving and in motor vehicles;[252]

b) he loaded and unloaded the van;[253]

c) he did a lot of watching;[254]

d) he did a lot of simple low-level jobs for the first six months such as carrying and cleaning,[255] and he did those things when working with Mr Zampogna;[256] and

e) he was being taught.[257]

[247] Transcript, 16 November 2010, page 68.
[248] Transcript, 16 November 2010, page 78.
[249] Transcript, 16 November 2010, page 70.
[250] Transcript, 16 November 2010, page 71.
[251] Transcript, 16 November 2010, pages 26 and 67.
[252] Transcript, 16 November 2010, page 28.
[253] Transcript, 16 November 2010, page 28.
[254] Transcript, 16 November 2010, page 28.
[255] Transcript, 16 November 2010, page 28.
[256] Transcript, 16 November 2010, page 28.
[257] Transcript, 16 November 2010, page 28 and 74.

239. On the basis of the above major and substantial activities undertaken by Mr Motherwell D'Adamo Nominees says that it is difficult to point to any evidence that could be characterised as Mr Motherwell "directly assisting" anyone.

240. D'Adamo Nominees says that Mr Motherwell said that for the first five months he was doing fairly basic work and that he explained why, because Mr Zampogna had the other two electrical apprentices (Mr Houlihan and Anthony) working for him,[258] and goes on to submit that there is no explanation of Mr Motherwell giving direct assistance to any other person.[259] Mr Motherwell said that Mr Houlihan and Anthony did more advanced work which included wiring and fitting light switches.[260] D'Adamo Nominees submits that Mr Motherwell had very little to do with any actual wiring which was carried out, and that a process of fitting a light switch which he described, was described in two different ways, and it was a general description, not a description of what Mr Motherwell actually did.[261]

241. D'Adamo Nominees said that Mr Motherwell said that he stopped working with Mr Zampogna after 4 February 2008: "in April or May 2008".[262]

242. D'Adamo Nominees submits that there is no evidence of the major and substantial work done by Mr Motherwell, or other persons who might have been employees, in this case. In those circumstances, it is said that no *ECI Award NAPSA* and no APCS can apply to him. Further, D'Adamo Nominees submits that if Mr Motherwell was not an apprentice then it must also be found that he was not an electrical assistant.

243. D'Adamo Nominees criticises the judgment in *D'Adamo Nominees (No. 2)* in this regard and suggests that the evidence relied upon does not establish that Mr Motherwell was employed in the role of electrical assistance or that the major and substantial basis on which he understood his duties was for the purposes of being an electrical assistant under the *ECI Award NAPSA*, and that the Court needs to

[258] Mr Motherwell's Affidavit at para.16.
[259] Mr Motherwell's Affidavit at para.17.
[260] Mr Motherwell's Affidavit at para.18.
[261] Transcript, 16 November 2010, page 74.
[262] Mr Motherwell's Affidavit, para.31.

examine the evidence in its totality.[263] The criticism is misconceived because the Court was in those circumstances dealing with a lower threshold test considering whether or not there was sufficient evidence to establish a case to answer.

244. D'Adamo Nominees submitted that Mr Houlihan, assuming that the Court found that he was an employee, was only one person and there is no, or alternatively, no sufficient evidence as to how Mr Motherwell assisted him, either directly or indirectly, or how often he did so such as to meet the test that any assistance provided comprised a major and substantial part of Mr Motherwell's employment. Further, D'Adamo Nominees says that there was little or no evidence of Mr Motherwell directly assisting anyone, and no evidence that Mr Motherwell's major and substantial duties demonstrated that he was directly assisting anyone.

245. The statement of claim pleads that:

> *From 20 August 2007 to 3 February 2008 the Employee [Mr Motherwell] was employed by the Respondent [D'Adamo Nominees] in the role of electrical assistant.*
>
> *Particulars*
>
> *Under Clause 5 of the NAPS, "Electrical Assistant" means an employee directly assisting any other employee covered by the award.*
>
> *The Employee's duties included accompanying a qualified electrician on site and providing assistance as required, carrying out some basic wiring under supervision, collecting and delivering wiring and other supplies, and basic sweeping and tidying tasks.*

246. Clause 5(10) of the *ECI Award NAPSA* defines "Electrical Assistant" as follows:

> *"Electrical Assistant" shall mean an employee directly assisting any other employee covered by this award.*

247. D'Adamo Nominees also submitted that there was doubt that Mr Motherwell, Mr Zampogna and Mr Houlihan were employed by

[263] *D'Adamo Nominees (No. 2)* at [46]-[47] per Lucev FM.

D'Adamo Nominees trading as L & A Electrics. For reasons set out above:

a) Mr Motherwell was an employee; and

b) Mr Houlihan was an employee.

248. In relation to Mr Zampogna:

a) D'Adamo Nominees submitted that there was insufficient evidence to conclude to the relevant standard of proof that Mr Zampogna was an employee of D'Adamo Nominees. It was said that none of the witnesses knew whether or not Mr Zampogna was an employee, and in particular:

i) Ms Rosendorff did not appear to know;[264] and

ii) Mr Chapple said he did not believe a definitive view had been formed;[265] and

b) D'Adamo Nominees suggests that the evidence includes indicia pointing to Mr Zampogna being an independent contractor. That evidence includes the absence of timesheets completed by Mr Zampogna, a sub-contractor agreement, and the trading name of Jojoy Pty Ltd on invoices prepared by Mr Zampogna for periods during which Mr Motherwell was employed.[266]

249. The payroll records, nominally payslips, for Mr Zampogna indicate that he was paid a flat rate each week of $2500, with PAYG withholding tax deducted, holiday leave accrual, and payment of the superannuation guarantee charge contributions. The payslips give no indication of the payment of any allowances, overtime, or provision for sick pay, unlike the payslips for Mr Motherwell and Mr Houlihan whom the Court has found to be employees of D'Adamo Nominees. Those payslips cover the pay periods from 11 August 2007 to 25 January 2008, which is most of the period during which it is alleged that Mr Motherwell was an electrical assistant. There are also tax invoices addressed to L & A Electrical from Jojoy Pty Ltd,[267] citing an

[264] Transcript, 17 November 2010, page 73.
[265] Transcript, 17 November 2010, page 38.
[266] Exhibit 5, annexure A, folios 85 to 100.
[267] "Jojoy".

ABN number (on many of the invoices) and recording the hours worked, from 13 August 2007 to 8 December 2007 upon which Mr Zampogna has been paid. There was evidence that Mr Zampogna was a director of Jojoy.[268] There is also in evidence a sub-contractor agreement between D'Adamo Nominees and the "Sub-contractor", seemingly signed by Mr Zampogna, agreeing to work for commission for the first two years and thereafter at a minimum fee of $130 an hour. The start date of that agreement is 28 October 2005. That agreement described itself as a "Contract for Services" and provides that the "Sub-contractor will provide L & A Electrics with tax invoices for hours and/or work completed." There was also evidence of Mr Zampogna's use of equipment and supplies provided by L & A Electrics, including a vehicle, fuel for the vehicle, and some work clothing.

250. There was also evidence given by Mr Motherwell that on at least one occasion he attended a non-L & A Electrics job with Mr Zampogna.

251. Having regard to the factors for consideration as to whether a person is an employee as set out in *Brodribb Sawmilling*, *Vabu* and *Climaze* and the other cases referred to previously in this Reasons for Judgment, the:

a) sub-contractor agreement between L & A Electrics and Mr Zampogna;

b) tax invoices directed to L & A Electrics from Jojoy, with an ABN number cited;

c) payroll records which indicate a flat weekly rate of payment to Mr Zampogna, and which do not indicate any of the usual allowances payable to an electrician under the *ECI Award NAPSA*, and do not make provision for sick leave as do the payslips for Mr Motherwell and Mr Houlihan;

d) the evidence of other work being performed by Mr Zampogna, other than for L & A Electrics,

is sufficient to persuade the Court that Mr Zampogna was not an employee of D'Adamo Nominees trading as L & A Electrics, or

[268] Transcript, 17 November 2010, page 162.

alternatively, that there was not sufficient evidence to satisfy the Court, on the balance of probabilities, that that was the case.

252. Because Mr Zampogna was not an employee of D'Adamo Nominees he could not, therefore, have been a person covered by the *ECI Award NAPSA*, and was therefore not a person covered by the award whom Mr Motherwell could have directly assisted.

253. There is no evidence that Mr Zampogna was an employee of Jojoy Pty Ltd. There is therefore no evidence that he was employed by Jojoy Pty Ltd. Thus, even if Jojoy Pty Ltd was an electrical contractor (about which there is also no evidence), and bound by the *ECI Award* or the *ECI Award NAPSA* (a question which was not explored in evidence in relation to Jojoy Pty Ltd), it has not, therefore, been established that Mr Zampogna was an employee of Jojoy Pty Ltd covered by the *ECI Award* or the *ECI Award NAPSA*. In that regard, for the period that Mr Motherwell was working with Mr Zampogna it has not been established that Mr Zampogna was a person covered by the *ECI Award* or *ECI Award NAPSA*, and Mr Zampogna cannot therefore have been a person whom Mr Motherwell was directly assisting as an employee covered by the *ECI Award NAPSA*.

254. From an abundance of caution, the Court notes that there was no evidence as to who "Anthony" was, or if he was in fact an apprentice, or whether in fact he was employed by D'Adamo Nominees, or whether the *ECI Award NAPSA* applied to him, and, if so, how. "Anthony" was therefore not established to be a person covered by the *ECI Award NAPSA* whom Mr Motherwell could have directly assisted.

255. In the circumstances, and on the evidence, it can therefore only be Mr Houlihan who was an employee whom Mr Motherwell could be said to be directly assisting as an employee covered by the *ECI Award NAPSA* during the time that the FWO claims that Mr Motherwell was an electrical assistant.

256. In order to conclude that Mr Motherwell was an "electrical assistant" under the *ECI Award NAPSA* that must be his major and substantial function as an employee. The major and substantial test is applied to

establish an employee's classification under an award or agreement.[269] The test requires an examination of what the major and substantial employment of the employee was. It is not merely a matter of quantifying time spent on various tasks; the quality of the type of different work done is a relevant consideration also.[270] It is an examination of what employees believed their duties to be, and what they could be directed to perform.[271] This test also applied in *Construction, Forestry, Mining and Energy Union v CSBP Limited*[272] where it was observed that to identify the primary purpose "*one does not focus upon one aspect of an employee's work in isolation from the totality of his or her duties*". The Court then referred to Burt CJ's comments in *The Federated Engine Drivers & Firemen's Union (WA) v Mt Newman Mining Co Pty Ltd*[273] that not every worker who drives an engine in carrying out there employment is an engine driver, the question is whether "*the worker is employed to drive an engine so that he earns his wages by doing that, or whether he is employed to do something else*",[274] merely operating a machine so as to do the thing a person employed to do does not make them an engine driver. In *Federated Clerks' Union of Australia Industrial Union of Workers (WA Branch) v Cary*[275] Burt CJ said:

> *[i]f in substance the worker's job is to write and the job is done when the writing has been done he is a clerk, but if in substance the writing done by the worker is but a step taken in the doing by him of something extending beyond it then he is not. The 'substance' of the work identifies the question as being one of degree and it indicates the answer to it will be, or may be, very much the product of a value judgment.*[276]

257. Integral to the question of major and substantial function in this matter is what is meant by "directly assisting" in the definition of "electrical assistant". Notwithstanding the observations of one member of the

[269] *The Director of the Fair Work Building Industry Inspectorate v Linkhill Pty Ltd (No. 7)* [2013] FCCA 1097.
[270] *Ware v O'Donnell Griffin (Television Services) Pty Ltd* [1971] AR (NSW) 18.
[271] *Transport Workers' Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCCA 4 at [172] per Judge Driver.
[272] [2012] FCAFC 48; [2012] FCAFC 48; [2012] FCAFC 48, (2012) 212 IR 206, 64 AILR 101-578 at [44] per Keane CJ, Siopis and Rares JJ; see also *Joyce v Christofferson* (1990) 26 FCR 261; 33 IR 390, 32 AILR 401; FCR at 279 per Gray J.
[273] (1977) 57 WAIG 794 ("*Mt Newman Mining*").
[274] *Mt Newman Mining* at 794 per Burt CJ.
[275] (1977) 57 WAIG 585 ("*Cary*").
[276] *Cary* at 586 per Bur CJ.

High Court in *Toowoomba Foundry Pty Ltd v The Commonwealth*[277] that a classification of "*employee directly assisting an employee whose margin above the basic wage is 14s or more*" was a "*vague classification*",[278] the ordinary meaning of the phrase "*directly assisting*" can be gleaned from the dictionary meaning of the words comprising that phrase. Relevantly, the words "directly" means:

> *without the intervention of a medium, immediately, by a direct process or mode.*[279]

In essence that means someone immediately assisting another. To "assist" means:

> *to aid, help.*[280]

It follows that "assisting" must mean giving aid or giving help. In the circumstances, the phrase "directly assisting" means immediately aiding or helping.

258. The question which remains, therefore, is whether for the period it is claimed that Mr Motherwell was an "electrical assistant" is there evidence that he was immediately helping or aiding Mr Houlihan during that period as a major and substantial part of his duties?

259. The *ECI Award NAPSA* requires that a person employed as an "electrical assistant" be an employee who was "*directly assisting any other employee*". The Court observes that there is no requirement under the *ECI Award NAPSA* for an electrical assistant to be assisting a qualified person as was perhaps suggested by some of the submissions for D'Adamo Nominees. It is sufficient if an electrical assistant, as defined in the *ECI Award NAPSA*, is "*directly assisting any other employee*".

260. Mr Motherwell's Affidavit evidence in relation to the question of the work that he performed during the period it was claimed that he was an electrical assistant was as follows:

---

[277] (1945) 71 CLR 545 ("*Toowoomba Foundry*").
[278] *Toowoomba Foundry* at 585 per Williams J.
[279] *The Shorter Oxford Dictionary on Historical Principles* (3rd Ed) (Volume 1) (Oxford: Clarendon Press, 1973), page 556 ("Shorter Oxford Dictionary").
[280] Shorter Oxford Dictionary, page 119.

> 11. *On or about Friday 31 August 2007, D'Adamo gave me a piece of paper with an address and the name, Joe Zampogna (**Zampogna**) and said that I would be working with Zampogna from Monday at the address. I do not remember the exact address.*
>
> 12. *For about the next nine months, I basically worked every day with Zampogna and two apprentices: Joshua Houlihan (**Josh**), who was a 4th year apprentice, and Anthony, who was a 2nd year apprentice. I do not know Anthony's surname.*
>
> ...
>
> 14. *While I was working with Zampogna, I would normally meet Zampogna and the other apprentices at Zampogna's house at approximately 7am. Zampogna would then drive us all to the work site for the day in an L&A Electrics van. The work site was always a partly built residential house. It was our job to do the wiring of the house. We would do the initial wiring of the houses, then the plasterers (from another company) would do the plastering and we would come back to the house a few weeks later to do the light fittings.*
>
> ...
>
> 16. *For about the first 3 months, Zampogna would specifically direct me what to do. After that time, I had learned what my tasks involved, and generally worked without Zampogna telling me exactly what to do. Josh and Anthony also told me what to do. For at least the first 5 months, I was doing fairly basic work because Zampogna also had the two other electrical apprentices (Josh and Anthony) working for him*
>
> 17. *While working with Zampogna, my duties involved loading up the van with supplies, taking the electrical cabling from the van on to the site, taking tools and ladders from the van on to the site, chiselling out light switch fittings, drilling into brick walls, feeding cabling through cavity walls, finishing power points, cleaning the van and generally cleaning up after Zampogna, Josh and Anthony.*
>
> (Emphasis added)

261. The above evidence is equivocal in relation to whether or not Mr Motherwell worked directly with Mr Houlihan, and to the extent that he might have worked directly with Mr Houlihan, when that was and for what period or periods. The thrust of the affidavit evidence is

that he was primarily "working with Mr Zampogna". There is evidence that he worked with Mr Houlihan, but whether he was directly assisting Mr Houlihan as such is not apparent.

262. Mr Motherwell was cross-examined about the period during which it was claimed he was an electrical assistant. Of it he says that:

a) he "was assigned to work with" Mr Zampogna;[281]

b) he could not remember who he worked with on 15 October 2007 but it would have been with "either" Mr Zampogna, Mr Houlihan or Anthony;[282]

c) Mr Zampogna, Mr Houlihan and Anthony were the only three people that he worked with through that time;[283]

d) he does not recall where he went on Friday, 14 December 2007, or what duties he did, or with whom he worked on that day;[284]

e) he cannot remember what duties he did on any given date, or with whom he worked with on any given date, and did not keep any records that would allow him to remember;[285]

f) he worked with Mr Zampogna until "April or May 2008";[286]

g) about a month after he finished work with Mr Zampogna he was told he would be working with Mr Wilson, who was a contractor, and he thinks that this was in "June or July 2008";[287]

h) he was working in the workshop on 30 April 2008 (the day the apprenticeship agreement was signed);[288]

i) each morning Mr Houlihan, Anthony and he would go to Mr Zampogna's house "jump in the Holden Rodeo, which is the work car, and go to work. By the end of each day, park up in …

[281] Transcript, 16 November 2010, page 24.
[282] Transcript, 16 November 2010, page 24.
[283] Transcript, 16 November 2010, page 24.
[284] Transcript, 16 November 2010, page 26.
[285] Transcript, 16 November 2010, pages 26-27.
[286] Transcript, 16 November 2010, page 38.
[287] Transcript, 16 November 2010, page 39.
[288] Transcript, 16 November 2010, page 39.

[Mr Zampogna's] driveway, and we'd unload it or load it up, and then take our own cars home";[289]

j) there were a couple of occasions on which Mr Zampogna brought his own white van to work, but "the majority of the time it was always in the Rodeo";[290]

k) they would sometimes drop Mr Houlihan and Anthony "off at a job because they were capable of doing a job on their own" and then he and Mr Zampogna would go on to another job;[291] and

l) there was about a month when he was in the factory between working with Mr Zampogna and working with Mr Wilson.[292]

263. An analysis of the timesheets in evidence for Mr Motherwell[293] and Mr Houlihan[294] indicates that:

a) Mr Houlihan and Mr Motherwell did not work together in the period from 3 to 23 September 2007;

b) there is no evidence, due to there being no timesheets for Mr Motherwell, which indicates that Mr Motherwell and Mr Houlihan worked together for the period from 19 November 2007 to 2 December 2007, and Mr Houlihan was sick on 3 December 2007; and

c) Mr Motherwell and Mr Houlihan did not work together at any time after 23 January 2008.

264. For the periods outside of the abovementioned periods during the period from 24 September 2007 to 23 January 2008 (and excluding the Christmas holiday break) it appears that Mr Motherwell and Mr Houlihan did work on the same sites.

265. Having regard to:

a) Mr Motherwell's equivocal affidavit evidence;

[289] Transcript, 16 November 2010, page 47.
[290] Transcript, 16 November 2010, page 49.
[291] Transcript, 16 November 2010, page 64.
[292] Transcript, 16 November 2010, page 67.
[293] Ms Rosendorff's September 2010 Affidavit, Annexure H.
[294] Mr Chapples's November 2010 Affidavit, Annexure A.

b) Mr Motherwell's oral evidence in which he was unable to give any direct evidence that he worked with Mr Houlihan at any particular time, although it is apparent that he worked with Mr Houlihan from time to time, but the nature of the work performed and the frequency of it is not discernible from his oral evidence;

c) the significant periods of time during which Mr Motherwell did not work with Mr Houlihan at all during the period that it is claimed that Mr Motherwell was an electrical assistant; and

d) the failure to call either Mr Zampogna or, and particularly, Mr Houlihan (who was an employee covered by the *ECI Award NAPSA*) to give evidence about the nature of the work performed by Mr Motherwell, and whether Mr Motherwell might have directly assisted anyone, it may be inferred that their evidence would not have assisted the FWO,

the Court is not satisfied, on balance, that the evidence establishes that Mr Motherwell was an employee directly assisting any other employee covered by the *ECI Award NAPSA*. On balance, the evidence overall suggests that he may have been directly working with and assisting Mr Zampogna, but even there the evidence is somewhat equivocal. The evidence does not establish that Mr Motherwell was directly assisting Mr Houlihan, who is the only person whom the evidence establishes was an employee directly covered by the *ECI Award NAPSA* who worked on the same sites as Mr Motherwell during the period that it is claimed that Mr Motherwell was an electrical assistant. Further, the evidence does not establish, in any event, that Mr Motherwell worked with Mr Houlihan for the whole of that period.

266. The FWO has therefore failed to establish its claim that Mr Motherwell was employed as an electrical assistant by D'Adamo Nominees during the period from 3 September 2007 to 3 February 2008.

267. Insofar as the issue of whether or not Mr Motherwell was an electrical assistant on and from 4 February 2008 was raised during the course of the proceedings, it not having been pleaded by the FWO at any stage, the evidence generally is equivocal and does not establish that Mr Motherwell worked as an electrical assistant after 4 February 2008. Mr Motherwell continued to work with Mr Zampogna for some time,

seemingly on the evidence ceasing prior to 30 April 2008 when Mr Motherwell was working in the workshop, but there is no sufficient evidence to indicate that in the period 4 February 2008 to prior to 30 April 2008 that Mr Motherwell was directly assisting any other employee covered by the *ECI Award NAPSA*. For the period that Mr Motherwell was in the "factory" there is no evidence that he directly assisted any other employee covered by the *ECI Award NAPSA*. In any event, in relation to direct assistance of any employee under the *ECI Award NAPSA* there is simply insufficient evidence to reach any definite conclusion on the balance of probabilities. From the time that Mr Motherwell ceased working in the factory and commenced working with Mr Wilson there is also no evidence that he was directly assisting any other employee covered by the *ECI Award NAPSA*. Mr Wilson was not such a person, he being a contractor, and not an employee, and therefore not covered by the *ECI Award NAPSA*.

268. In all of the above circumstances, the FWO has failed to establish that Mr Motherwell was employed as an electrical assistant at any time during his employment at D'Adamo Nominees.

Conclusions and orders

269. The Court has concluded that:

a) Mr Motherwell was not employed by D'Adamo Nominees as an electrical assistant under the *ECI Award NAPSA* for the period from 3 September 2007 to 3 February 2008, or at all during his employment at D'Adamo Nominees;

b) Mr Motherwell was not registered as an apprentice under the provisions of s.31 of the *IT Act* because the apprenticeship agreement purported to be entered into was not duly executed for the purposes of s.30(1)(c) of the *IT Act*, and was therefore void ab initio;

c) Mr Motherwell was therefore not an apprentice employed by D'Adamo Nominees for the period from 4 February 2008 to 30 January 2009; and

d) it follows from (a), (b) and (c) above that the *ECI Award NAPSA* did not apply to Mr Motherwell during his employment at

D'Adamo Nominees, and it is therefore unnecessary to further consider the specific wage and entitlement claims made by the FWO based on the *ECI Award NAPSA*.

270. In the above circumstances, it follows that the application must be dismissed, and there will be an order accordingly.

I certify that the preceding two hundred and seventy (270) paragraphs are a true copy of the reasons for judgment of Judge Antoni Lucev

Deputy Associate:

Date: 8 May 2015