FWC Bulletin

5 September 2024 Volume 9/24 with selected Decision Summaries for the month ending Saturday, 31 August 2024.

Contents

Application for appointment of independent administrator for CFMEU

02 Aug 2024

The Fair Work Commission's General Manager, Murray Furlong, has initiated proceedings in the Federal Court under s.323 of the *Fair Work (Registered Organisations) Act 2009* (RO Act) to appoint an independent administrator for the Construction and General Division of the Construction, Forestry and Maritime Employees Union (CFMEU).

The proposed scheme of administration covers the Divisional Executive and offices in the Victoria-Tasmania, New South Wales, Queensland Northern Territory and South Australian Divisional Branches. The remaining Divisional Branches in Western Australia and the Australian Capital Territory would continue to function as usual but could be brought under the scheme at a later
date on application to the Court.

Following significant consultation with a wide range of stakeholders representing both employer and employee interests, it is proposed that the Court appoint Mark Irving KC as Administrator.

Mr Irving KC has been a Member of the Victorian Bar for over 26 years. His experience is extensive and includes acting in significant matters relating to both unions and employer organisations. A copy of his biography is attached to the media release. The Court is asked to approve a scheme for the taking of action by Mr Irving KC as independent administrator.

To find out more read the Media release: Application for appointment of independent administrator for CFMEU.

President’s statement about our work and performance in 2023-24 published

14 Aug 2024

Justice Hatcher, President, has issued an end of financial year statement about our work and performance in 2023-24.

The statement provides information about:

- Our operational performance over the 2023-24 reporting cycle
- Major cases
- Changes arising from the Secure Jobs, Better Pay Act
- Changes arising from the Closing Loopholes Act
- Our implementation efforts in relation to changes arising from Closing Loopholes No. 2 Act

Read:

- President’s statement: The Fair Work Commission’s work and performance in 2023–24 (pdf)
- The Closing Loopholes Act – what’s changing

Media release: Appointment of Independent Administrator, CFMEU (Construction and General Division)

23 Aug 2024

In accordance with the provisions of the *Fair Work (Registered Organisations) Amendment (Administration) Act 2024*, the Construction and General Division of the Construction, Forestry and Maritime Employees Union (CFMEU) has been placed under administration for up to five years.

The Attorney-General, authorised by the Minister for Employment and Workplace Relations, has determined a scheme for the administration in the Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024.

Read the full Media release: Appointment of Independent Administrator, CFMEU (Construction and General Division).

New laws in our Fair Work system start today

26 Aug 2024

Significant changes to our functions started on 26 August 2024 as a result of amendments to the *Fair Work Act 2009* made by the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024.*

You can read about this on our New laws webpage.

The laws:

- empower us to deal with applications relating to disputes about the right to disconnect
- change the definition of casual employment and change the pathway from casual to permanent employment and our role in relation to disputes
- change the general protections provisions in relation to sham contracting and protected workplace rights
- give us powers relating to 'employee-like' workers performing digital platform work including:
    - the ability to make minimum standards orders
    - dealing with disputes about unfair deactivation from a digital platform
- give us powers relating to the road transport industry including:
    - the ability for new Expert Panels to make minimum standards orders and road transport contractual chain orders, and deal with certain modern award matters
    - dealing with regulated road transport worker disputes about unfair termination of a contract
    - a new road transport objective applying to certain road transport industry matters
- allow us to register collective agreements relating to regulated workers and businesses
- extend some workplace delegates' rights to regulated workers
- give us powers to deal with disputes about unfair contract terms for independent contractors
- inserts a definition of employee and employer for the purposes of the *Fair Work Act 2009*.

We have published a range of information and education materials to help you understand the new laws. You can access these materials from the New laws page on our website.

Application forms and forms for those responding to applications in our new jurisdictions have also been published. These forms can be accessed from the Forms page on our website.

We have also published a decision [2024] FWCFB 316 together with determinations changing modern awards to resolve potential uncertainty and difficulty in interactions between existing modern award provisions and new laws about casual employment. The changes to modern award provisions come into effect from 27 August 2024.

You can keep up to date about reform implementation and changes by subscribing to Announcements or following us on LinkedIn .

Working from home major case started

29 Aug 2024

A Full Bench has issued a statement starting a new major case to develop a working from home term in the Clerks – Private Sector Award 2020.

This case is an outcome of the Modern Awards Review 2023-24, and the term that is developed may serve as a model term for other modern awards.

If you are interested in this case, you can attend a directions hearing before Justice Hatcher at 9.30 am on 13 September 2024 to discuss how the case will be run.

We finished the Modern Awards Review 2023-24 and published the Final Report on 18 July 2024. The Report said that 6 new cases will be started:

1. *Amusement, Events and Recreation Award 2020* (coverage of arts workers)
2. *Live Performance Award 2020* (correcting errors and deficiencies)
3. *General Retail Industry Award 2020* (further considering parties' proposals)
4. *Clerks Award – Private Sector Award 2020* (working from home provisions)
5. *Higher Education Industry – Academic Staff – Award 2020* and *Higher Education Industry – General Staff – Award 2020* (fixed term contracts)
6. Part-time employment.

We will publish more information about these cases on the Outcomes of the Modern Award Review 2023-24 page on our website as it becomes available.

Read:

- the Full Bench statement [2024] FWCFB 357 starting the working from home major case (pdf)
- about the Working from home – Clerks Award case.
- the Modern Awards Review 2023-24 Final Report (pdf)
- about the Modern Awards Review 2023-24

Decisions of the Fair Work Commission

The summaries of decisions contained in this Bulletin are not a substitute for the published reasons for the Commission's decisions nor are they to be used in any later consideration of the Commission's reasons.

Summaries of selected decisions signed and filed during the month ending Saturday 31 August 2024

1 INDUSTRIAL ACTION – suspension of protected industrial action – ss.424, 604 Fair Work Act 2009 – appeal – Full Bench – Wilmar Sugar P/L operates 8 sugar mills located at various places in Queensland – Wilmar has been engaged in bargaining for the making of a new enterprise agreement to replace the *Wilmar Enterprise Agreement 2020* since March 2023 – 3 unions are bargaining representatives for employees proposed to be covered by the replacement agreement, the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU), the Australian Manufacturing Workers' Union (AMWU) and the Australian Workers' Union (AWU) (collectively, the appellant unions) – on 24 June 2024, the CEPU and AMWU notified Wilmar of an intention to take protected action in the form of one-hour stoppages of work at each of the sugar mills on 4 different days: 2, 4, 8 and 11 July 2024 – AWU notified an intention to take protected industrial action in the form of a one-hour stoppage of work only on 2 July 2024 – AWU indicated during the hearing of the appeal that it had intended to give notice of an intention to also take protected industrial action on 4, 8 and 11 July – on 25 June 2024, Wilmar applied for an order under s.424(1) of the FW Act suspending protected industrial action for a period of 3 months – Wilmar contended that an order suspending protected industrial action was required to be made because protected action was threatening to cause significant damage to an important part of the Australian economy for the purposes of s.424(1)(d) – on 30 June 2024 the Commission at first instance ordered that protected industrial action in relation to the proposed agreement be suspended for a period of 6 weeks – later on 30 June each of the appellant unions filed a notice of appeal with respect to the decision and order of the Commission in substantially the same form – sought an urgent hearing of the appeals and a stay of the decision – application for a stay was listed for hearing on 2 July 2024 – during the hearing of the stay applications, the Commission indicated that the appeals could be listed for an urgent hearing on 5 July 2024 – as a result of that indication, the appellant unions did not press for a stay pending hearing of the appeal but reserved their positions should the Full Bench reserve its decision after hearing the appeals – the protected action notified for 2 July and 4 July did not proceed – the FW Act enables or requires the Commission to suspend or terminate protected industrial action in various circumstances set out in ss.423 to 426 – the provision relied upon in this matter is s.424(1)(d) which requires that the Commission suspend or terminate protected industrial action that has threatened, is threatening or would threaten to cause significant damage to the Australian economy or an important part of it – an important contextual feature of s.424 is that, although the Commission is required to suspend or terminate particular protected industrial action if satisfied that one of the circumstances in s. 414(1)(c) or (d) exists, the effect of such an order is that all protected action in relation to the proposed agreement ceases to have protection –

Commission required to make an order suspending or terminating protected industrial action under s.424(1)(d) if 2 requirements are met: protected industrial action is being engaged in or is threatened, impending or probable; and the protected industrial action has threatened, is threatening or would threaten to cause significant damage to the Australian economy or an important part of it – parties advanced detailed submissions addressing each aspect of those requirements, including what is necessary for protected industrial action to be 'threatened, impending or probable', what constitutes 'significant damage' and what could constitute an 'important part' of the Australian economy – permission to appeal granted – appeals raise a number of matters of importance and general application in relation to the application of s.424 of the Act, particularly the matters in relation to which the Commission must be satisfied for an order suspending or terminating protected industrial action to be made under s.424(1)(d) – grounds for appeals were that: 1. the Commission erred by admitting an expert report in circumstances where the underlying modelling setting out the assumptions underpinning the economic conclusions was not set out in the report; 2. the Commission erred in reaching each of the conclusions that: protected industrial action beyond 4 notified one-hour stoppages was threatened, impending or probable; the action would cause harm to an important part of the Australian economy; and any such harm would constitute significant harm; and 3. the decision was unreasonable and plainly unjust in the sense described in *House v the King* – the Full Bench rejected appeal ground 1 – found that the appellant unions were not denied procedural fairness by reason of the admission of the expert report of Mr Lawrence having regard to the use made of that report in the decision at first instance – grounds 2 and 3 in the notice of appeal were dealt with together in the submissions of the parties – the AMWU, supported by the other unions, identified 3 errors in the conclusion made by the Commission at first instance – the errors involved an alleged failure to have regard to relevant considerations and an erroneous application of the requirements in s.424(1)(d) – each of the errors arose from the conclusion of the Commission that the 4 notified instances of protected industrial action are threatening or would threaten to cause significant damage to an important part of the Australian economy – the first and second errors were alleged to relate to the conclusion that the damage threatened by the 4 instances of protected action was 'significant' and the third relates to the Commission's identification of the relevant 'part of the Australian economy' – necessary to reflect briefly on the reasoning of the Commission at first instance – the reasoning relevantly proceeded in the following steps: having considered the evidence, the Commission concluded that it was appropriate to apply an assumption that a one-hour stoppage of work would produce 12 hours of lost production at each mill for the purposes of calculating the impact of the stoppage – the Commission used the estimates provided by Wilmar's General Manager, Finance and Information – he gave evidence as to the loss of revenue that would be caused to Wilmar and to canegrowers by 18 hours of lost production – those figures were used to determine the hourly cost impact of lost production and then calculated the loss that would be occasioned by 4 12-hour periods of lost production – the Commission, again relying on the evidence presented, added amounts for lost revenue from Wilmar's bioethanol and cogeneration operations – that exercise produced a total estimated direct revenue lost from the notified stoppages of $26.48 million – finally, the Commission applied what she

described as a 'conservative multiplier of 0.3' to produce a total loss figure of $34.434 million – the appellate unions did not dispute the Commission's calculations for the purposes of the appeal aside from submitting that there was no satisfactory evidentiary basis for the application of a multiplier of 0.3 to the direct economic cost to Wilmar for the purpose of determining the total economic impact of the stoppages – the error was rather alleged to be found in the conclusion the Commission drew from the outcome of her calculations in paragraph [161] and the finding that 'these figures are significant' – following that paragraph, the Commission proceeded directly to consider whether that damage was to an important part of the Australian economy – the complaint made in relation to that reasoning by the appellant unions was twofold – the first error alleged to be found in the conclusion at paragraph [161] of the decision was that the Commission concluded that a potential loss of revenue of $34.424 million was significant in isolation and without reference to or in the context of the Australian economy as a whole or any identified important part of the Australian economy – the Full Bench agreed that this represented an error in the decision-making process which demonstrated a misunderstanding of the opinion required to be formed by s.424(1)(d) – Full Bench held the question of whether protected industrial action has threatened, is threatening or would threaten to cause significant damage to the Australian economy or an important part of it cannot be answered by simply producing an estimate of the likely economic impact of the industrial action as a monetary figure and asserting that the figure is large – to assess the significance of damage threatened to be caused by industrial action, it is necessary to understand that the damage must be significant by reference to the Australian economy as a whole or an important part of it – to say that the loss of revenue or profit to a particular employer or third parties might, in the abstract, be considered to be a large sum does not address the question posed by s.424(1)(d) – the significance of the threatened damage must be assessed in the context of, and by reference to, the Australian economy as a whole or the important part of the Australian economy alleged to be subject of the threat – the degree of damage cannot be examined in the abstract divorced from consideration of the nature, size and elements of the part of the Australian economy alleged to be threatened – whether significant damage is threatened to an important part of the Australian economy cannot be answered merely by reference to estimates that an objectively large sum of loss might result from industrial action – the same quantum of financial loss may be significant in one context but not in another – it is a misunderstanding of s.424(1)(d) to reason that the threatened damage is significant simply because it is a large sum – the opinion required to be formed requires consideration of whether the impact of the industrial action can be described as significant in the context of the economy as a whole or the relevant identified part of it – Full Bench found the Commission failed to apply s.424(1)(d) in this manner – the conclusion drawn from paragraphs [155]-[161] of the decision at first instance was that the Commission regarded a loss of revenue of $34.424 million to be a significant figure having regard to dictionary definitions of that word – found the decision does not reflect any consideration of whether a loss of revenue of $34.424 million is significant in the context of the Queensland economy, regional economies of North Queensland or the sugar industry or sugar manufacturing industry or even Wilmar's total operations – having found that the conclusions of the Commission at first instance involved error in the construction and application

of the section, it was unnecessary for the Full Bench to express a concluded view as to whether the finding of that significant damage was threatened was reasonably open on the material before the Commission – sufficient to observe that, if the proper approach were adopted, it is far from obvious that the same conclusion would be reached – the second specific error identified in the conclusion of the Commission at paragraph [161] of the decision was that the Commission concluded that the 4 instances of protected industrial action threatened to cause significant damage without taking into account that the harm feared was contingent – as has been explained, the value of the loss of production likely to be occasioned by stoppages of work at Wilmar's mills is capable of calculation – however, whether any interruption of processing ultimately resulted in a loss of revenue to Wilmar or to canegrowers depends on future and unknown events – the appellant unions contended that the Commission failed to have regard to a relevant consideration in evaluating whether the damage threatened to be caused by the protected industrial action was significant, namely, that any loss was contingent and uncertain and might not come to pass – the Full Bench found the Commission considered the contingent and uncertain nature of the loss of revenue when considering if the protected action was threatening to cause any damage at all – however, it is not apparent from the decision that the Commission considered the contingent nature of the losses that it was contended would be caused by the protected action when evaluating if the threatened damage could be described as significant – in the particular circumstances of this case, the Full Bench believed it was necessary for the Commission to consider the contingent nature of loss of revenue Wilmar claimed would be caused by the protected action that was threatened – in this matter, it was not merely a matter of the extent of the likely consequences being uncertain – on one view, whilst the loss of revenue was a potential and maybe the more likely outcome, it is possible that, ultimately, no loss of production would be suffered at all – in the opinion of the Full Bench, to properly apply s.424(1)(d), it was necessary to consider that matter in evaluating whether the industrial action was threatening to cause significant damage – found that the Commission did not do so – the third specific error identified in the decision concerns the manner in which the Commission identified the relevant important part of the Australian economy she found was threatened by the protected industrial action – Full Bench understand the Commission to have concluded that there was a threat of significant damage to an important part of the economy, being 'Wilmar's contributions to the sugar industry' – Full Bench do not believe it is open, on a proper interpretation of s.424(1)(d), to regard the operations of one employer as constituting an important part of the Australian economy – the language of s.424(1)(d) refers to the Australian economy or an important part of it – an economy is simply the sum of all activities related to the production, sale, distribution, exchange, and consumption of resources by a group of people living and operating within it – the language of the section suggests that the relevant 'part' of the Australian economy must also involve the collective activity of a group of people albeit within an identifiable and discrete component of the whole economy – the language is not compatible with regarding a single employer as being part of the Australian economy – Full Bench found the Commission erred in treating Wilmar's operations as being an important part of the Australian economy – for each of those 3 reasons, the Commission's reasons involved errors in the construction and

application of s.424(1)(d) and the decision must be set aside – on redetermination, the Full Bench made a finding that protected industrial action was threatened, impending or probable in the form of one-hour stoppages of work notified by the AMWU and CEPU to occur on 8 July 2024 and 11 July 2024 – however, the Full Bench was not satisfied that this protected industrial action had threatened, was threatening or would threaten to cause significant damage to the Australian economy or a significant part of it – the 2 stoppages of work notified by the AMWU and CEPU were unlikely to result in any loss of production at Wilmar's mills at all or, at most, some minor delay if a mechanical or other issue happened to arise during the period of the one-hour stoppages – in those circumstances, there was plainly no basis upon which the Full Bench could be satisfied that significant damage was threatened to be caused to any important part of the Australian economy – a suspension order could not be made under s.424(1) of the Act – Wilmar's application must be dismissed – appeals allowed – first instance decision and order quashed.

Appeals by Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, the Australian Manufacturing Workers' Union (AMWU) and the Australian Workers' Union against decision and order of Dobson DP [[2024] FWC 1720], [PR776565] Re: Wilmar Sugar P/L

C2024/4397 and Ors
Gibian VP
Wright DP
Crawford C

Sydney

[2024] FWCFB 319
26 July 2024

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2 ENTERPRISE BARGAINING – single interest employer authorisation – majority employee support for bargaining – clearly identifiable common interests – public interest – reasonably comparable operations and business activities – coverage of existing single enterprise agreement – s.248 Fair Work Act 2009 – Full Bench – application by APESMA for single interest employer (SIE) authorisation in respect of proposed multi-enterprise agreement covering employers in NSW black coal mining industry (relevant employees) – an additional respondent had ceased relevant operations and was removed from proposed authorisation by applicant – employees to be covered are those engaged as: deputies, responsible for leading underground mine's production team and maintaining site priorities; undermanagers, responsible for managing mining operations of site; shift engineers, responsible for maintenance and associated activities; and control room operators, who manage and control day-to-day underground communication and reporting – deputy, shift engineer and undermanager roles are statutory roles under *Work Health and Safety (Mines and Petroleum Sites) Regulation 2022* (NSW) (WHS Regulation), control room operators also fulfil function under WHS Regulation – relevant employees employed at four underground black coal mines operated by respondents or related entities – first contested application of its kind since legislative amendments commencing 6 June 2023 – Full Bench granted Australian Council of Trade Unions (ACTU) and Minerals Council of Australia (MCA) permission to intervene – limited intervenors to making submissions and/or filing informative materials – ACTU supported application whilst MCA opposed it – respondents directed to file response to application indicating whether facts arising from authorisation's legislative requirements contested – Full Bench heard matter over 6 days – tension in positions of parties concerning emphasis given by objects of Act relating to bargaining

for and making single enterprise agreements rather than multi-employer agreements – ACTU and APESMA submitted that object of Act to encourage bargaining not limited to single enterprise bargaining, citing historical trend away from centralised wage fixing and towards agreement making as means of setting wages, in concert with Parliament's focus moving from single to multi-enterprise bargaining – as such, reference to 'enterprise level;' within Act's objects should not be understood as reference solely to single enterprise – respondents and MCA contended that a multi-employer agreement would go beyond the 'enterprise level' in Act's objects which recognises primacy of single enterprise bargaining – Full Bench noted force in both propositions advanced; Act and its objects should be understood as changing emphasis from national or industry level outcomes to bargaining at an enterprise level and limitations upon multi-enterprise authorisations (such as ss.249(1D) and 240(3)) lend some priority to single enterprise bargaining – however, Full Bench considered import of Act's objects is to promote collective bargaining that achieves productivity and fairness at level of the enterprise, including at multi-enterprise level, where authorised and subject to express provisions giving some priority to single enterprise agreements – Full Bench then considered application's context and matters in dispute – observed applicant seeking to bargain collectively with respondents and listed member concerns claimed by applicant: desire to preserve industry-unique payment of accrued personal leave on termination in certain circumstances, concerns regarding employer use of guarantees of annual earnings with consequence that conditions in industry award do not apply, maintenance and improvement of entitlements to accident pay, protection of redundancy entitlements, concerns with unilateral changes to workplace policies and their impacts on conditions, access to effective dispute resolution, and desire to address the above matters and protect terms and conditions by making an agreement – previous attempts by applicant to bargain with industry employers at single enterprise level largely unsuccessful, as such applicant did not attempt to bargain with any respondent individually – Full Bench observed no present bargaining underway involving relevant employees and respondents – majority of relevant employees voted in favour of collective bargaining – following ballot, applicant notified respondents of intention and made application – Full Bench observed requirements of s.249 – Full Bench satisfied valid application made, at least some relevant employees represented by applicant, each party had opportunity to express views, each respondent employed at least 20 employees at time of application, respondents not named in SIE authorisation or supported bargaining authorisation in relation to relevant employees, proposed agreement not to cover employees in relation to general building or construction work, proposed authorisation specified matters required by s.250(1) and circumstances contemplated in ss.250(3) and (4) did not apply – Full Bench observed following matters to be in dispute: whether a majority of relevant employees wanted to bargain for agreement; whether each respondent had clearly identifiable common interests; whether making authorisation would be contrary to public interest; whether operations and business activities of respondents reasonably comparable with that of each other; and whether Delta Coal's relevant employees were covered by an agreement that had not nominally expired – Full Bench considered context of Australian black coal industry, noting its significant impact on Australian and NSW economies, large cost of upkeep including royalties, rates and tax payments, and status as a

significant employer, with NSW black coal industry employing 25,336 FTE workers – Full Bench outlined broadly each respondent's mining operations, noting difference between 'longwall mining', and 'bord and pillar' systems – longwall mining uses a continuous miner to develop tunnels and coal panels under a temporary hydraulic support, before a 'shearer' cuts coal laterally and deposits it on a conveyer belt system for transport to surface – bord and pillar mining creates parallel roadways in coal seam joined by cross roads creating pillars of uncut coal, some of which are left to support mine roof to prevent collapse – bord and pillar mining significantly cheaper than longwall mining, with less time needed to establish mine – Full Bench observed distinction between first respondent's (Delta Coal) operations and those of other respondents: Delta Coal the only respondent to utilise bord and pillar system and unlike other respondents, sells coal directly to specific power station at contract-fixed price and has senior management employed at outside entity – Full Bench observed competing view about 'rebuttable presumptions' concerning whether employers share common interests and whether contrary to the public interest, and whether they have reasonably comparable operations and business activities – respondents contended that rebuttable presumptions displaced by evidence to the contrary, first respondent cited similarity in wording of Act's provisions and s.51A(2) of *Trade Practices Act 1974* (Cth); evidence to contrary being that which if adduced, establishes or infers reasonable grounds for making representation to displace presumption [*McGrath*] – APESMA contended the SIE provisions impose 'persuasive burden' on party seeking to rebut presumption; onus to prove to contrary rather than merely adduce evidence – Full Bench considered ss.249(1AA), 249(3AB), supplementary explanatory memorandum – determined onus on respondents to establish relevant tests not met – Full Bench considered whether majority of relevant employees wanted to bargain for SIE agreement – noted as fact that majority of employees balloted supported motion to bargain – respondents (with exception of Delta) contended that ballot results not demonstrative of majority support, due to inaccurate and misleading information from applicant invalidating apparent consent – observed Commission's ability to use 'any method [that it considers appropriate] to determine majority support, citing s.249(1D), with applicant to bear risk of failure if adduced materials inadequate to permit Commission to reach requisite state of satisfaction – considered s.248(1B)(d) lacks requirements akin to 'genuine' or 'informed' support; unwilling to imply such notions into provision – nonetheless, Full Bench accepted respondents' contentions may, where appropriate, involve assessment as to whether ballot was falsely derived as when evaluating support for majority support determinations – considering in detail applicant's conduct in organising ballot and informing relevant employees, Full Bench took view that it was not unreasonable for applicant to lead decision making process, in doing so advocating for SIE application – Full Bench did not accept that applicant implied SIE bargaining would be easy to employees, and despite materials directly provided to employees not expressly referencing bargaining period of at least 12 months, or that employers would need to agree to put agreement for vote, such information was accessible to employees – Full Bench therefore did not consider that information provided to employees was misleading or inaccurate – Full Bench observed that communications regarding raising of industry standards would have been interpreted as an objective rather than guarantee – Full Bench did accept that some employee-provided materials

comparing enforceability of individual contracts compared with agreements not strictly correct and could have been clearer, but noted applicant was emphasising practical experience rather than strict legal position – Full Bench found that process of organising support ballot and associated information provided did not involve misrepresentation capable of vitiating majority support – ballot result an accurate reflection of relevant employees' intention to bargain collectively – Full Bench rejected second respondent's (Whitehaven) contention that changing coverage of proposed authorisation would delegitimise ballot, noting that majority support precedes that which emerged upon application being made, and s.250(2) contemplates Commission removing named employers from proposed authorisation if certain circumstances apply – Full Bench considered Delta's (disputed) contention that some of its relevant employees already covered under existing agreement – existing agreement contained 'step up' clause, whereby employees covered under that agreement would receive pay increase for fulfilling Deputy duties – Full Bench observed that role coverage of Delta agreement differs from SIE scope's roles, held that Delta agreement employees 'stepping up' to fulfil Deputy duties would not place them within SIE authorisation's coverage – Full Bench considered whether employers share 'clearly identifiable' [*UWU, AEU and IEU*] common interests – observed statutory scheme and the difference between provisions applying to a supported bargaining authorisation (s.243) – Full Bench accepted second respondent submission that inquiry to be performed at entity level, inclusive of operations and interests beyond mine site, though Full Bench noted s.249(3A)(c) deeming 'nature of enterprise… terms and conditions of those enterprises' as potentially relevant, with each respondent's mine included within Act's definition of 'enterprise' – concurring with most respondents, Full Bench construed provisions in s.249 as recognising purpose of facilitating bargaining – given respondent objection to identification of common interest, Full Bench discussed three part assessment: firstly, whether factors relied upon as interests were demonstrated by evidence, secondly whether they were relevant interests in relation to enterprise bargaining for SIE employees, and thirdly, whether interests are common or different as between respondents – mindful of Act's objects, Full Bench distinguished between relevant common interests and mere common circumstances (example: employers being in same industry) – Full Bench considered nature and context of respondents: geographical location, regulatory regimes, nature and economics of enterprises – observed that unlike other respondents transporting coal to Port of Newcastle to sell to international markets for profit, Delta supplies coal to single power station at fixed price that does not reflect market price for coal nor covers operating costs – all respondents except Delta noted to have difficulty attracting and retaining staff, reliant on FIFO/DIDO workers – Delta the only employer to not utilise guarantee of annual earnings (GAE) arrangements with relevant employees, and only respondent to not employer shift engineers – Full Bench considered interests of respondents and noted Delta a clear outlier – Full Bench also observed clear differences in mine operations affecting interests of respondents: location and geology affecting mines, mining systems used, production levels and lifespan of mines, employee commute, coal pricing and export market – unique terms and conditions of employment of each respondent observed – Full Bench found that respondents' evidence broadly demonstrated same approach to terms and conditions underpinned by some interests common to each organisation, and some interests common to non-Delta

respondents – Full Bench considered nature of enterprises, noted differing operations, differing corporate structures, differing leases – nonetheless, the evidence of Peabody, Whitehaven and Ulan did not show how their different production and profitability circumstances were relevant to bargaining for relevant employees – noted expectation that different commercial interests of Delta would influence their approach in a bargaining context – turning to geographical location, Full Bench observed that respondents all located in NSW, and therefore subject to same regulatory scheme – Full Bench held that Delta demonstrated it does not have clearly identifiable common interests, but other respondents had not established as such with regard to themselves – claimed differences between non-Delta respondents revealed to be differing attributes rather than interests upon closer examination; these attributes giving rise to common interests – Full Bench considered whether in public interest to make authorisation, noting rebuttable presumption – referred to oft-cited authorities providing definition: 'matters affecting public as a whole such as the achievement or otherwise of various objects of the Act, employment levels, inflation, and maintenance of proper industrial standards [paraphrased]' [*Re Kellogg Brown and Root*] – Full Bench noted industry context; Australia second largest exporter of thermal coal, industry a significant employer with significant impact on NSW/Australian economy via royalty and tax payments – no evidence that making authorisation would have detrimental effect on respondents' contributions to industry – respondents concerned that bargaining would proceed inefficiently and respondents' flexible employment arrangements may be undermined – Full Bench held these were matters pertaining to respondents' interests, not public interests – respondent contention that it may be contrary to public interest to not include respondent employers originally named in application, Full bench considered this not within the scope of s.249(3)(b) – noting satisfaction that respondents share common interests and making authorisation would not be contrary to public interest, Full Bench considered enlivened requirement of s.249(1)(b)(iv), that the Commission be satisfied that operations and business activities of each employer reasonably comparable (rebuttable presumption) – as 'operations', 'business activities' and 'reasonably comparable' not defined in Act, Full Bench considered ordinary definitions in *Macquarie Dictionary* – Full Bench concurred with applicant's submission that comparable need not mean 'same', but 'capable of being compared' and of similar type – 'reasonably' noted as qualifier, importing level of objective assessment – noted observation made by prior Full Bench that requirement for comparability of operations and business activities likely more stringent than that for common interests [*IEU v CEWA*] – MCA submitted Commission should evaluate following factors, without limitation: mining and processing techniques of each respondent, nature and quality of coal produced, economic market, nature of investment decisions and funding, impact of regulatory, economic and industrial factors, cost structures and skills and workforce requirements – 'operations' taken to refer to 'how' employer operates, 'business activities' taken to refer to 'what' employer provides or sells – respondents all submitted that business activities and operations not reasonably comparable with each other – evaluating each respondent, Full Bench considered differences and similarities between operations and business activities supported by evidence – Full Bench considered: principal business activities, operation location, mining method, mine environments including stressors, geography and access conditions, equipment used, distribution channels, size, structure

and nature of workforce, applicable regulatory regimes, cost of production, capital and maintenance, anticipated life of mines, sources of revenue and market for product, marketing and contracting arrangements, characteristics of coal produced, size, scale and yield of mines, operating margins and realised coal price – Full Bench noted similarities and differences, citing unique corporate and ownership structures – Full Bench observed following key similarities between respondents: all in same industry, operating in same state, relevant employee positions similar with functions required by mining safety legislation, subject to common regulatory regimes, and all subject to (albeit different) stressors associated with geology of mines and environment – Peabody, Whitehaven and Ulan all share the nature of work performed by relevant employees, competitive international market and customer base in Asia, regional inland NSW base of operations, challenges of attracting and retaining staff, longwall mining method – Full Bench satisfied that Ulan and Whitehaven share reasonably comparable operations and business activities, but noted further consideration warranted regarding Peabody – Peabody's mine observed to have unique characteristics distinguishing it from Ulan and Whitehaven's mines: relatively small longwall operation with higher production costs, significantly lower percentage of extractable coal yielded, use of much older and less efficient equipment, differing contractual arrangements regarding percentage of coal committed to long-term fixed price contracts – Full Bench observed these difference may result in unique commercial challenges, but in relation to bargaining context, are more relevant to common interest consideration already considered – with substantial similarities in mind, Full Bench held that Peabody's differences not so different that their operations and business activities not reasonably comparable with those of Ulan and Whitehaven – Full Bench acknowledged shorter anticipated life span of Peabody mine, possibly enlivening future application under s.251 to vary authorisation to remove employer – Full Bench considered whether Delta's operations and business activities reasonably comparable to other respondents – reiterated that Delta: supplies coal to single customer within same corporate group (co-located at domestic power station), operations not involving exploratory drilling for coal/mining opportunities, does not compete in either domestic or global marketplace, does not export coal but provides it on a fixed-price basis, does not operate for profit or commercial gain but operates at a loss, relying on subsidy from parent company to meet operating costs – distinguishing from Peabody's differences, Full Bench observed Delta's different purpose of operations – noted other factors distinguishing Delta: location near regional centre, locally based workforce, use of bord and pillar mining, lack of coal preparation plant, coal transported directly to power station rather than ports for export, potential of further regulation under *Essential Services Act 1988* (NSW) – Full Bench held that Delta's operations and business activities not reasonably comparable to other respondents – Full Bench noted proposed agreement to not cover employees in relation to general building and construction work – satisfied that Peabody, Ulan and Whitehaven should be specified in authorisation, but not Delta – authorisation issued separately, specifying relevant matters required by s.250(1) – authorisation to come into operation on 23 August 2024, ceasing to have effect on day agreement is made or 12 months after authorisation, whichever is earlier – noted that Commission may assist parties in bargaining if sought by parties, through potential s.240 application or joint request for

Collaborative Approaches Program assistance.

Association of Professional Engineers, Scientists and Managers, Australia v Great Southern Energy P/L t/a Delta Coal, Whitehaven Coal Mining Ltd, Peabody Energy Australia Coal P/L, Ulan Coal Mines Ltd

B2023/1339
Hampton DP
Wright DP
Matheson C

Adelaide

[2024] FWCFB 253
23 August 2024

3 CASE PROCEDURES – representation – s.596 Fair Work Act 2009 – Full Bench – Full Bench required to undertake 'unusual task' of determining requests from 46 separate applicants for permission to be represented by Employee Claims P/L t/a Employee Dismissals (ED) – of 46 matters, 16 were general protections applications pursuant to s.365, 30 were unfair dismissal applications brought pursuant to s.394 – Full Bench required to undertake task given conduct of ED in an earlier s.365 matter ([2023] FWCFB 265 – *Howell*) – ED represented the applicant in *Howell* – matter resolved in conference, requiring Mr Howell's former employer to pay $2,692 in compensation to Mr Howell – payment made to ED – Mr Howell did not receive the compensation, instead ED invoiced him for $4,490 – ED later discontinued Mr Howell's application without his instructions – Mr Howell complained to Commission he had not received compensation and did not authorise ED to discontinue – dispute referred to a Full Bench – that Full Bench found purported discontinuance was invalid and a nullity – observed there is no regulatory scheme governing qualifications, conduct, ethics or financial dealings of paid agents – noted Commission has overriding obligation to perform functions and exercise powers in manner which is fair, just, open and transparent – proper discharge of this function would not permit Commission to grant s.596 permission to paid agent who has conducted themselves in proceedings in manner significantly inconsistent with applicable professional obligations of lawyers in equivalent circumstances – President of Commission issued recommendation ED repay Mr Howell's former employer the compensation amount and former employer would make payment of same amount directly to Mr Howell – apparent ED did not comply with recommendation, prompting President to make statement ([2024] FWC 466) referring other matters to present Full Bench – Full Bench considered various communication between ED and Mr Howell as relevant to present 46 matters – noted, amongst other concerns, ED's communication contained no advice or description of contemplated legal action and was 'inadequate, inaccurate and misleading' regarding what could be sought from Commission in a s.365 matter – communication also suggested ED's $4,490 plus GST fee was subject to 'No Win No Fee Guarantee' – guarantee not explained in ED's early communication – guarantee couched in terms requiring seven conditions be met – Full Bench noted President's assessment of those conditions meant any settlement offer made that was less than ED's professional fee obligated Mr Howell to pay ED amount offered whether settlement offer was accepted or not – a 'win' for purposes of guarantee included Mr Howell receiving nothing – President's statement listed 30 other published decisions of Commission in which ED's conduct found to be problematic – problematic conduct included: non-payment of filing fees; lack of communication with clients leading to delay and confusion in proceedings; not responding to correspondence from

clients, other parties or Commission; causing delay and confusion in proceedings; lodging multiple proceedings concerning a single dismissal; and failing to file notices of discontinuance where matters settled – Full Bench expressed this decision only concerns the 46 matters before it and was not a ruling generally concerning requests for permission to be represented by ED – Full Bench ordered ED produce all documents concerning ED's representation of applicants in each matter – noted various criticisms of communications, many were the same as had been criticised in *Howell* proceeding – ED's sole director gave evidence in support of s.596 applications – Full Bench rejected ED's suggestion it had improved its practices, noting documents produced continued to be 'complex, onerous and confusing' – Full Bench noted statutory context of s.596 and relevant authority – noted assessment whether to grant s.596 permission was two-step process requiring 1) one or more criteria in s.596(2) is satisfied and, if satisfied, 2) whether reasonable in all of the circumstances to exercise discretion in favour of party seeking permission [*Grabovsky*; *Lee*] – Full Bench noted Commission may, in exercising discretion to grant permission to be represented, have regard to circumstances that paid agent has been subject of earlier adverse integrity findings [*McAuliffe*] – noted s.596 not intended to interfere with party's right to determine who its representative would be if permission granted [*Fitzgerald*] – Full Bench determined it could have regard to prior conduct that, if repeated, would not assist and may hinder fair and efficient conduct of proceedings – Full Bench considered s.596 question for 46 matters before it – determined s.596(2) made out in 22 matters – not satisfied s.596(2) made out in remaining matters – whether to exercise general discretion to grant permission considered – found ED used template approach to filling in applications; considered this a failure to engage with details of claim and failure to act with candour and honesty – found further ED's conduct continued to reflect that criticised in *Howell*, including failing to act in applicant's best interests – rejected ED's submission the conduct described in *Howell* was isolated instance and should be given little weight – Full Bench found ED repeated various conduct as had been described in *Howell* – Full Bench stated Commission can generally rely on professional responsibilities legal professionals are required to follow – paid agents do not have same obligations – Commission may be confident in particular paid agents based on past practice – held Commission inversely may need to ask applicant how they chose particular agent and require production of contract or fee arrangement to consider whether arrangements will hinder fair and efficient conduct of matter – stated grant of permission is not 'mere formality' – held in each case it would not exercise discretion to grant s.596 permission to be represented by ED – added applicants entitled to seek permission to be represented by a different lawyer or paid agent.

Massey and Ors v Brighter Access Ltd and Ors

U2023/12620 and Ors
Wright DP
Slevin DP
Crawford C

Sydney

[2024] FWCFB 353
23 August 2024

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4 TERMINATION OF EMPLOYMENT – valid reason – reinstatement – ss.378, 394 Fair Work Act 2009 – applicant dismissed from role as airline Cabin Crew Member for consuming alcohol before flight commenced – separately suggested applicant breached fatigue

management policy – respondent contended clear rule cabin crew could not consume alcohol within 8 hours of commencing duties – suggested applicant breached rule by consuming glass of prosecco 7.5 hours before commencing duty – respondent further contended applicant breached fatigue management policy by engaging in intercourse after requesting roster change to manage fatigue – alcohol consumption allegation considered – Commission contemplated applicable regulations and policy documents – observed respondent regulated by Civil Aviation Safety Authority (CASA) – CASA regulation requires respondent to have a 'Drug and Alcohol Management Plan' – under further CASA regulation consumption of alcohol any time within 8 hours prior to flight by crew member or having blood alcohol content greater than 0.00% during flight duty will be breach – respondent has 'Drug and Alcohol Management Program' (DAMP Manual) policy document – purpose of DAMP Manual expressed as to 'consolidate the policy and processes relating to the management of alcohol and other drugs in the workplace' – Commission observed DAMP Manual captured some, but not all, of respondent's drug and alcohol management policies – separate policy document, the 'A4 Manual' also deals with drug and alcohol management – A4 Manual contains rule that cabin crew shall abstain from consuming alcohol at time period 8 hours immediately before commencing duty or related activities (A4 Rule) – respondent staff trained on regulations and policies before commencing flight duties – found during his training, applicant was taught about DAMP Manual and CASA regulations; was told not to consume alcohol 8 hours prior to sign on, but that applicant considered that to be a guideline rather than a rule; and applicant not taught A4 Manual formalised the A4 Rule – on 17 December 2023 applicant attended respondent's Christmas party at approximately 2pm with colleague – colleague was Mr McEwen, Cabin Crew Manager – Mr McEwen rostered to start duty at 9:55pm for 10:55pm flight that night, applicant not rostered to work 17 December – applicant consumed single glass of prosecco – finished drink no later than 2:30pm – applicant consumed no further alcohol – later that day after Christmas party (approximately 5:30pm) Mr McEwan asked via group communication if anyone could pick up a shift on 10:55pm flight to cover an absence – applicant contacted Mr McEwan to express interest in covering shift – raised with Mr McEwan that he had consumed alcohol at Christmas party – Mr McEwan told applicant 'I'm pretty sure 8 hours is just a guideline. You will need to be 0.00% when you sign in … you will find more information in the DAMP Manual' – applicant consulted DAMP Manual and searched for variations of '8 hours' to locate any applicable restriction – unable to locate such and concluded nothing prevented him taking on duty – applicant breathalysed himself at 7pm, recording blood alcohol content level of 0.00% – applicant attended for 9:55pm sign-on and completed the shift – in following days applicant heard rumours he undertook the shift whilst drunk – applicant approached respondent on 20 December to clear up rumour, suggesting he consumed one glass of prosecco by 2:30pm and contended 8-hour rule was a guideline – respondent countered that under DAMP Manual 8-hour rule was a rule – respondent staff left room to consult DAMP Manual, unable to find rule it then checked A4 Manual which contained A4 Rule – two days later applicant received letter alleging breach of drug and alcohol policy by consuming alcohol within 8 hours of commencing duty – response given and considered – show cause letter concerning alcohol breach and fatigue management breach (discussed later) issued – applicant dismissed for alcohol breach only – whether valid reason relating to alcohol consumption

considered – found applicant breached A4 Rule by consuming alcohol 7.5 hours prior to sign-on but noted breach of policy does not automatically create valid reason for dismissal [*Hider*] – found applicant did not understand 8-hour Rule as more than a guideline – found further applicant trained to consult DAMP Manual if in doubt – held not unreasonable for applicant to conclude details of 8-hour Rule would be in DAMP Manual – DAMP Manual did not contain blanket prohibition on drinking 8 hours prior to duty – applicant also checked in with a manager (Mr McEwan), found applicant entitled to rely on manager's guidance – respondent conceded a person could be compliant with DAMP Manual but not compliant with A4 Manual – held applicant appropriately consulted DAMP Manual and reasonable for applicant to think DAMP Manual takes precedence regarding drug and alcohol policy – held while applicant in breach of A4 Rule, this was not valid reason for dismissal – fatigue management breach considered for completeness – respondent has 'Cabin Crew Fatigue Risk Management System manual (FRMS Manual) – FRMS Manual empowers crew to remove themselves from duty due to fatigue – FRMS Manual sets out potential breaches, including if crew member acts contrary to FRMS entitlement (including carrying out social activities during fatigue period) – Commission observed again FRMS Manual does not contain all respondent's directives regarding fatigue management – during November 2023 flight applicant assisted a passenger who experienced medical episode – during assistance the passenger urinated on applicant's shirt sleeves – applicant rostered to work following morning from 8:20am – applicant affected by this serious medical incident and could not sleep due to anxiety – at 4:26am applicant contacted respondent to exercise fatigue management and be moved to later flight – applicant's duty moved to later flight – after having flight moved applicant met someone for casual sex through an app on the basis physical interaction would help him fall asleep – he met individual outside hotel and they went to applicant's room – after intercourse applicant fell asleep – respondent later investigated fatigue request and obtained CCTV footage of hotel hallway and room swipe card access records – respondent issued allegations letter, setting out allegations 1) applicant removed himself from duty to engage in 'social activities' and 2) applicant lied about medical incident during oral conversation with respondent – in applicant's response he expressed understanding having sex was not orthodox way of falling asleep but that it is common in the gay community and was successful for him – applicant acknowledged he now understood not appropriate to have guest in respondent-provided hotel room for any reason after accessing fatigue policy – whether valid reason relating to fatigue management considered – Commission described respondent's approach to allegation 1 'mystifying' – respondent conceded if straight, married man had sex with his wife after accessing fatigue it would 'probably not' be any of respondent's business to comment on it – Commission observed nothing wrong with consenting adults using dating apps for casual sex unless it breaches a lawful and reasonable workplace policy – observed FRMS Manual requires staff refrain from social activities during fatigue period – Commission declined to comment on whether sex is a social activity – held applicant accessed fatigue for genuine reason – accepted applicant engaged in casual sex to go to sleep – acknowledged while may not be the way everyone chooses to fall asleep, this did not mean applicant was misusing fatigue entitlement – found allegation 2 should have been clarified with applicant rather than forming formal allegation – held no valid reason relating to fatigue management – Commission considered

fact applicant self-reported his potential error regarding 8-hour Rule a relevant matter per s.387(h) – took into account applicant approached respondent to be upfront and honest about flight following alcohol consumption – concluded consideration of dismissal by noting while A4 Rule breached, this was not valid reason for dismissal – stated applicant not rostered to work when he attended Christmas party; had one drink 7.5 hours before sign-on; checked in with his manager; checked the DAMP Manual; breathalysed himself; and was compliant with DAMP Manual and CASA regulations when he commenced duty – further concluded applicant did not breach FRMS Manual – held dismissal was unfair – remedy considered – reinstatement sought – opposed by respondent on basis reinstatement may cause other employees to think they can 'get away' with breaching A4 Rule – Commission rejected this, stating applicant's situation will assist staff understanding of respondent's policies – reinstatement with continuity of employment and period of continuous service ordered.

Macnish v Virgin Airlines Australia P/L

U2024/1853 [2024] FWC 2154
Lim C Perth 13 August 2024

Other Fair Work Commission decisions of note

Appeal by Mining and Energy Union against decision of Mirabella C of 22 December 2023 [[2023] FWC 2705] Re: EnergyAustralia Yallourn P/L

ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – superannuation – s.739 Fair Work Act 2009 – appeal – Full Bench – appellant lodged appeal against decision of Commission in relation to dispute resolution clause of respondent's agreement – dispute in question concerned appellant raising fact that certain shift workers (members of a superannuation fund division) were not paid superannuation contributions for periods in which they took time off in lieu of overtime (TOIL) – appellant contended that this was inconsistent with cl 9.5.3 of Respondent's agreement – parties agreed dispute should be arbitrated by Commission – in originating decision, Commission accepted parties' position that expression 'superannuation salary' in clause construed per definition of 'ordinary time earnings' (OTE), *Superannuation Guarantee (Administration) Act 1992* (Cth) (SGA Act) – Commission determined payments in respect of TOIL not OTE, held that respondent's lack of payment consistent with correct application of clause – appellant's grounds of appeal: Commissions decision predicated on incorrect interpretation of cls 12.3 and 10.3.4 of agreement, and decision inconsistent with FCAFC decision [*BlueScope Steel*] – Full Bench granted permission to appeal as appellant's argument held merit, s.739(5) requires a decision not be made that is inconsistent with relevant instrument, and to grant respondent with opportunity to adduce evidence that at first instance may have answered case put by appellant in appeal – applying practical reading of cl 9.5.3, Full Bench accepted appellant submission that clause identifies 'numerator' of superannuation contributions applicable to common 'denominator' of salary – numerator a percentage figure, either 12% or two percent more than Federal Government Superannuation Guarantee – Full Bench considered construction of cl 9.3, rejected respondent's construction of term 'superannuation salary' as incorporating or aligning with definition of OTE – construed clause as establishing 'bespoke' definition of 'superannuation salary'; operating entirely by internal reference to agreement itself – this construction supported by wider context of superannuation clauses – paragraphs (a) (b) and (c) of cl 9.3 identify that clause entitlements apply for multiple purposes under agreement – Full Bench noted that cl 9.5.3 establishes direct obligation on Respondent to make superannuation contributions, an obligation that did not exist at time of making agreement (SGA Act merely imposes taxation liability on employers not making

prescribed contributions) – clause also intends prescribed contribution rate to be higher than SGA Act rate – Full Bench therefore held cl 9 operates independently to scheme of SGA Act – Full Bench considered purpose of 'superannuation salary' (cl 9.3), that application of clause would satisfy SGA Act and operate harmoniously with agreement as a whole and Respondent's superannuation fund – cl 9.3 therefore to be applied by its own terms and not with reference to OTE definition in SGA Act – Full Bench considered whether shift workers at centre of dispute received contributions per agreement – applying agreement, noted that normal rate of pay applies to TOIL taken, that no element of normal pay rate falls within superannuation contribution exclusion (contained in cl 9.3) – respondent therefore required to make superannuation contributions in respect of TOIL taken under cl 9.5.3 – Full Bench noted that even if cl 9.3 incorporated OTE definition in SGA Act, same result would prevail, as definition distinguishes between OTE and other earnings – Full Bench noted that identification of earning in respect of ordinary hours of work ascertained by references to relevant industrial instrument [*BlueScope Steel*] – SGA Act, on other hand, applies on own terms – Full Bench held cl 9.5.3 established binding and enforceable obligation on Respondent to make superannuation contributions with respect to TOIL days taken – Full Bench noted *Superannuation Guarantee Ruling SGR 2009/2*, which designates wages paid in respect of rostered days off (RDO) as OTE – Full bench also considered previous ruling that that RDOs accrue superannuation [*CSR Limited*] – Full Bench ordered originating decision quashed, determined that Respondent's existing practice was not consistent with correct application of cl 9.5.3.

C2023/8160 [2024] FWCFB 340
Hatcher J P Sydney 14 August 2024
Asbury VP
Bell DP
Hampton DP

Appeal by Austin against decision of Simpson C of 23 November 2023 [[2023] FWC 3084] re Sandgate Taphouse P/L t/a Sandgate Post Office Hotel

CASE PROCEDURES – evidence – ss.394, 400, 604 Fair Work Act 2009 – appeal – Full Bench – first instance application for unfair dismissal remedy dismissed on 23 November 2023 – appellant lodged appeal on 14 December 2023 – advanced four grounds for appeal – ground one: Commissioner made error of law in relation to correctness of conclusion – not open to Commissioner to find dismissal not unfair where respondent "did not discharge their evidential burden under s. 387(b)" – appellant argued decision incorrect as a matter of law as no written notice of dismissal provided before decision to terminate was made – ground two: Commissioner made significant errors of fact – not reasonably open on evidence for Commissioner to find that KPIs did not frequently change as appellant suggested – Commissioner erred in not accepting appellant's evidence that failure to meet benchmarks not appellant's fault – erroneous for Commissioner to find business failures linked to appellant's performance – respondent bore evidentiary onus to show valid reason for dismissal – Commissioner departed from rules of evidence without explanation and consequently denied procedural fairness – ground three: Commissioner made errors of law misapplying statutory test in s.387 – insufficient weight placed on some factors and excessive weight placed on others – ground four: Commissioner made error of law by failing to take into account relevant facts, failing to attribute proper weight to competing evidence – Full Bench noted grounds of appeal raised issues with onus of proof borne by parties in unfair dismissal proceedings, particularly evidential onus – Full Bench agreed with observations from *Teterin* and *Chan* – applicant has carriage of application, bears risk of failure – if Commission unable to make necessary finding in relation to case of party invoking jurisdiction, party should fail – where an evidentiary onus resides answered by asking in relation to each matter which party will fail if no evidence or no further evidence about matter is given – failure by parties to offer evidence relating to matters in s.385 does not relieve Commission of statutory obligation to reach requisite satisfaction based on relevant and probative evidence – Full Bench stated Commission not bound by rules of evidence and procedure – regarding ground one, Full Bench

noted no requirement for written reason for dismissal for purposes of s.387(b) – appellant argued respondent did not meet evidential burden under s.387(b) – Full Bench did not accept respondent bore evidentiary burden to establish that appellant was notified of reason for dismissal – Full Bench held appellant bore legal onus under s.385(b) to show dismissal was harsh, unjust or unreasonable – Full Bench found no error in relation to ground one and dismissed this ground of appeal – regarding ground two, Full Bench stated no error could be seen with Commissioner's approach – found that the way the evidence was tendered was unremarkable – Commission may inform itself in relation to any matter before it in such a way as it considers appropriate – no requirement for Commission to form view in advance of dealing with a matter in relation to how it will inform itself – no rule to procedural fairness requiring Commission to announce during hearing that it intends to apply or depart from rules of evidence – appellant not denied procedural fairness – found reasonably open for Commissioner to base conclusion on KPI – Full Bench did not accept Commissioner misapplied statutory test with respect to matter in s.387(a)-(h) and did not accept there were inconsistencies with application of rules of evidence – Full Bench rejected ground two of appeal – Full Bench did not accept Commissioner gave insufficient weight to evidence going to matters in s.387 and placed excessive weight on other factors – Full Bench rejected ground three of appeal – Full Bench rejected ground four of appeal – Full Bench found no error of principle in Commissioner's approach to receiving evidence and appellant not denied procedural fairness – no public interest justifying grant of appeal – no errors of facts or law – appeal dismissed.

C2023/7994 [2024] FWCFB 323
Asbury VP Brisbane 1 August 2024
Beaumont DP
Roberts DP

Poulter v The ACT Greens Incorporated

TERMINATION OF EMPLOYMENT – minimum employment period – associated entity – s.394 Fair Work Act 2009, Corporations Act 2001 – applicant's employment ended 6 March 2024 after 11 month period – applicant filed unfair dismissal application – respondent submitted it was a small business employer and applicant had not completed minimum employment period – Commission considered jurisdictional objection – applicant submitted that when respondent considered together with 'associated entities' it was not a small business employer – Commission considered if Australian Greens (national body) was an associated entity of respondent (s.50AAA *Corporations Act 2001* (Cth)) – applicant submitted that Australian Greens exerts control over respondent (s.50AAA(7), s.50AA) – respondent submitted that relationship is collaborative – Commission considered charter and constitution of Australian Greens and respondent – held that the Australian Greens has capacity to determine outcome of decisions about respondent's financial and operating policies because of operation of charter and constitution – held this met definition of control at s.50AA – held that operations, resources or affairs of respondent are 'material' to Australian Greens (s.50AAA(7)) – found that respondent and Australian Greens are associated entities – found that respondent not a small business employer – found that minimum employment period met – jurisdictional objection dismissed – application to proceed.

U2024/3401 [2024] FWC 1600
Dean DP Canberra 20 August 2024

Lloyd v Australia And New Zealand Banking Group Limited

CONDITIONS OF EMPLOYMENT – flexible working arrangement – s.65B Fair Work Act 2009 – applicant made flexible working arrangement request to work from home full-time on the basis of being over 55 years of age – respondent refused applicant's request – applicant sought determination of dispute by arbitration – applicant sought three findings in relation to 1) whether the respondent discussed her flexible working

arrangement request before rejecting it; 2) that the respondent did not genuinely try to reach an agreement; and 3) that the reasons for rejection were not based on reasonable business grounds – the applicant further sought an order that the respondent grant the request for the flexible working arrangement – respondent contended that applicant did not meet threshold requirement to seek determination of matter by arbitration – respondent raised jurisdictional objection – contended applicant did not bring application 'because of' her age as alleged – the respondent contended in the alternative that the order sought by the applicant was not consistent with the provisions of the FW or instrument or that there was no reasonable prospect of resolving the dispute – Commission noted six jurisdictional requirements for whether a valid request had been made [*Quirke*] – one requirement being employee's desire for changed working arrangement must be 'because of' relevant circumstances in s.65(1A) and request for change must 'relate to' the relevant circumstances – Commission considered that because a nexus was required to be established between the circumstances under s.65(1A) FW Act and the request that more is required than the employee simply satisfying one of the circumstances – Commission held an objective and rational connection between circumstances of the employee and request was required – Commission held that the applicant's assertion that a person over 60 is more vulnerable to COVID was general in nature – no evidence that applicant had any specific contraindication or specific risk in relation to COVID – Commission held therefore there was no objective rational connection between the applicant's age and the request – Commission held it had no jurisdiction to deal with dispute – in the alternative Commission considered whether it would grant application if wrong on jurisdiction – the Commission held that the respondent failed to respond to the applicant's request within the requisite 21 day period but did discuss the request and genuinely tried to reach an agreement – Commission considered whether it would otherwise exercise its discretion to issue orders – Commission acknowledged that while the applicant's work could be performed exclusively from home her request ignored the individual and organisational benefits of the respondent's 50% workplace attendance requirement – Commission held respondent's refusal was on reasonable business grounds and would issue an order to that effect – application dismissed.

C2024/659 [2024] FWC 2231
Masson DP Melbourne 21 August 2024

Walker v Australian Capital Territory as represented by Chief Minister Treasury and Economic Development Directorate

GENERAL PROTECTIONS – jurisdiction – s.365 Fair Work Act 2009; ss.125-127 Public Sector Management Act 1994 (ACT) – respondent raised jurisdictional objection to application for unfair dismissal remedy – respondent contended applicant was not dismissed and instead employment ended by operation of law, being forfeiture of office provisions of *Public Sector Management Act 1994* (ACT) (PSM Act) ended Applicant's employment – applicant contended debilitating symptoms prevented return to work following COVID-19 vaccinations – applicant employed for 29 months, worked for four months, and absent for over two years – respondent contended applicant was absent from work for over four weeks and her employment ceased by operation of s.127 of the PSM Act – Commission considered operation of PSM Act in relation to jurisdictional question arising under s.386 of whether respondent dismissed applicant – applicant took leave from August 2021 to April 2023 – respondent directed applicant to return to work in July 2023 after being certified fit to work part-time from home in April 2023 – applicant produced further medical evidence day before return – respondent contested evidence – respondent commenced forfeiture of office process under s.127 of PSM Act in August 2023 foreshadowing applicant would be taken to have retired if she remained absent or was absent without further explanation or the respondent's permission – applicant's lawyer provided further medical evidence seeking absence until December 2023 and suggesting alternative dispute resolution – respondent rejected applicant's explanation in October 2023 and directed her to an independent medical examination – respondent notified applicant two weeks later she was taken to have retired under s.127(5) of PSM Act – Commission construed effect of ss.126 and 127 to mean

retirement only effected upon employer's action – words '4 weeks or more' in s.127(1) means Head of Service's power to issue notice under s.127(2) is discretionary – circumstances analogous to abandonment of employment such that employment continues despite abandonment as described in 4 Yearly Review [*Abandonment of Employment*] – Commission caveated that *NSW Trains v James* may alter 4 Yearly Review's implication that termination of only employment contract and not employment relationship may not be a dismissal – an employer's notice under s.172(2) will cause employment's end if employee ignores notice, deeming absence retirement – applicant did not actually abandon employment but analogous to abandoning her employment – applicant continued to engage with matter/respondent to preserve employment by various medical certificates – unauthorised absence ends employment because employment contract renounced and employer issues notice to terminate [*4 Yearly Review*] – provision not self-executing – respondent exercised discretion in issuing both notices and rejecting applicant's explanation – found respondent was at liberty to make other choices and not issue notices or reject applicant's explanation such that she may not have been dismissed at all – held employment ending resulted from Head of Service requiring applicant to engage with process under s.127 and not by operation of s.127 – force of provision itself did not end employment – provision gives Head of Service ability to make decision – employment cessation by operation of law contrasted with employment cessation by respondent's conduct – issuing notice under s.127(2) and writing to applicant under s.127(4) constituted respondent terminating applicant's employment – Commission considered respondent's alternative submission applicant repudiated employment – for same reasons Commission did not find applicant abandoned employment, found applicant did not repudiate employment – applicant's conduct did not reach a standard of being so uncooperative as to have repudiated employment – Commission dismissed respondent's jurisdictional objection – found Applicant was dismissed from employment – Commission established jurisdiction to deal with application under s.368.

C2023/6686 [2024] FWC 2010
Easton DP Sydney 30 July 2024

Dr Andrew Amos

ANTI-BULLYING – worker – ss.789FC, 789FF Fair Work Act 2009 – applicant was engaged in performing voluntary work for the Royal Australian and New Zealand College of Psychiatrists (respondent) – respondent is a membership organisation responsible for training, education and representing its member psychiatrists – application made for a stop-bullying order – respondent raised jurisdictional objection that applicant was not a worker per Work Health and Safety Act 2011 (Qld) (WHS Act) – applicant submitted that he performed voluntary work on multiple committees for the respondent including the Membership Engagement Committee (MEC) – applicant contended work associated with MEC was where bullying took place – applicant submitted committee work included decision making and advisory functions, detailed report preparation and regular meeting attendance, thereby making him eligible as a worker to make application – respondent contended applicant did not meet definition of a 'worker,' as tasks applicant undertook were done so in his role as a member of the respondent and were 'member facing contributions' – respondent suggested participation on a committee should not be deemed volunteer-based work – consideration – per s.789FF the Commission only has jurisdiction to make a stop bullying order where satisfied that a worker has been bullied at work by an individual or group, and that there is a risk the worker will continue to be bullied by the individual or group – noted the WHS Act definition of 'worker' is very broad in that a person only need perform work 'in any capacity' for the other person conducting the business or undertaking [*Bibawi*] – the two limbs of the definition are that first, a person must first carry out work, and second, the work must be carried out for a person conducting a business or undertaking in any capacity; this extends beyond the capacities of an employee [*Balthazaar*] – regarding the first limb, the Commission noted that in the MEC's Regulations, the MEC's responsibilities included strategic oversight, advice, direction and leadership – found this fell within the broad definition

of work – held the second limb was satisfied on respondent's own evidence – held although the applicant was a member of a membership committee for the respondent, he was a worker for purpose of WHS Act – jurisdictional objection dismissed.

AB2024/225 [2024] FWC 2081
Dobson DP Brisbane 5 August 2024

Priolo v Derrimut Health & Fitness P/L

GENERAL PROTECTIONS – jurisdiction – employee or contractor – ss.365, 386 Fair Work Act 2009 – applicant claimed she was adversely terminated for certain protected reasons by respondent – applicant worked as a Pilates Instructor – applicant signed two separate agreements described as a 'Group Fitness Instructor Independent Contractor Agreement' (Agreement) – applicant claimed she was an employee – respondent claimed applicant was engaged as an independent contractor – agreement was terminated due to alleged behaviour and attendance numbers at applicant's Pilates classes – Commission required to determine whether it had the jurisdiction to conduct a conference as respondent raised a jurisdictional objection [*Coles Supply Chain*] – for the Commission to have jurisdiction, the applicant needed to have been dismissed within the meaning of s.386 – observed notion of dismissal for s.386 requires employment relationship between applicant and respondent – applicant claimed under the agreement and in practice respondent controlled how, when and where she performed her work – suggested respondent controlled how applicant conducted her classes such as duration of classes and class management – applicant claimed she carried no financial risk for classes, could not subcontract her work and had consistent and ongoing hours of work – respondent cited *Jamsek* and *Personnel Contracting* that Agreement represented a comprehensive written contract to support claim applicant was a contractor – characterisation of relationship undertaken with reference to contract terms and conditions – respondent cited three key clauses of Agreement – applicant free to engage in other business activities at any time when services not required to be performed (clause 2.9(a)) – relationship between parties was that of principal and contractor (clause 2.10) – applicant agreed to submit an itemised invoice to obtain payment (clause 5) – respondent operates gyms nationwide – respondent operated an online booking system for patrons to book classes – all classes conducted by applicant for respondent were advertised and booked via this system – applicant did not set fees for classes – applicant's pay outlined in Agreement – number of classes was set by verbal agreement between parties – applicant initially taught 6 classes per week, however at respondent's request this increased to 29 classes – applicant signed a new agreement on 5 June 2023 which commenced on 7 June 2023 – applicant provided weekly invoices to respondent detailing classes taught and related information – in December 2023 respondent varied operational requirements changing the policy where instructors would not be paid if there were fewer than 4 participants in class – respondent also changed process for how it would be notified when a class had to be cancelled – applicant was notified of the Agreement's termination on 16 January 2024 and given two weeks' notice which was inconsistent with the Agreement which required 30 days' notice – Commission cited *Chambers and O'Brien* outlining list factors to determine whether a person was an employee or contractor – Commission considered two key considerations of characterising the legal relationship of parties [*Personnel Contracting*] – extent to which putative employer has right to control how, when and where putative employee performs the work – extent to which putative employee can be seen to be working in their own business as distinct from putative employer's business – Commission also noted conduct of parties prior to entering contract not generally relevant to assessment [*Aspire 2 life P/L v Jessica Tidmarsh*], manner in which the relationship worked in practise may be relevant in certain limited circumstances to find contractual terms where not otherwise ascertainable or to determine any variation agreed [*Personnel Contracting*], when assessing the significance of a relevant fact, the Commission should consider the extent to which the fact bears directly on whether worker is contracted to work in employer's business rather than as an independent enterprise [*Personnel Contracting*] –

Commission considered applicant's claim contract was a sham – applicant claimed requirement of any replacement class could not be undertaken by her had to be conducted by another instructor who had their own contract with respondent – contractor liable to pay all other personnel services including payroll tax even though this was contrary to respondent paying all of their instructors including any instructors backfilling for another instructor – right to subcontract work to anyone who was qualified to perform the work – Commission considered Agreement outlined applicant's obligations to ensure that the services provided to a particular standard – applicant held the requisite licenses and qualifications – applicant liable to pay and meet payroll tax for personnel in respect of the services provided under Agreement – Commission noted Agreement clauses were not applied in practice and respondent did not expect this to happen – variations to Agreement had to be made in writing and signed by both parties – applicant and respondent had not agreed to the variations respondent now engaged in – no express terms in Agreement permitted the change – Agreement was not varied when the hours applicant worked increased – notice provided by respondent of cessation of Agreement (2 weeks) was less than that set in Agreement (30 days) – Agreement did not address operation of the online booking system, however it was understood by the parties the basis for booking arrangements – Commission considered this an indication Agreement was not intended to exclusively set out contract terms – Commission held relationship was governed in part by written Agreement and in part by an oral contract – applicant claimed contract was a sham on the basis of s.357 – applicant claimed respondent misrepresented employment as independent contracting arrangement – Commission considered parties conduct needed to be inconsistent with the written agreement between parties [*Neale*] – exercise of control in a relationship is factor for consideration of whether contract was a sham [*Personnel Contracting*] – Commission held Agreement was not a sham – Commission considered the element of control in the Agreement – Agreement outlined manner work was to be performed (clause 2.3), restrictions on diet and alcohol consumption (clause 2.4), uniform and grooming standards (clause 2.5), appropriate licenses and qualification requirements (clause 2.7), abide by respondent's policies as well as restriction on performance of business activities (clause 2.9) – held the changes made by respondent to performance of work was significant and of direct relevance to relationship – applicant performed obligations like that of an employee rather than as an independent contractor – Agreement generally required applicant to perform work in the respondent's business rather than conducting her own business – lack of capital investment required by Agreement and applicant used respondent's equipment to perform tasks – factors weighing in favour of an independent contractor (such as mode of remuneration, leave provisions and arrangements of extent of work) were a poor indicator of the true nature of the relationship – Commission noted such features could also apply to both independent contractual arrangements and casual employment – held applicant contracted to work for respondent's business due to varied Agreement terms and was *"indivisibly integrated into Derrimut's business and operations"* – held applicant employed by respondent as an employee within the meaning of the Act – Commission held applicant was dismissed – jurisdictional objection dismissed – application listed for s.368 conference.

C2024/1012 [2024] FWC 995
Hampton DP Adelaide 7 August 2024

Fair Vote Services P/L

ENTERPRISE BARGAINING – protected action ballot – eligible ballot agent – ss.444, 468A Fair Work Act 2009 – application for eligible protected ballot agent – observed requirements for eligible protected action ballot agent – observed applicant must be fit and proper person to conduct protected action ballots – Commission considered whether applicant had established eligibility to apply and be approved as protected ballot agent – observed if satisfied, discretion arises to approve application – found 'person' in ss.444 and 468A and related provisions includes corporations – found applicant is a corporation and eligible to apply and be approved as protected ballot agent – Commission considered whether applicant fit and proper person – observed

applicant not previously requested or authorised to conduct protected action ballots – found this factor was not adverse to granting the application – observed applicant's shareholders agreement imposed binding obligations to ensure its independence as protected action ballot agent – found loan agreement with ACTU expressly preserves this independence – found once established, applicant will be separate from its founders both financially and operationally – found executive director of applicant has extensive expertise and experience in election projects and governance events – observed executive director also experienced in polls and elections which adopted various models and systems – Commission observed executive director never been disqualified from holding directorship or other office, been charged with or convicted of criminal offence, named as defendant in civil lawsuit or had any court make any adverse finding against him – Commission found executive director of applicant to be fit and proper individual – Commission found applicant undertook to ensure its employees are also fit and proper persons – Commission observed online software and physical systems used by the applicant – Commission found material before it confirmed extensive independent voting and professional experience of director of applicant – Commission found software, systems, processes and procedures used by applicant are consistent with and satisfy considerations required to asses fit and proper person – found legal steps taken by applicant provide appropriate independence – Commission found applicant entitled to apply and is fit and proper person to be approved as eligible protected action ballot agent – application approved – Commission considered requirement in s.468A(4) to review ballot agent approvals at least each 3 years to ensure ballot agents continue to meet requirements of s.468A(2) – found time period between eighteen months and two years is appropriate, with public review.

B2024/495 [2024] FWC 1775
Hampton DP Adelaide 31 July 2024

Hampshire v Breakwater Metaland P/L

TERMINATION OF EMPLOYMENT – remedy – ss.387, 391, 394 Fair Work Act 2009 – application for an unfair dismissal remedy – whether dismissal was harsh, unjust or unreasonable – applicant was employed as an estimator with the respondent his entire working life from 1997 until dismissal on 31 March 2024 – applicant's brother also worked for the respondent all his working life – the applicant's grandfather started the respondent steel works business in the 1990s – applicant and his brother remain significant shareholders along with other family – applicant's family started a shareholder oppression proceeding in the Supreme Court of Victoria in late 2022 against the majority shareholder – remedies sought included winding up the respondent – respondent's board appointed an interim chair in October 2023 – interim chair later appointed as CEO for 12 months to 'clean up' the respondent's culture – applicant given first and final warning on 20 December 2023 for disregarding and deliberately ignoring other employees – applicant given show cause letter on 7 March 2024 – letter referred to prior warning and new allegation he inappropriately communicated with other employees on 5 March 2024 – Commission preferred evidence of respondent's witnesses that the applicant stormed into the office of another sales employee like a "bull at a gate" and raised his voice – applicant dismissed at a meeting with respondent's CEO and General Manager on 21 March 2024 – whether the dismissal was harsh, unjust or unreasonable – Commission found that 5 March incident may have warranted some disciplinary action but alone not a valid reason for termination – respondent could not establish pattern of conduct because first and final warning was not sufficiently particularised – held dismissal was harsh, unjust and/or unreasonable – remedy considered – whether reinstatement was inappropriate in the circumstances – whether loss of trust and confidence by respondent was soundly and rationally based [*Nguyen*] – Commission rejected applicant's claim that shareholder oppression proceedings should not weigh against reinstatement – applicant contended pursuing legal action should not weigh against reinstatement per *Nguyen* – Commission noted in *Nguyen* applicants were pursuing action for alleged underpayment, akin to exercising workplace right – present application legal proceeding not related to exercise of workplace right, instead

applicant's proceeding suggests relationship amongst shareholders irretrievably broken down and company should be wound up – *Nguyen* distinguished on this basis – employment relationship found to be unworkable and reinstatement untenable – applicant's position no longer being available and respondent's size (approximately 24 employees) also made reinstatement inappropriate – Commission ordered respondent to pay $49,500 compensation (less tax) to applicant.

U2024/3576 [2024] FWC 1933
O'Neill DP Melbourne 13 August 2024

Sleeper P/L t/a Oporto Melbourne Central

ENTERPRISE AGREEMENTS – pre-approval requirements – s.185 Fair Work Act 2009 – application for single enterprise agreement – Commission raised five concerns regarding application: filed beyond 14-day time period, s.185(3)(a); pre-approval requirements regarding steps taken to explain agreement terms and their effect on employees, ss.180(5); and (6); requirements regarding genuine agreement by employees, ss.186(2)(a) and 188; whether inconsistent with National Employment Standards; and whether passed BOOT – term of current agreement was extended by a Full Bench to 6 June 2024 – application for further extension of current agreement before a Full Bench – Commission considered extension of time for filing – applicant accepted agreement was not filed within 14-day time period – Commission noted lack of formal application for extension of time – considered potential effect of delay in filing and fairness of extending time – applicant submitted there was no significant change in workforce from date of agreement to date of filing and no significant prejudice to parties because of delay – Commission noted the delay of 54 days was a significant period in pre-approval steps – noted there was no evidence of any other steps taken to avoid any unfairness caused by delay – concluded there was insufficient evidence to be satisfied that it would be fair to extend 14-day time period under s.185(3)(b) – Commission minded to dismiss application on this basis – while not strictly necessary, Commission considered whether pre-approval steps appropriately taken -Commission considered pre-approval requirements in s.180(5) – applicant contended meetings were held and information provided to employees in November 2023 and further bargaining occurred on 10 and 24 January 2024 – submitted agreement terms did not change in any significant manner between November 2023 and ballot on 14 March 2024 – Commission noted information provided to employees did not adequately explain differences between existing and proposed agreements and how various existing terms would be dealt with in proposed agreement – noted that information provided to employees did not include explanation of effect of potential outcomes of Full Bench application to extend current agreement, that proposed agreement might displace Award terms rather than existing agreement terms – considered principles of pre-approval requirements in s.180(5) [*One Key*] – unable to conclude that written and oral explanations to employees about effect of terms of proposed agreement satisfied s.180(5) – not satisfied that all reasonable steps were taken in accordance with s.180(5) – unable to conclude that agreement was genuinely agreed to by employees as required by s.186(2)(a) – application dismissed under s.587(1)(a).

AG2024/1716 [2024] FWC 2132
Roberts DP Sydney 12 August 2024

Nakhla v SMYC P/L

TERMINATION OF EMPLOYMENT – genuine redundancy – remedy – ss.387, 389, 394 Fair Work Act 2009 – applicant lodged for unfair dismissal under s.394 – informed of redundancy by respondent on 26 March 2024 – employment ceased immediately, no other roles suitable for redeployment – applicant paid five weeks' notice for years of service, 10 weeks' severance per NES – applicant alleged dismissal was harsh, unjust or unreasonable as respondent failed to meet consultation obligations under *Clerks-Private Sector Award 2020* – applicant considered dismissal was due to being aged 68 years and requiring part-time hours for dialysis treatment – Commission examined

s.389 criteria for genuine redundancy – satisfied per s.389(1)(a) changes to respondent's operational requirements no longer required applicant's role to be performed by anyone – found respondent decided by mid-February 2024 duties to be redistributed to existing employees nationally – found respondent failed per s.389(1)(b) by not consulting with applicant regarding major workplace change per cl.38 of award, therefore not genuine redundancy – Commission entertained s.389(2), found it would not have been reasonable to redeploy applicant within enterprise given lack of suitable roles available in Queensland, the applicant's age and medical condition requiring part-time hours – observed applicant would have relocated to Sydney, however did not hold qualifications needed for available roles – Commission observed under s.387 respondent had valid operational reason to dismiss applicant not related to capacity or conduct, however made definite decision to terminate applicant and failed to consult for six weeks – appropriate course of action from respondent would have been to inform applicant of definite decision during meeting – applicant could have brought support person, had opportunity to respond to decision to terminate over following days – respondent should have provided list of available roles, even if none were suitable for redeployment – held respondent's conduct in breach of consultation provisions of award weighed heavily on finding dismissal was not genuine redundancy – held dismissal not case of genuine redundancy – held dismissal harsh, unjust or unreasonable – application upheld, applicant unfairly dismissed – remedy considered – held proper period for consultation would have been one week – compensation remedy ordered per s.392.

U2024/4346 [2024] FWC 2102
Hunt C Brisbane 7 August 2024

Pawelczyk v Commonwealth Bank of Australia

TERMINATION OF EMPLOYMENT – valid reason – harassment – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant dismissed because of misconduct of serious nature when applicant sent more than 50 messages to his manager from 16 November 2023 to 10 December 2023 and when applicant sent emails to other employees about a job interview – applicant said dismissal unfair because: (1) text messages sent to his manager were misinterpreted to fit the respondent's narrative; (2) applicant had no intent to harm his manager and she was okay with the messages; (3) the messages to his manager were factual, not personal; (4) errors in the applicant's pay caused financial distress and this was not taken seriously or properly addressed by his manager or respondent; (5) the conduct for which applicant was dismissed occurred outside of working hours; (6) his manager 'torpedoed' applicant's job application in another area of respondent; (7) respondent handled applicant's complaint against respondent poorly including by separating it from the investigation in allegations about applicant's conduct; and (8) applicant was dismissed after, and for, making the complaint against his manager – respondent submitted that even accepting the concerns raised by applicant as legitimate, they did not justify the plainly unreasonable conduct toward or in relation to applicant's manager and other employees – respondent said conduct was in breach of its Values, Code of Conduct and Group Conduct Policy (Unlawful Workplace Conduct, Unacceptable Workplace Conduct and Workplace Bullying) – Commission observed that many of the messages were sent in early hours of the morning, or later in evening, outside of working hours and were extremely disrespectful to applicant's manager, at times threatening, and made plain the applicant's disdain for his manager's managerial ability and the applicant's desire for his manager to lose her job – Commission observed applicant's behaviour towards his manager was motivated by the belief that his manager was lying and not providing the necessary support as a manager – Commission noted there was no evidence that applicant's manager was deliberately dishonest in dealings with the applicant – Commission held the impugned conduct of applicant was only possible because of the employment [*McManus*] – respondent's Group Conduct policy dealt with workplace interactions and behaviours and it was expressed to apply 'at all times' when employees were interacting with colleagues – the existence of the Group Conduct policy was notified to applicant in the employment agreement dated 2 October 2023 – Commission held the policy was

reasonable, including in its application to out of hours conduct where the conduct was directly work-related and likely to give rise to employee psychosocial risk – Commission noted there was no context outside of work in which the messages could have arisen and the only relationship between applicant and his manager was a work relationship – Commission observed that viewed objectively, messages sent by applicant were inconsistent with Group Conduct policy and applicant's duty as an employee to cooperate with the respondent and follow reasonable and lawful directions – Commission noted they were not trivial or 'one-off' outbursts, but were sustained, hostile and at times threatening – Commission held the content, frequency and timing of the messages had the likely consequence of causing his manager harm and messages were deliberate and targeted – on 6 December 2023, applicant attended an interview for an internal role in a different area of the respondent and thought the meeting went well but discovered on 8 December 2023 that he had been unsuccessful – applicant initial request for feedback about the interview on 8 December 2023 was straightforward and polite but in successive emails over the period to 19 December 2023, applicant began to disparage his manager – applicant told respondent not to worry about giving feedback but respondent gave feedback on 13 December 2023 – Commission found no evidence to support the assertion that applicant's manager interfered with applicant's unsuccessful job application – Commission observed the job interview emails from 13 to 19 December 2023 formed part of the reasons given by the respondent for dismissal – applicant was alleged to have not accepted the feedback given despite asking for it; questioning the integrity of the person providing the feedback; speaking ill of other candidates for the position; and speaking ill of his manager – Commission noted the first of these reasons, although strictly correct, overlooked applicant's change of mind and advice to the respondent that applicant no longer wanted feedback on the job interview – Commission held on its own, this could not constitute a valid reason for dismissal, however, the remaining concerns in relation to the job interview correspondence were well founded on the materials – Commission found taken together with the messages sent to his manager, they formed part of a pattern of conduct by the applicant that indicated he was no longer prepared to cooperate with the respondent or to follow reasonable and lawful instructions including by complying with the Group Conduct policy – Commission held there was a valid reason for the dismissal of applicant and the process of dismissal was a fair one – dismissal not unfair – application dismissed.

U2024/3942 [2024] FWC 2115
McKinnon C Sydney 15 August 2024

Margaritis v Safiery P/L

TERMINATION OF EMPLOYMENT – valid reason – insubordination – ss.387, 392, 394 Fair Work Act 2009 – applicant engaged as general manager of respondent's electronics, technology and energy solutions business – multiple attempts by respondent to telephone applicant to address performance concerns – respondent left voice message requesting that applicant call respondent daily – applicant did not return call – call to applicant to address performance concerns – respondent reiterated request – further refusal to comply with request – following Christmas shutdown, applicant performed work as normal for 11 days without calling respondent daily – applicant's work email account disabled 19 February – termination letter issued later that day citing insubordination as reason for dismissal – application for unfair dismissal remedy – no email or letter outlining respondent's concerns and consequences of failing to comply with direction – Commission considered principles to be applied when establishing finding there was a valid reason for dismissal [*Mellios*] – Commission unconvinced by respondent's submission that applicant demonstrated insubordination – no evidence applicant was provided with clear and unequivocal direction to call daily – Commission observed respondent would have acted sooner than 19 February if it really thought applicant was being insubordinate – Commission accepted that some of respondent's submissions supported finding of misconduct – applicant's tone, conduct and performance noted – found tone, conduct and performance did not amount to insubordination or serious misconduct justifying dismissal – Commission not satisfied there was a valid reason for dismissal –

Commission considered whether applicant was notified of the reason for dismissal [*Crozier*] – found that consideration was neutral as not satisfied there was a valid reason for dismissal – respondent failed to provide written direction or clarification of its expectations – Commission considered respondent's contention that applicant's failure to attend to customer calls and queries was unsatisfactory performance – not satisfied that unsatisfactory performance presented valid reason for termination – no evidence applicant was provided with an opportunity to respond to the reasons for dismissal – Commission noted respondent did not have dedicated human resources specialists, finding this to be a neutral factor – respondent adopted informal hands-on approach, Commission suggested this challenged clearly communicating decision – held this factor an insufficient excuse in view of respondent's deficiencies in handling termination – Commission considered other relevant matters – applicant not paid for hours worked over three days – applicant did not receive 1 month notice period – dismissal harsh, unjust and unreasonable – Commission found there was no valid reason for dismissal – considered that if it found the dismissal valid, dismissal was nevertheless harsh, unjust and unreasonable – harsh given applicant's age and that respondent's concerns were not formally communicated or so serious as to constitute serious misconduct – applicant was not notified of reason for dismissal and not provided opportunity to respond – reinstatement inappropriate – applicant's renumeration calculated in relation to four month anticipated period of employment, plus superannuation [*Sprigg*] – 10% deducted to account for applicant's misconduct.

U2024/2601 [2024] FWC 1844
Connolly C Melbourne 2 August 2024

Sowden v Design True P/L

GENERAL PROTECTIONS – jurisdiction – repudiation – termination at initiative of employer – s.365 Fair Work Act 2009 – applicant 's employment as Senior Designer ended 4 April 2024 – applicant filed general protections dismissal application – respondent submitted employment ended on the applicant's initiative rather than by dismissal – Commission considered jurisdictional objection – respondent contended applicant commenced employment with another entity on 5 February 2024 without permission and applicant resigned from employment with respondent on 2 April 2024 with effective date of 9 April 2024 – respondent wrote to applicant on 4 April 2024 advising it considered applicant had repudiated employment and it accepted the repudiation – in Commission respondent argued applicant repudiated employment by commencing employment with another entity in breach of her contract and respondent accepted this repudiation – respondent argued accepting repudiation did not constitute dismissal on its initiative – Commission considered repudiation and summary dismissal case law – acceptance of repudiation is required to bring employment to an end [*City of Sydney RSL*] – discussion of distinction between employee's repudiatory conduct as a factor to justify dismissal in contrast with supporting a proposition there was no dismissal [*Fonterra*] – respondent's submission found to be inconsistent with Act – Commission observed Act contemplates that employees may contest findings of serious misconduct resulting in dismissal under general protections and unfair dismissal provisions – noted result of respondent's submission would mean employers could avoid operation of these provisions by demonstrating repudiation and acceptance without further engaging relevant provisions – further held that complex contractual arguments are inconsistent with s.577(1) which requires Commission exercise power in manner which is 'quick, informal avoids unnecessary technicality' – held that the principal contributing factor that brought employment to an end was respondent's purported acceptance of the applicant's repudiation – jurisdictional objection dismissed – dispute to be listed for conference.

C2024/2542 [2024] FWC 2063
Crawford C Sydney 2 August 2024

Application by Job Site Recyclers P/L T/A Job Site Recyclers P/L

CONDITIONS OF EMPLOYMENT – redundancy – alternative employment – s.120 Fair Work Act 2009 – applicant is a business that cleans domestic building sites and recycles waste – applicant experienced downturn in work due to bankruptcies in domestic building industry – applicant forced to close main facility and lay off one hundred staff – applicant made two applications to vary redundancy pay to zero for two employees on basis it obtained 'other acceptable employment' for them – respondent employees objected to application – first employee entitled to seven weeks pay under NES – second employee entitled to eight weeks of pay under NES – applicant claimed redundancy pay should be reduced to zero because it claimed it found both employees acceptable employment at another construction cleaning company (EcoTrans) a week after their redundancy – Commission considered whether applicant had found employees 'other acceptable employment' as required by s.120 – acceptability of alternative employment is an objective test answered with reference to objective factors [*Hot Tuna P/L* and *Von Bibra*] – factors included nature of work, pay, working hours, skills, duties, seniority and location [*Moore*] – applicant arranged EcoTrans to take over cleaning work previously performed by applicant – applicant's managing director gave evidence applicant sought to transition staff to EcoTrans to carry out this work – applicant gave evidence first employee did administrative work paid at $65,000 per annum – applicant's office located near first employee's home – EcoTrans offered first employee job with similar duties in the same industry for slightly less pay than she received with applicant – first employee gave evidence new work environment was substantially different at EcoTrans compared to applicant – applicant previously provided position in a clean office – described EcoTrans' worksite as "loud and dusty" – applicant completed two shifts with EcoTrans before resigning as she felt working there would make her feel mentally unstable and could not work there long term – first employee described a culture that was overwhelming and unprofessional – suggested EcoTrans staff were rude and shouted at each other from opposite sides of office – stated she was not given sufficient training about how to use EcoTrans software nor understood the scope of work and services which were different from the applicant – second employee worked for applicant performing overviews, booking and scheduling work – applicant's office around 9 kilometres from second employee's home – second employee accepted position at EcoTrans performing co-ordination and quality assurance working with booking co-ordinators and schedulers – applicant assisted second employee to obtain this position – similar duties and slightly higher pay than previous position – second employee claimed it was not acceptable work because EcoTrans' office was further away compared with applicant and this increased his petrol usage – EcoTrans recycling facility was attached to its office – subject of dust, loud and excessive noise from trucks – had to learn new skills dealing with a software interface – new role also meant requiring workers to adhere to company standards and this resulted in confronting interactions with workers – applicant addressed both employees' claims noting that they were working in the waste management industry – both employees had previously worked at office adjacent the applicant's recycling facility before they had moved to the applicant's separate offices – noted that the two work sites looked quite similar – Commission found applicant had obtained alternative work for both employees (per s.120(1)(b)(i)) – pay for the first employee at EcoTrans was roughly equivalent to her previous pay with applicant – new role at EcoTrans was similar to role with applicant – noted that no requirement for employer to obtain identical employment – noted marked difference between the first employee's work environment and her new work environment – Commission applied *Von Bibra* test – held employment obtained for first employee was of sufficient comparability to the original work she performed for applicant – held acceptable other employment obtained for first employee – second employee paid similar wage at EcoTrans and applicant – did not consider additional commute long enough to make the new job objectively unacceptable – accepted new job was demotion in kind but not different from an earlier role second employee held with applicant – intimidating exchanges second employee claimed was a subjective assessment – not sufficient evidence to make an objective assessment – Commission noted aspects of new job were less appealing such distance, demotion, dirty work environment and interactions with field workers – needed to be balanced against objectively acceptable factors such as working at a task of the same nature and performed a previous similar role with applicant – applying *Von Bibra* test, held

applicant had found second employee a new job that was also of sufficient comparability to original work performed for applicant – Commission considered whether to reduce the redundancy pay to both employees – noted applicant made significant effort to place both workers in similar positions as their previous roles with applicant – important factor in exercising Commission's broad discretion under s.120(2) – acknowledged applicant's evidence that construction site cleaning is a dusty, dirty business that requires exposure to inert waste – did acknowledge the difference between performing administrative work in an office attached to a warehouse where the recycling takes placed compared to performing administrative work removed from the actual process of recycling – determined redundancy entitlements be reduced by seventy percent given applicant's effort to obtain new employment for employees – issued orders for employees to be paid reduced amounts subject to taxation.

C2024/3033 and C2024/3034		2024 FWC 2192
Perica C	Melbourne	16 August 2024

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Department of Employment and Workplace Relations - https://www.dewr.gov.au/workplace-relations-australia - provides general information about the Department and its Ministers, including their media releases.

AUSTLII - www.austlii.edu.au/ - a legal site including legislation, treaties and decisions of courts and tribunals.

Australian Government - enables search of all federal government websites - www.australia.gov.au/.

Federal Register of Legislation - www.legislation.gov.au/ - legislative repository containing Commonwealth primary legislation as well as other ancillary documents and information, and the Federal Register of Legislative Instruments (formerly ComLaw).

Fair Work Act 2009 - www.legislation.gov.au/Series/C2009A00028.

Fair Work (Registered Organisations) Act 2009 - www.legislation.gov.au/Series/C2004A03679.

Fair Work Commission - www.fwc.gov.au/ - includes hearing lists, rules, forms, major decisions, termination of employment information and student information.

Fair Work Ombudsman - www.fairwork.gov.au/ - provides information and advice to help you understand your workplace rights and responsibilities (including pay and conditions) in the national workplace relations system.

Federal Circuit and Family Court of Australia - https://www.fcfcoa.gov.au/.

Federal Court of Australia - www.fedcourt.gov.au/.

High Court of Australia - www.hcourt.gov.au/.

Industrial Relations Commission of New South Wales - www.irc.justice.nsw.gov.au/.

Industrial Relations Victoria - www.vic.gov.au/industrial-relations-victoria.

International Labour Organization - www.ilo.org/global/lang--en/index.htm - provides technical assistance primarily in the fields of vocational training and vocational rehabilitation, employment policy, labour administration, labour law and industrial relations, working conditions, management development, co-operatives, social security, labour statistics and occupational health and safety.

Queensland Industrial Relations Commission - www.qirc.qld.gov.au/index.htm.

South Australian Employment Tribunal - www.saet.sa.gov.au/.

Tasmanian Industrial Commission - www.tic.tas.gov.au/.

Western Australian Industrial Relations Commission - www.wairc.wa.gov.au/.

Workplace Relations Act 1996 - www.legislation.gov.au/Details/C2009C00075

Fair Work Commission Addresses

Australian Capital Territory
Level 3, 14 Moore Street
Canberra 2600
GPO Box 539
Canberra City 2601
Tel: 1300 799 675
Fax: (02) 6247 9774
Email:
canberra@fwc.gov.au

New South Wales

Sydney
Level 11, Terrace Tower
80 William Street
East Sydney 2011
Tel: 1300 799 675
Fax: (02) 9380 6990
Email:
sydney@fwc.gov.au

Newcastle
Level 3, 237 Wharf Road,
Newcastle, 2300
PO Box 805,
Newcastle, 2300

Northern Territory
10th Floor, Northern Territory House
22 Mitchell Street
Darwin 0800
GPO Box 969
Darwin 0801
Tel: 1300 799 675
Fax: (03) 9655 0420
Email:
darwin@fwc.gov.au

Queensland
Level 14, Central Plaza Two
66 Eagle Street
Brisbane 4000
GPO Box 5713
Brisbane 4001
Tel: 1300 799 675
Fax: (07) 3000 0388
Email:
brisbane@fwc.gov.au

South Australia
Level 6, Riverside Centre
North Terrace
Adelaide 5000
PO Box 8072
Station Arcade 5000
Tel: 1300 799 675
Fax: (08) 8410 6205
Email:
adelaide@fwc.gov.au

Tasmania
1st Floor, Commonwealth Law Courts
39-41 Davey Street
Hobart 7000
GPO Box 1232
Hobart 7001
Tel: 1300 799 675
Fax: (03) 6214 0202
Email:
hobart@fwc.gov.au

Victoria
Level 4, 11 Exhibition Street
Melbourne 3000
PO Box 1994
Melbourne 3001
Tel: 1300 799 675
Fax: (03) 9655 0401
Email:
melbourne@fwc.gov.au

Western Australia
Level 12,
111 St Georges Terrace
Perth 6000
GPO Box X2206
Perth 6001
Tel: 1300 799 675
Fax: (08) 9481 0904
Email:
perth@fwc.gov.au

Out of hours applications

For urgent industrial action applications outside business hours, please refer to our Contact us page for emergency contact details.

The address of the Fair Work Commission home page is: www.fwc.gov.au/

The FWC Bulletin is a monthly publication that includes information on the following topics:

- summaries of selected Fair Work Decisions
- updates about key Court reviews of Fair Work Commission decisions
- information about Fair Work Commission initiatives, processes, and updated forms.

For inquiries regarding publication of the FWC Bulletin please contact the Fair Work Commission by email: subscriptions@fwc.gov.au.