FWC Bulletin

3 April 2025 Volume 4/25 with selected Decision Summaries for the month ending Monday, 31 March 2025.

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General Manager's section 653 Fair Work Act reports published

26 Mar 2025

The reports for 2021-2024 have been tabled in the Senate and are now available. Every 3 years the General Manager of the Fair Work Commission is required, under section 653 of the Fair Work Act 2009, to:

- review the developments in making enterprise agreements in Australia
- conduct research into the extent to which individual flexibility arrangements (IFAs) under modern awards and enterprise agreements are being agreed to, and the content of those arrangements, and
- conduct research into the operation of the provisions of the National Employment Standards (NES) relating to employee requests for flexible working arrangements and extensions to unpaid parental leave.

Reports covering the 2021-2024 reporting period have been tabled in the Senate and can be accessed on the General Manager reports page.

New Model Rules for registered organisations have been published

28 Mar 2025

Unions and employer associations must have rules which meet standards set out in the *Fair Work (Registered Organisations) Act 2009* (RO Act). To make it easier for organisations when they are making rule alterations, the Registered Organisations Governance and Compliance External Review recommended we produce a set of Model Rules.

We have now published two sets of Model Rules for registered organisations, following intensive consultation and collaboration with a range of stakeholders. Our model rules are designed to reduce the regulatory burden, making it faster, more efficient and cheaper to develop new rule books or make amendments to existing rule books. We want to acknowledge and thank our stakeholders for helping us achieve these significant outcomes.

There are separate model rule books for:

- organisations with branches, and
- organisations without branches.

There is also a guidance note to explain how to use the Model Rules to:

- understand better practice examples of individual rules
- explain the importance of particular rules and the law around them
- help organisations better understand their existing rules and how they meet the legal requirements, and
- give organisations a place to start their research when they want to introduce a new rule.

You can access the rule books on the Rules for unions and employer associations page. They are also available below with the guidance note:

- Federated rule book (pdf)
- Federated rule book (doc)
- Unitary rule book (pdf)
- Unitary rule book (doc)
- Model Rules for Registered Organisations: User Guide (pdf)

In addition to the rule content, each rule book has extensive expert annotation. The annotation makes accessible a century of case law, the complex rules requirements and guides everyday users through some of the intricacies of rules law. Compliance officers and new rule users alike will appreciate the expertise and guidance found in the notation, not just for helping organisations to make improvements to their rules, but to better understand the requirements around their existing rule books.

A senior official of a registered organisation who has been actively collaborating with us on this project said:

'This model rules project is a fantastic initiative driven by the Commission to streamline the process of developing and enhancing all our rules. Peter Punch and FWC have listened to all of us and made model rules that are easy to reference and utilise for all registered organisations. This is a game changer and assists all of us protecting our organisations and makes sure that we're up to date with our rules and that they are succinct with our members' values. This project is a preventative measure that stops organisations breaching timelines and having convoluted rules

that cause us all issues. Congratulations again and I'll look forward to the election rules as the next stage of this project.'

The RO Act contains substantial requirements registered organisations must meet to have compliant rules. The Model Rules are designed to help organisations understand and comply with these, and other, requirements.

This has been a significant project for our Registered Organisations Services Branch. In addition to the outcomes referred to above, the Model Rules aim to:

- comply with the RO Act and the case law
- recognise practical requirements
- be user-friendly, with a logical structure and plain language, and
- embed good governance into organisational practices.

A second stage of the Model Rules project is now underway, which involves drafting election rules with assistance from the Australian Electoral Commission, and is expected to be completed in June 2025.

We continue to actively collaborate with our stakeholders and the General Manager specifically wishes to thank them for the time they have committed to providing us with insights and feedback, so as to ensure this resource will better serve their needs.

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 Monday, 31 March 2025.

1 CONDITIONS OF EMPLOYMENT – regulated labour hire arrangement – s.306E Fair Work Act 2009; s.51(xxxi) Australian Constitution – Full Bench – two applications filed by Mining and Energy Union (MEU) seeking regulated labour hire arrangement orders (RLHAO) – RLHAO sought regarding labour hire workers employed by 'CoreStaff' or 'Skilled' – CoreStaff and Skilled supply workers to open cut mine site operated by Bengalla Mining Company P/L (Bengalla) – Bengalla's approximately 560 employees at mine site covered by *Bengalla Enterprise Agreement 2022* (Agreement) – RLHAO opposed by Bengalla, Skilled and CoreStaff (collectively, Objectors) on three grounds – (1) Commission had no jurisdiction to issue RLHAO as would give rise to property acquisition contrary to s.39 – (2) Commission should be satisfied not fair and reasonable in all circumstances to do so per s.306E(2) – (3) RLHAO sought not sufficiently specific and would exclude certain groups – Full Bench noted RLHAO statutory context – observed s.306E(1) requires Commission to make RLHAO if satisfied criteria in paragraphs s.306E(1)(a), (b) and (c) met and neither prohibition in s.306E(1A)-(2) applies [*Batchfire*] – further noted meaning of 'protected rate of pay', being full rate of pay payable to employee if host employment applied to employee – RLHAO requires regulated employee not be paid less than protected rate of pay – Full Bench considered first objection ground – summarised ground as contention Act would operate to acquire property otherwise than on just terms (per s.51(xxxi) *Australian Constitution*) if RLHAO made, consequently s.39 prevents MEU's application being made therefore no jurisdiction – observed Skilled's submission regarding s.39 was jurisdictional in character – Full Bench stated not clear s.39 deprives Commission of jurisdiction to make RLHAO even if some possibility order might result in acquisition of property other than on just terms – found Commission likely to conclude not fair and reasonable to make RLHAO if order would result in property acquisition contrary to s.51(xxxi) *Australian Constitution* – Full Bench suggested s.39 poses two questions: (1) whether order sought by MEU would result in acquisition of property at all and (2) if it would, whether acquisition of property within meaning of s.51(xxxi) *Australian Constitution* – 'acquisition' does not occur merely because property rights may be adversely affected by Commonwealth law – must be some identifiable benefit or gain obtained by Commonwealth or another person and benefit or gain must be proprietary in nature in that it represents an interest in property [*Cth v Tasmania*] – Skilled pointed to two forms of property: bundle of rights conferred by labour hire contract with Bengalla, and sum of money Skilled provisioned for leave accruals with respect to work performed pursuant to labour hire contract – Full Bench held making of RLHAO would not alter Skilled's rights under its contract with Bengalla – observed 'at most' it may reduce profit derived from supplying labour – held this was not

acquisition of Skilled's rights under its contract – Full Bench considered sum of money for leave accruals – accepted money set aside represents form of property – firmly rejected submission RLHAO 'acquired' that property – suggested if Skilled had $100,000 in the bank day prior to order, that same $100,000 would remain day after RLHAO – consequence of RLHAO may be increased leave liability, but no acquisition of any Skilled property – held no 'acquisition' of Skilled property if RLHAO made – if incorrect on 'acquisition', Full Bench considered second question: whether 'acquisition' within s.51(xxxi) *Australian Constitution* – not every acquisition by law falls within s.51(xxxi) [*Georgiadis*] – application of 'just terms' constraint depends on question of characterisation; whether law can be characterised as law with respect to acquisition of property – held any acquisition resulting from RLHAO would be subservient and incidental to principal purpose and function of Part 2-7A (which sets main terms and conditions of employment of an employee that are provided under the Act via NES, modern awards, enterprise agreements and workplace determinations) – Part 2-7A confers capacity to make order effect of which to ensure labour hire workers supplied to work for a host receive the same rate of pay as host's directly engaged employees – held s.39 not engaged by making RLHAO, therefore s.39 did not affect jurisdiction in this matter or provide reason not to make order – Full Bench considered whether RLHAO must be made – satisfied MEU entitled to apply for RLHAO as is employee organisation entitled to represent interests of CoreStaff and Skilled employees supplied to work at Bengalla mine: s.306E(7) – satisfied s.306E(1) requirements met, noted no party disputed Agreement would apply to CoreStaff and Skilled supplied workers if they were instead directly employed by Bengalla – satisfied employees provided for supply of labour rather than provision of service – whether not fair and reasonable to make order considered – Commission required to make broad value judgment as to whether satisfied not fair and reasonable – requires balancing various interests affected by order – Objectors submitted Commission prohibited from making RLHAO on basis not fair and reasonable to do so per s.306E(2) – Full Bench noted s.306E(2) only operates if Commission positively satisfied not fair and reasonable in all circumstances to make RLHAO [*Batchfire*] – Commission only required to consider matters in s.306E(8) if parties make submission on those matters – Full Bench noted parties made submissions on particular matters – suggested not correct for Commission to approach s.306E(2) question by adopting predisposition in favour of order being made – however, Full Bench also noted circumstances which satisfied s.306E(1) and (1A) and nature of arrangements under which work performed is relevant to fair and reasonable assessment – Full Bench noted it must consider whether 'not fair and reasonable' separately with respect to CoreStaff and Skilled – whether not fair and reasonable regarding CoreStaff considered – CoreStaff suggested not fair and reasonable as its employee shift patterns not contemplated by Agreement; employees engaged in manner not contemplated by Agreement; Agreement entitles those relevantly covered to performance-based wages and payments; and CoreStaff would be burdened with significant leave liability increase – Full Bench summarised CoreStaff's central submission as Agreement only providing for full-time employment and annualised salary – Full Bench noted difficulty may arise from calculating protected rate of pay in this circumstance, but unable to give weight to consideration – Bengalla and CoreStaff accepted it would be possible to calculate hourly rate based on annualised salary provided in Agreement for determining protected rate of pay –

CoreStaff secondly submitted protected rate of pay would not be fair and reasonable as annualised salary compensated for overtime and additional hours potentially not applicable to CoreStaff employees – Full Bench accepted this submission had force, noting protected rate of pay may involve degree of overcompensation – such consequence might support conclusion RLHAO not fair and reasonable, however matter must be considered along with other relevant circumstances – found other circumstances reduced force of submission – only small proportion of CoreStaff employees may be overcompensated, alternative course would result in CoreStaff employees working patterns applying to Bengalla employees being affected by failure to make order – Full Bench observed large pay gap between CoreStaff employees and comparable Bengalla employees – unchallenged evidence of MEU that a full-time CoreStaff employee would receive between $46,406 and $52,730.50 more per annum if directly employed by Bengalla – Full Bench determined any overcompensation for particular CoreStaff employees must be seen in context of pay differential – having regard to matters raised in submissions, Full Bench held not satisfied it is not fair and reasonable to make RLHAO with respect to CoreStaff employees supplied to Bengalla – whether not fair and reasonable regarding Skilled considered – Skilled did not make specific s.306E(8)(a)-(e) submissions, instead made submission regarding whether fair and reasonable in all circumstances to make order by reference to objects of Act in s.3 as expressed by High Court in [*Mondelez*] – Full Bench suggested appropriate to consider submission with respect to each aspect of fairness identified by High Court, namely: fairness to employees, between employees, to employers, between employers and between employees and employers – Skilled conceded higher rate of pay resulting from RLHAO would be benefit and weighed in favour of order – Full Bench rejected submission higher rate may form basis for later collective bargaining a significant matter in determining whether not fair and reasonable to make order – observed RLHAO intended to supplement an enterprise agreement applying to regulated employees – regarding fairness between employees, Skilled submitted RLHAO unfair to Bengalla employees as Skilled's employees would have benefit of Agreement rates without productivity compromises contained within it – Full Bench did not accept unfairness caused on Bengalla employees if RLHAO made, stating 'no evidence any Bengalla employees hold that view, and we would be surprised if they did' – regarding fairness toward Skilled, Full Bench accepted financial impact of RLHAO on labour hire employer is relevant – however no evidence before Full Bench regarding total cost contemplated by RLHAO, size of Skilled's operations, financial position or that making of RLHAO would cause financial difficulties – held no basis to conclude financial burden on Skilled's overall operation would be significant – further found no aspect of Skilled's bargaining history supported conclusion not fair and reasonable to make order – held not satisfied not fair and reasonable to make RLHAO with respect to Skilled employees supplied to Bengalla – Full Bench required to make RLHAO with respect to CoreStaff and Skilled employees provided to Bengalla – necessary to consider form of orders – subset of Skilled employees were wash technicians or car washers – this work not contemplated by Agreement – no party wanted carve out for wash technicians – necessary to assess whether those employees would be covered by Agreement – question posed by s.306E(1)(b) whether Agreement would apply to wash technicians if Bengalla employed people to perform work of that kind – after considering Agreement coverage and *Black Coal*

Mining Industry Award 2020, Full Bench satisfied wash technicians would be covered by Agreement if employed by Bengalla – Full Bench held it was required by s.306E to make RLHAO applying to all employees supplied by CoreStaff and Skilled to perform work at Bengalla mine – delayed commencement of RLHAO until 13 April 2025 to allow parties time to calculate protected rate of pay – no specification when RLHAO will cease.

Application by the Mining and Energy Union re Bengalla Mining Company P/L

C2024/4711 and Anor — [2025] FWCFB 53
Gibian VP — Sydney — 13 March 2025
Wright DP
Roberts DP
Ryan C

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2 INDUSTRIAL ACTION – suspension of protected industrial action – cooling off – s.425 Fair Work Act 2009 – Full Bench – application for order to suspend industrial action until 6 September 2025 – Full Bench expedited hearing and issued brief reasons on 19 February 2025 [[2025] FWCFB 38] – protected industrial action (PIA) suspended until 1 July 2025 – full reasoning for decision of 19 February 2025 provided by Full Bench per s.425 of FW Act in this decision – Full Bench summarised background – industrial action concerned Sydney Trains and NSW Trains services – bargaining for new enterprise agreement since 31 May 2024 between applicants and Combined Rail Unions (CRU), including the Australian, Rail, Tram and Bus Industry Union (RTBU) – PIA commenced in September 2024 and was continuous from October 2024 to February 2025, apart from some short interruptions – on 2 February 2025, RTBU notified applicants of partial work ban (go-slow action) which commenced on 12 February 2025 and continued until 26 February 2025 – on 5 February 2025, Sydney Trains issued a notice to employees per s.471(4)(c) of FW Act that employees engaging in partial work ban would not be entitled to payment – on 12 to 13 February 2025, parties engaged in further negotiations and reached agreement in-principle on all substantive matters except quantum of wage increase in third year of proposed Agreement – bargaining process derailed later that day when CRU advanced claim in respect of a 'sign-on' bonus of $4,500 to be paid to all employees – applicants submitted this was an entirely new claim – CRU submitted it was an existing entitlement under 2022 Agreement and was implicitly agreed to be retained in proposed Agreement – RTBU reverted to position that go-slow action would commence following day – s.471(4)(c) notices enlivened – RTBU characterised notices as 'lockout' notices in its communication with members and public – large number of train drivers and guards did not attend work (absent or called in sick) resulting in significant rail network disruption – position continued over weekend of 15 to 16 February 2025 – non-attendances diminished over 17 to 19 February 2025, however there remained employees who did not attend work without reason and elevated levels of sick leave – Full Bench satisfied and not in dispute that PIA engaged in – Full Bench acknowledged PIA included: (1) go-slow action notified by RTBU on 2 February 2025 to commence on 12 February 2025 until 26 February 2025; (2) REM ban notified by RTBU on 8 September 2024 to commence on 18 September 2024 and continue indefinitely; (3) ban on service of alcohol on regional trains notified on 2 February 2025 to commence on 12 February 2025 and continue indefinitely; (4) campaign bans in nature of promoting CRU bargaining campaign

while at work, notified on various dates in September 2024 and to continue indefinitely; and (5) non-attendance at work in response to s.471(4)(c) notices relating to go-slow action notified on 2 February 2025, constituting PIA under s.471(4A) – Full Bench considered s.425 considerations – (1) per s.425(1)(a) whether suspension would be beneficial to bargaining representatives and assist resolving matters at issue – held suspension would be beneficial to bargaining representatives by assisting resolving matters at issue and return parties to position they had reached on 13 February 2025 (agreement in principle on all major issues except sign-on bonus and issue of wage increase in third year of proposed Agreement) – observed mature approach for parties to work through 'last minute impediment' of sign-on bonus issue at conference scheduled on 17 February 2025 – found RTBU treated impediment as automatically justifying commencement of go-slow action to members, with consequence s.471(4)(c) notices would become operative – observed 'nothing achieved' by RTBU's further PIA, which resulted in no further substantive negotiations and cancellation of scheduled conference – observed parties engaged in 'mutual public recrimination', with both parties under significant pressure due to public backlash against disruption to train services and associated media attention – Full Bench concluded suspension would maximise prospects of reaching an agreement – (2) per s.425(1)(b) duration of PIA – Full Bench acknowledged PIA engaged for 5 month period – found bargaining reached point where continuance of PIA 'very unlikely' to contribute to finalisation of dispute about sign-on bonus – mutual recrimination engendered by events since 13 February 2025 could result in parties moving further apart – held duration of PIA weighs in favour of grant of suspension – (3) per s.425(c) whether suspension contrary to public interest or inconsistent with objects of FW Act – Full Bench held suspension would not be contrary to public interest and would instead be 'positively' in public interest – observed suspension would pause any disruption to train services in Sydney and regional NSW and allow public confidence in reliability of rail network to be restored – acknowledged PIA may escalate if no suspension, due to NSW Government's publicly-stated immovable position on payment of sign-on bonus – Full Bench did not accept CRU submission that effects of PIA on third parties is not relevant, or not to be given significant weight because it is dealt with in s.426 as part of separate mechanism – Full Bench determined public interest test under s.425(1)(c) is broad and not to be read down by reference to separate criteria for suspension – (4) per s.425(1)(d) other matters Commission considers relevant – Full Bench found it relevant that views of some RTBU members appeared to have been inflamed by adverse publicity about PIA, s.471(c) notices and false characterisation of these notices by RTBU as 'lockout' notices – Full Bench acknowledged disruption of Sydney Trains network on 14 February 2025 and following weekend was result of RTBU members not attending for work in response to s.471(4)(c) notices – RTBU's position was to blame this on concern on part of employees that they would not be paid if they attended work – Full Bench considered characterisation of these notices by RTBU as 'lockout' notices was a significant factor in aggravating degree of non-attendance at work – found characterisation of notices by RTBU as 'lockout' was 'plainly false' – 'lockout' defined in s.19(3) of FW Act as conduct by employer that 'prevents the employees from performing work under their contracts of employment without terminating those contracts' – Full Bench found a notice under s.471(4)(c) does not have effect of a lockout, since employee is entitled to attend work, perform contracted duties

and be paid in full – held cooling off period would reduce ongoing adverse media publicity and render s.471(4)(c) notices redundant – Full Bench concluded suspension of PIA engaged in appropriate – rejected applicants' submission suspension should apply until 6 September 2025, being earliest day they can apply for intractable bargaining declaration to terminate all PIA and proceed to arbitration – Full Bench did not consider bargaining to be intractable – considered lengthy period of suspension warranted – suspension order issued until 1 July 2025 – Commission to convene further conference in extant s.240 proceedings to confirm matters agreed in-principle and endeavour to resolve outstanding sign-on bonus issue.

Application by Sydney Trains and Anor

B2025/255 [2025] FWCFB 46
Hatcher J Sydney 26 February 2025
Easton DP
Harper-Greenwell C

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3 CASE PROCEDURES – application dismissed on FWC's own initiative – ss.365, 604 Fair Work Act 2009 – appeal – Full Bench – appellant applied for permission to appeal and to appeal first instance decision of Commission to close file in relation to s.365 general protections application – on 10 October 2024, matter was listed for hearing to determine jurisdictional objections (no dismissal and out of time) – Commission called adjournment during proceedings to engage in discussions to resolve matter – parties engaged in private discussions with Commission and reached 'in principle' agreement – parties continued to negotiate settlement terms between themselves without assistance of Commission – on 24 October 2024, Commission decided to refuse appellant's request for transcript – no further correspondence between Commission and parties for six weeks – on 3 December 2024, Commission emailed parties confirming that file would be 'administratively closed' – on 11 December, appellant's solicitor indicated there was no in principle settlement and sought to have matter relisted – later that day, Commission replied confirming matter resolved on 10 October 2024 and the file was closed – Commission's role ceased in the matter – on 23 December 2024, appellant filed notice of appeal – grounds of appeal specified Commission erred in administratively closing file: (1) file closed on incorrect basis matter resolved on 10 October 2024, since in principle settlement was subject to deed being agreed to and appellant obtaining taxation advice; (2) even if binding agreement reached on 10 October 2024, agreement had subsequently been terminated and ceased to bind parties due to repudiation; and (3) parties not afforded procedural fairness since parties not provided notice of proposal to administratively close file, nor adequate reasons, and parties not heard on matter – supplementary grounds submitted prior to appeal hearing: Commission should not have conciliated matter before determining jurisdictional objections; and if Commission did not make decision on 3 December 2024, it did so on 11 December when concluded matter had settled, which was made in error – respondent agreed no binding settlement reached on 10 October 2024 or at any other time, and no more than in principle agreement reached subject to execution of deed of release – however, respondent open to Commission exercising discretion to close file and dismiss appellant's application on its own initiative per s.587(3)(a) of FW Act – permission to appeal granted by Full Bench: (1) Commission

erred in dismissing application on basis binding settlement reached in circumstances in which parties agreed that had not occurred; (2) Commission failed to afford parties procedural fairness as to whether application should be dismissed, which caused 'substantial injustice' to appellant; and (3) in public interest to grant permission to appeal – Full Bench accepted further evidence of witness statement by appellant's solicitor describing events which resulted in adjournment of hearing and settlement discussions involving appellant and Commission per s.607(2) of FW Act – Full Bench found it was open to Commission to dismiss appellant's application if a binding settlement of dispute had been reached between parties – Full Bench considered whether a decision to dismiss was made – held email from Commission on 3 December 2024 constituted a 'decision' for purposes of ss.604 and 598(1) of FW Act – found administrative closing of file does not bring proceedings to end – accepted common position of parties that decisions of 3 and 11 December were a decision to dismiss the application – Full Bench considered reasons for dismissal of application – acknowledged Commission made finding of fact that binding agreement to resolve matter was made, however did not accept submission that passage of time was reason for closing file or failure of parties to communicate with Chambers – held reason for closing of file was Commission's perception that matter resolved on 10 October 2024 – Full Bench considered whether binding settlement reached [*Masters*] – parties agreed no binding agreement reached on 10 October 2024, the basis upon which Commission believed matter resolved unclear – parties description of agreement as 'in principle' not determinative, since phrase used when negotiating settlement and generally indicates there is no intention yet to enter into binding contract [*Singh*] – observed fact parties anticipated a formal deed of release would be executed suggested parties did not intend to be immediately bound [*Farrell*] – held Commission was wrong to assume and find that matter was resolved between parties – Full Bench considered whether procedural fairness denied – held procedural fairness not afforded to parties because Commission did not provide parties with opportunity to be heard on question of whether application should be dismissed on ground that matter had been resolved – held grounds (1) and (3) made out and unnecessary to consider ground (2) and supplementary grounds – Full Bench allowed appeal – decision of Commission made on 3 December 2024 quashed – jurisdictional objections to be determined – matter to be remitted to a different member of Commission.

Appeal by Dawson against decision of Riordan C of 3 December 2024 Re: Centre for Digestive Diseases P/L

C2024/9334 [2025] FWCFB 50
Gibian VP Sydney 7 March 2025
Boyce DP
Butler DP

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4 TERMINATION OF EMPLOYMENT – jurisdiction – foreign state immunity – s.394 Fair Work Act 2009; ss.9, 12 Foreign States Immunities Act 1985 – applicant was one of several employees dismissed by respondent between 2021-2022 resulting in numerous proceedings in Commission and Federal Court of Australia – applicant was a citizen of Republic of Sudan and held an Australian subclass 309 Spouse (Provisional) visa granted in 2010 – applicant not permanent resident at date he entered into

work contract on 30 November 2020 – respondent raised two jurisdictional objections: lack of valid service of application and immunity under s.9 of *Foreign States Immunities Act 1985* (Cth) (FSI Act) – Commission found matter was factually identical to 2024 case, finding respondent was immune from jurisdiction of Commission [*Saleh*] – Commission considered s.9 of FSI Act which provides for general immunity from jurisdiction – found applicant was a member of respondent's administrative and technical staff – exception to general immunity at s.12(6) of FSI Act considered – however, Commission acknowledged applicant would have to be permanent resident of Australia at time his work contract was entered into for exception to immunity given by s.9 to apply – Commission held respondent immune from jurisdiction of Commission due to applicant not being permanent resident of Australia at time he entered into his work contract – found applicant citizen of South Sudan and held Australian subclass 309 Spouse (Provisional) visa – Commission found application not validly served on respondent – application was served on the Embassy in Canberra rather than Ministry of Foreign Affairs of the Kingdom of Saudi Arabia in Riyadh [*Alramadi*] – unnecessary to determine further given finding on immunity – application dismissed.

Ahmed v Saudi Arabian Cultural Mission/Saudi Embassy and Ors

U2021/11507 [2025] FWC 666
Dean DP Canberra 7 March 2025

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5 CONDITIONS OF EMPLOYMENT – flexible working arrangement – ss.65, 65B, 65C Fair Work Act 2009 – applicant employed since 1985 – applicant currently employed as Team Leader Planner Roll Workshop – applicant shares caring responsibilities with wife for their three school aged children – since 2011, applicant had informal flexible working arrangement (FWA) where his start and finish times on Thursday were flexible enough to allow him to meet parental responsibilities around school pick up times and after school activities – on July 2024, FWA ended when General Manager informed employees recent audit identified FWA's in relation to start and finish times were not compliant with clause 18.6 of *Opal Australian Paper Maryvale Mill Mechanical Maintenance & Engineering Store Enterprise Agreement 2024 (*Agreement) – applicant's roster plan would involve swapping Thursday 10-hour shift to Friday 8-hour shift in week one and swapping Thursday 10-hour shift to Monday 8-hour shift in week two, also varying start and finishing time by 30 minutes on Thursday, allowing applicant to work 8 hours each Thursday commencing at 6.30am and finishing at 3pm to accommodate parental responsibilities – respondent's alternative suggestion involved 2 hours of make up time at end of next 8-hour shift, so that instead of finishing at 3.30pm applicant would work until 5.30pm if he finished work 2.5 hours early on Thursday shift, with balance of 0.5 hours to be made up with an earlier start time of 30 minutes on following Thursday – applicant rejected respondent's suggestion on basis it was impracticable and would result in variation of weekly pay – applicant submitted respondent's refusal to accept FWA not on reasonable business grounds – respondent stated refusal on reasonable business grounds and granting request would be breach of Agreement – on 9 August 2024, applicant made FWA application under s.65(1) of FW Act [*Quirke*] – on 30 August 2024, respondent refused FWA request which enlivened s.65(B) – Commission has jurisdiction to

deal with dispute per ss.65B and 65C – Commission found refusal of request on basis of inconsistency with Agreement not a reasonable business ground – acknowledged inconsistency reinforces entitlement to request under s.65, which in effect permits FWA to provide for a change to hours and days of work which differs from terms of Agreement – observed National Employment Standards (NES) is a minimum employment standard that cannot be overridden by a term of Agreement – held effect of clause 18 of Agreement if applied literally to reject FWA request, limits entitlement to a legislative minimum standard – s.65C(2A) provides Commission must not make an order that would be inconsistent with either a provision of FW Act or an industrial instrument that are ancillary, incidental or supplementary but only to effect they are not detrimental – s.65C(2A) cannot be read in isolation but must be read in context of s.65 in its entirety and ss.55, 56 and 59 of FW Act – acknowledged a variation of roster will not produce a result less favourable to either applicant or respondent – application of clause 18 of Agreement over and above requirement of s.65 of FW Act is inconsistent with compliance with NES – held both clause 2.3 of Agreement and s.55 of FW Act confirm NES overrides any limitation in clause 18 of Agreement to an employee seeking a change to working hours to accommodate a FWA – held not a reasonable business ground by respondent to refuse request – Commission ordered respondent grant applicant's request for FWA to allow applicant during school term times to complete his ordinary hours each Thursday from 6.30am to 3pm and to extend shift in clause 18 of Agreement which concludes at 3.30pm to finish at 5.30pm (Friday in week 1 and Monday in week 2).

May v Paper Australia P/L

C2024/7074		[2025] FWC 799
Yilmaz C	Melbourne	20 March 2025

Other Fair Work Commission decisions of note

Application by Budd

CASE PROCEDURES – referring question of law – s.608 Fair Work Act 2009; r.13(1) Fair Work Commission Rules 2024 – applicant sought referral of five questions to Federal Court of Australia – validity of r.13(1) of *Fair Work Commission Rules 2024* (Cth) (FWC Rules) – Australian Federal Police (AFP) engaged in bargaining with employees and representatives – on 27 June 2024, applicant filed s.229 application for bargaining orders – on 15 November 2024, bargaining concluded and employees voted to approve the *Australian Federal Police Enterprise Agreement 2024*-2027 (Agreement) – AFP filed an application under s.587 to dismiss applicant's s.229 application – at hearing for dismissal of s.229 application, applicant raised that because application to dismiss was prepared by lawyers on behalf of AFP who have not been granted permission under s.596 of FW Act, the application was invalid – applicant submitted r.13(1)(b) of FWC Rules was invalid as it was not authorised by FW Act, and without permission under s.596 the AFP's application to dismiss was not permitted to be prepared by lawyers – Commission rejected this contention during proceedings on 29 November 2024 – on 2 December 2024, Agreement was approved – on 17 December 2024, applicant appealed Commission's decision to reject his contention about validity of AFP's application – on 18 December 2024, Commission published decision and order to dismiss applicant's s.299 application – applicant has not appealed Agreement decision or dismissal of his s.299 application – hearing on appeal of decision made by Commission on 29 November 2024 regarding validity of r.13(1)(b) adjourned pending this application – s.608(1) provides the President may refer a question of law arising in a matter before the Commission for opinion of the

Federal Court – discretion to make referral remains even if two preconditions, being the question must be one 'of law' and question must be one 'arising in a matter before the Commission' are met [*Grabovsky*] – applicant did not address question of whether referral should occur in his submissions – Commission found questions can be characterised as questions of law – Commission accepts questions arose in appeal against decision of Commission – Commission not satisfied discretion to refer applicant's questions should be exercised – Commission acknowledged 'complete lack of practical utility' in having questions determined – questions only of practical relevance insofar as they arise in connection with applicant's application for bargaining orders – applicant's application for bargaining order had no prospect of success as Agreement had been approved – applicant's questions for referral are of academic interest only in respect of his litigation – irrespective of validity of AFP's s.587 application to dismiss applicant's s.229 application and whether his appeal against the Commission's rejection of his contentions succeeds or not, the s.229 application cannot succeed – other factors weighed against exercise of discretion – r.13(1)(b) as it applies to the making of applications and submissions is authorised by FW Act – Commission can dismiss an application under s.587(3)(a) on its own initiative – applicant has not appealed Agreement approval or dismissal of his bargaining orders application – application for referral under s.608 is rejected.

ADM2024/12 [2025] FWC 611
Hatcher J Sydney 28 February 2025

Application by Victorian Ambulance Union Incorporated

CASE PROCEDURES – referring question of law – s.608 Fair Work Act 2009; ss.18(b), 18C Fair Work (Registered Organisations) Act 2009 – application for referral of question of law to Federal Court – on 4 April 2024, applicant filed application per s.18(b) of *Fair Work (Registered Organisations) Act 2009* (RO Act) for registration as an organisation of employees (substantive matter) – Commission issued order staying substantive matter until appeal in separate proceeding, an appeal by Ambulance Employees Association of Western Australia (AEA), was heard and determined by Full Bench – separately constituted Commission had dismissed AEA's s.18(b) RO Act application at first instance [[2024] FWC 1573] – in its appeal, AEA contended Commission erred at first instance in construction of s.18C(1) of RO Act which was to be read as referrable to eligibility for membership of an association under its rules rather than its actual or 'flesh and blood' membership – Full Bench rejected AEA's interpretation and affirmed first instance construction of s.18C(1) – Full Bench granted permission to appeal and dismissed appeal regarding AEA matter [[2024] FWCFB 451] – applicant's substantive matter before Commission next listed for Mention on 5 March 2025 – on 26 February 2025, applicant lodged this application seeking proper construction of s.18C(1) of RO Act – specifically: (1) whether it requires a majority of members be employees performing work in same enterprise in order for an association to be an 'enterprise association' – (2) whether association's rules require a majority of its members be employees performing work in same enterprise in order for an association to be an 'enterprise association' – (3) if all members fall into a category stated in s.18C(3) of RO Act, whether a further requirement is a majority must fall into category stated in s.18C(3)(a), where an association may only be a 'federally registrable enterprise association' – s.608(1) of FW Act imposes two conditions for President to refer a question of law in a matter before it for opinion of Federal Court – (1) question must be one 'of law' – (2) question must be one 'arising in a matter before Commission' [*Grabovsky*] – however, discretion conferred by s.608(1) to be exercised having regard to purpose and objects of FW Act [*Grabovsky*] – Commission acknowledged even if preconditions satisfied, discretion remains as to whether referral should occur – Commission accepted applicant's proposed question capable of being characterised as question of law, and it arose in applicant's substantive application seeking registration as an organisation of employees under s.18(b) of RO Act – Commission held discretion should not be exercised to refer question to Federal Court for following reasons: (1) not appropriate under s.608 to allow applicant to challenge construction of s.18C(1) of RO Act as held in Full Bench's decision in AEA matter – this approach would place

into question correctness of Full Bench's decision without there being any proper basis to do so – (2) in relation to applicant's 'third possible construction' of s.18C(1) of RO Act, the proposed construction was not expressed in a sufficiently coherent way to satisfy it being reasonably arguable – (3) if applicant genuinely wishes to advance a construction of s.18C(1) of RO Act that was not considered in AEA matter, there is no reason to think it would not properly be considered by Commission at first instance or by a Full Bench on appeal – (4) not likely to produce any savings in costs or time in final determination of applicant's application – s.608 application refused.

ADM2025/5		[2025] FWC 616
Hatcher J	Sydney	28 February 2025

O'Brien v Total Tools Fyshwick P/L

TERMINATION OF EMPLOYMENT – extension of time – s.394 Fair Work Act 2009 – applicant dismissed on 3 October 2024 – applicant emailed Commission on 22 October 2024 to commence proceedings against respondent for unfair dismissal – email sent within 21-day statutory time limit – covering email noted application enclosed, however, no application form attached – applicant received automated reply email from Commission foreshadowing a delayed response due to high volume of applications being lodged at the time – applicant contacted Commission on 13 December 2024 to ascertain status of application – Commission advised applicant he had not attached the application form to his email of 22 October 2024 – applicant subsequently lodged application form on 15 December 2024, outside of time limit – Commission to consider if circumstances exceptional, thereby allowing further time to lodge application per s.394(3) – respondent contended applicant's failure to submit application form was not exceptional [*Sleep*] – further, applicant had failed to follow up on status of application in a timely and proper manner, and merits of application were weak – Commission observed a hearing to determine whether to grant an extension of time is an inappropriate venue to make a detailed assessment on substantive merits of a case – as contest on merits existed, s.394(3)(e) considered neutral – observed applicant's email of 22 October 2024 provided sufficient evidence applicant was under the impression he had successfully lodged application – found delay in applicant contacting Commission was acceptable as the substance of the automated reply email created an expectation of a delayed response – observed not unreasonable applicant waited some time before following up on application – found Commission did not inform applicant that his application form was not attached to his email, and once notified, applicant rectified issue in a timely manner – found satisfactory reason for delay per s.394(3)(b), as circumstances were sufficiently out of the ordinary, noting a single exceptional circumstance can warrant such a finding [*Nulty*] – extension of time to file application granted per s.394(3) – application to proceed.

U2024/14944		[2025] FWC 701
Dean DP	Canberra	11 March 2025

Saunders v Bengalla Mining Company P/L

TERMINATION OF EMPLOYMENT – valid reason – misconduct – s.394 Fair Work Act 2009 – applicant employed with respondent for 19 years – operated water and haul trucks at respondent's open cut mine in Muswellbrook (Mine) – applicant dismissed on 12 July 2024 for serious misconduct – respondent's primary case applicant interacted with her mobile phone while operating a truck on 10 occasions between January and June 2024 – secondary case applicant breached safety policy by having her mobile phone on and in cab while operating equipment at Mine – respondent submitted Technology Coordinator suspected mobile phone usage when reviewing footage of a distraction event involving applicant in June 2024 – Technology Coordinator reviewed other footage where he believed applicant had used mobile phone while operating a haul truck – Technology Coordinator found 9 other similar instances between January and June 2024 – acknowledged no mobile phone visible in footage captured by Operator Awareness System (OAS) – relied on specific features of footage to

determine applicant had interacted with mobile phone on relevant dates – applicant denied allegations and offered alternative potential explanations including that her head movements were due to looking out of window for potential vehicle interactions, getting food or drinks out of her bag, her book having been dislodged from her bag and preventing it from falling, cleaning up or preventing a drink from spilling, or hard hat may have fallen against passenger door activating applicant's headlamp and causing it to flash – respondent conducted re-enactment of alternative explanations and respondent's expert witness determined no alternatives put by applicant could account for relevant features observed in footage – at hearing respondent relied on opinion evidence of expert in measuring light in visible and near-infrared parts of the spectrum – applicant relied on evidence of expert in monitoring distraction events detected by OAS – Commission considered evidence of expert witnesses, where opinion differed in relation to the 5 videos – preferred opinion of respondent's expert witness, who concluded footage was clearly indicative or likely indicative of a mobile phone in the cab of truck – considered valid reason – Commission satisfied applicant interacted with her mobile phone while driving a truck at Mine on 5 of 10 occasions – satisfied respondent proved primary case and secondary case allegations of misconduct *[Briginshaw]* – satisfied valid reason to terminate employment – satisfied other relevant criteria of s.387 met – considered harshness – noted length and quality of applicant's service – satisfied respondent undertook fair investigation and afforded applicant procedural fairness – satisfied dismissal was not disproportionate to gravity of applicant's misconduct – held dismissal not harsh, unjust or unreasonable – application dismissed.

U2024/8658 [2025] FWC 658
Saunders DP Newcastle 5 March 2025

Music v Sharesight P/L

TERMINATION OF EMPLOYMENT – contractor or employee – ss.386, 394 Fair Work Act 2009 – applicant commenced employment with respondent on 12 April 2021 as Project Delivery Manager – around September 2022, applicant proposed to move overseas to Canada for a year in mid-2023 for personal reasons, but remain employed by respondent – on June 2023, respondent made offer to applicant with new engagement terms if she wished to work for respondent whilst in Canada – respondent's offer involved applicant changing engagement with respondent from employee to independent contractor and required applicant to resign from her employment with respondent in order to become an independent contractor – on 7 June 2023, applicant accepted offer to resign from employment and become independent contractor – applicant moved to Canada on 12 June 2023 – outstanding employment entitlements paid to applicant on 16 June 2023 – on 3 July 2023, applicant and respondent signed independent contractor agreement (ICA) for period 29 June 2023 to 9 July 2024 – no evidence of subsequent changes to ICA – on 9 July 2024, respondent gave applicant notice of termination in accordance with ICA – in accordance with terms of ICA, engagement between applicant and respondent terminated (or ceased) 30 days later – applicant filed unfair dismissal application with Commission on 21 July 2024 – respondent claimed application misconceived on basis applicant not an employee and not dismissed within meaning of s.386 of FW Act – Commission indicated s.15AA of FW Act, which concerns itself with real substance, practical reality, and true nature of relationship when determining meanings of employee and employer, commenced on 26 August 2024 and does not apply to the resolution of this matter – Commission applied test established in [*Personnel Contracting*] – observed contract terms sole basis for determining totality of employment relationship – confirmed 'the classification of the relationship that exists between parties…is to be ascertained objectively by reference to the terms of a contract (identifying the rights and obligations of the parties under the contract), and not by reference to questions of fairness, or the manner in which subsequent conduct and performance might undercover a reality' – Commission confirmed [*Personnel Contracting*] applies general rules of contractual interpretation – found clear intention to create legal relations – found ICA set out terms 'wholly in writing' – applicant contended contract a sham – Commission found no evidence ICA a sham [*Deliveroo*

Australia] – applicant claimed she was induced to enter into ICA – Commission found no evidence to support allegations of mistake or misrepresentation, let alone evidence that would give rise to finding that ICA ought to be considered void or of no effect – Commission acknowledged no evidence to suggest ICA lacked 'genuine consent' or could otherwise be categorised as fraud – applicant submitted ICA had given rise to a relationship of employment – Commission found any change subsequent to ICA not relevant to employment relationship – Commission observed ICA provided applicant with full control over how she performed her work – found no obligation under ICA for applicant to perform particular hours of work – held terms of ICA on issue of 'right to control' pointed towards existence of an independent contractor relationship – Commission held respondent's ownership of products and intellectual property not determinative of employee relationship – held terms of ICA favoured applicant working in own business – Commission concluded applicant was an independent contractor and not an employee for purposes of s.386 – application dismissed.

U2024/8458 [2025] FWC 634
Boyce DP Sydney 4 March 2025

Quayle v Redpath Contract Services P/L

TERMINATION OF EMPLOYMENT – Merit – compensation – s.394, 387 Fair Work Act 2009 – applicant was employed full time as a 'drive in drive out' driller by respondent, an international mining contractor that provided services to Peak Gold Mines P/L (Peak) for just over a year – applicant assigned on Peak project in NSW, covered by the *Redpath Contract Services National Enterprise Agreement 2022* (respondent's Agreement) and rostered for 12 hour shifts on a 14 day on/off rotation – applicant's employment conditional on receiving and maintaining 'site clearance' from Peak, failure to maintain this could result in termination – respondent's Agreement sets out performance review system in clause 20, and clause 7.3 of respondent's contract with Peak sets out Peak's ability to object to personnel hired by respondent working on site – applicant advised supervisor at Peak of close family death and was permitted to take rest of rotation as leave, to return on 18 September 2024 – months prior to this, supervisor had noticed applicant's work rate was consistently 25-35% lower than other driller employees – around same time as applicant took bereavement leave, supervisor advised to underground mine manager he intended to manage applicant on a performance improvement plan (PIP) – supervisor expressed concern whenever applicant took personal leave, it seemed to be at start or end of a rotation, and noted applicant's unwillingness to produce certificate to substantiate bereavement leave – correspondence between supervisor and general manager set out applicant's leave – on 7 September 2024, before applicant had returned from leave, Peak emailed respondent's general manager advising applicant's site access was revoked due to unreliability with attendance and low quality of work – respondent had internal discussion about redeployment but found no suitable sites available for applicant, taking into account their drive in drive out employment basis – days later, applicant advised of site revocation due to 'absenteeism and poor quality of work' and invited applicant to show cause as to why respondent should not terminate him within a day – applicant attended meeting next day and argued he had done nothing wrong, he did not understand allegations, he had not been previously advised of performance issues, and his absences from work were approved – that same day, applicant received letter terminating employment due to 'serious misconduct' as defined in respondent's discipline procedures – applicant dismissed for serious misconduct following revocation of site clearance due to performance and attendance issues, shortly following absences due to sick and bereavement leave – applicant argued his absence was approved following loss of close family member, that no concerns had been raised to him prior to dismissal, and respondent failed to provide details of allegations, or consider redeploying him – applicant commenced new employment three weeks later on lower salary and incurred significant personal travel costs – Commission examined respondent's disciplinary procedures to understand why applicant's conduct characterised as 'serious misconduct', noting it sets out step-by-step procedure for investigation of serious misconduct – Commission considered jurisdiction in application; and was satisfied applicant was protected from unfair

dismissal – Commission considered merits of application – observed requirement that Commission be satisfied dismissal was harsh, unjust or unreasonable – Commission considered whether there was valid reason for dismissal – found 'failing to fulfil obligation in employment contract' given as example of serious misconduct in respondent's disciplinary procedure, but could not accept every failure to fulfil obligations in employment contract should automatically be regarded as serious misconduct, particularly where failure is not deliberate nor involving safety issues – Commission observed concerns of respondent and Peak related to performance rather than conduct, the response to which under respondent's disciplinary procedure should have been warnings, counselling or a PIP, rather than immediate termination – Commission found applicant was first made aware of performance issues on 11 September 2024 when advised of show cause meeting, respondent did not follow own disciplinary procedure in respect of applicant's performance – Commission took view labelling applicant's actions as 'misconduct' was inappropriate and unreasonable – held no valid reason for dismissal based on applicant's conduct – Commission nonetheless noted it is not required to confine itself to determine whether respondent's reason for dismissal was valid, but rather must consider whether a valid reason for termination, not limited by reason given by respondent – Commission considered whether valid reason for dismissal in light of applicant's capacity – Commission noted contract between Peak and respondent permitting Peak to remove an employee from site if it forms opinion employee 'is not properly performing their duties, is for other reasons detrimental to the proper performance of the Services, is incompetent, unqualified or negligent or is responsible for a violation of a Health and Safety Requirement, Environmental Requirement or any other applicable policy or procedure on-Site' – Commission noted evidence of applicant's site access revocation and that it appeared Peak was permitted to do so – Commission observed 'capacity' as defined in s.387(a) goes beyond physical or skill capacity of employee, encompassing situations where employees lack necessary licenses, qualifications or approvals to perform inherent job requirements, noting where employee's capacity to perform job affected by actions of third party, employer must still treat employee fairly [*Baptist Care SA*] – Commission noted evidence established Peak was permitted by contract with respondent to remove applicant's site access, with no redress available to respondent in respect of this once Peak had formed subjective view applicant not capable of performing duties – evidence showed respondent conducted own enquiries into applicant's performance and attendance issues – respondent did attempt to find alternative employment opportunities, but no roles available in mines close to applicant's home – despite applicant's contentions to the contrary – Commission satisfied respondent genuinely unavailable to find suitable alternative employment – Commission ultimately found applicant dismissed after site clearance revoked and respondent unable to find redeployment, which together constituted valid reason for dismissal based on capacity – Commission held applicant notified of valid reason for dismissal pursuant to s.387(b), despite 'clumsily worded' show cause letter – Commission considered whether applicant given an opportunity to respond to reasons relating to capacity or conduct – Commission accepted respondent did not provide particulars of allegations as contended by applicant, but felt provision of information would not have changed outcome – Commission found applicant was given opportunity to respond to reason for termination in writing and in person, but opportunity for applicant to influence outcome extremely limited given site access revocation – negating applicant's contentions, evidence demonstrated applicant was invited to bring a support person to show cause meeting, though he did not – Commission found applicant not warned about performance issues prior to dismissal, constituting a matter weighing in favour of finding of unfairness – size of respondent's business and its dedicated HR management specialists found to be neutral considerations – Commission considered other relevant matters – applicant contended dismissal during leave constituted adverse action, and Commission should take into account his financial and family circumstances – adverse action contention rejected by Commission – Commission observed procedural issues weighed in favour of unfairness commencing well before site clearance revocation – contract between respondent and Peak did not give Peak unfettered right to remove site access, and circumstances in which it could do so were not made clear to applicant – respondent had access to records showing applicant's underperformance but took no steps to address this with applicant until just before dismissal, despite obligation under

Agreement to provide applicant with a performance review well before dismissal – no evidence performance review taken – Commission observed Peak's decision to remove site access amidst frustrating four months without improvement hardly surprising, respondent should have foreseen this and taken proactive steps to address it, per its contract with Peak – applicant would have been aware of issues, which could have been dealt with via counselling, written warning, and/or PIP – regarding applicant's leave and whether he was an unreliable employee, aspects of Agreement and employment contract provided respondent with capacity to deal with any concerns, for which no evidence thereof came before Commission – Commission found respondent's failure to advise applicant of conditions in which site clearance could be revoked, concerns about performance and attendance, failure to provide applicant an opportunity to address concerns under disciplinary procedure, Agreement and contract of employment, all matters weighing in favour of finding of unfairness – Commission found applicant's financial and family circumstances to also weigh in favour of unfairness – Commission held despite valid reason for dismissal, it was harsh and unreasonable and satisfied unfair dismissal – Commission considered whether to grant remedy – applicant did not seek reinstatement – Commission considered payment of compensation appropriate, considered remuneration applicant would have received had he not been dismissed, fact applicant had made efforts to mitigate loss by obtaining new employment, albeit at lower remuneration and with incurrence of personal travel costs – Commission rejected respondent's submission that compensation should be discounted due to failure to maintain site clearance as applicant not advised of circumstances in which this could happen – Commission assessed compensation figure [*Sprigg*] to be $18,192 plus superannuation – compensation ordered.

U2024/11208 [2025] FWC 702
Wright DP Sydney 11 March 2025

Stoddard v Crushing Services International P/L

TERMINATION OF EMPLOYMENT – extension of time – exceptional circumstances – s.394 Fair Work Act 2009 – applicant terminated on 11 October 2024 – unfair dismissal application lodged on 7 November 2024 – application lodged 6 days outside 21-day statutory time limit – respondent raised jurisdictional objections on grounds that application lodged out of time, minimum employment period not completed and applicant had multiple applications on foot – applicant submitted several reasons for delay in filing application – applicant claimed he filed his unfair dismissal application in the incorrect jurisdiction with the Western Australian Industrial Relations Commission (WAIRC) on 30 October 2024 – applicant sought and received preliminary legal advice on 7 October 2024 – applicant submitted he became aware of WAIRC's email dated 30 October 2024 regarding incorrect jurisdiction on 6 November 2024 – applicant indicated he took immediate action once notified of error in filing application in incorrect jurisdiction, to then file with Commission [*Palmer*] – respondent raised objection to WAIRC application on 12 November 2024 citing jurisdictional issues – applicant withdrew WAIRC application on 25 February 2025 – respondent submitted applicant had an additional 32 days post-notification of termination in addition to the 21 days to seek advice regarding proper jurisdiction for lodgement [*King*] – respondent noted Applicant had signed proof of receipt of Fair Work Information Statement containing 21-day statutory limit for lodgement – Commission accepted applicant was not aware the WAIRC was the incorrect jurisdiction until 6 November 2024 – Commission found applicant acted as soon as he became aware of incorrect jurisdiction, by filing application with Commission the next day – Commission found applicant was not explicitly advised as to correct jurisdiction for lodgement prior to filing application – Commission held reasons for delay were exceptional circumstances [*Nulty*] – Commission satisfied applicant met minimum employment period – Commission dismissed jurisdictional objection for multiple applications, given WAIRC application no longer on foot [*ABC Transport*] – extension of time granted – application to proceed to conciliation.

U2024/13352 [2025] FWC 723

Milligan v Altona North Medical Group P/L

TERMINATION OF EMPLOYMENT – extension of time – exceptional circumstances – representative error – s.394 Fair Work Act 2009 – applicant was employed as receptionist since October 2021 – applicant's position made redundant following sale of respondent's business on 15 January 2025 – unfair dismissal application lodged on 6 February 2025 – application lodged one day outside 21-day filing period – applicant indicated reason for delay was due to personal and medical reasons, family illness and caring responsibilities – applicant was 39 weeks pregnant at time of dismissal and due to be induced on 20 January 2025 – applicant sought legal advice on day of dismissal via her husband who had preliminary discussion with solicitor – on 29 January 2025, applicant's solicitor did not hear from applicant's husband and instead contacted applicant to follow up on matter and provided her personal contact details – on 30 January 2025, applicant's husband confirmed with solicitor that applicant wished to make unfair dismissal application and requested fee estimate – on 3 February 2025, applicant's husband contacted solicitor confirming applicant wished to proceed with application – on 4 February 2025, after returning from leave, solicitor provided draft application to applicant for review and had a further conversation with applicant regarding changes to first draft – solicitor informed applicant deadline to lodge application was on 5 February 2025 – at around 5pm on 5 February 2025, solicitor sent revised draft to applicant and checked inbox until 9.30pm waiting for response from applicant – applicant's husband attempted to contact solicitor on three occasions after 10pm – solicitor did not see applicant's husband's texts or emails until following morning – solicitor indicated she did not contact the applicant that evening since she did not want to disturb the family after all the challenges and difficulties they had been facing, including caring for newborn child – Commission found solicitor's reason for not contacting applicant that evening 'inadequate and unacceptable' – observed knowledge of applicant's challenges indicated a reason to follow up a response with applicant – found solicitor showed initiative prior in contacting applicant and could have filed application by deadline and amended it at a later date – held applicant had acceptable reason for delay – exceptional circumstance existed due to representative error [*Nulty*] – no acceptable explanation from solicitor for failure to lodge application within time – extension of time granted.

U2025/1286 [2025] FWC 728
Mirabella C Melbourne 13 March 2025

Leeson v McDougall & Sons P/L

TERMINATION OF EMPLOYMENT – extension of time – exceptional circumstances – representative error – s.394 Fair Work Act 2009 – applicant's dismissal took effect on 19 December 2024 – applicant filed unfair dismissal application on 13 January 2025 – application lodged 4 days outside 21-day filing period – applicant's legal representative specified dismissal date in application as '20 December 2024' – applicant submitted she was informed by her legal representative the last day to lodge her application was 13 January 2025 – Commission found it was uncontroversial applicant received termination letter on 19 December 2024 and that her dismissal took effect on this date – Commission observed primary reason for delay was representative error – Commission found applicant relied on representative's miscalculation of dates and expertise – Commission determined last day of lodgement of application was '9 January 2025' – Commission found three errors made by applicant's representative – (1) representative incorrectly relied on the date applicant received her final pay (20 December 2024) as date dismissal took effect – (2) representative miscalculated the 21 days from that date as falling on '11 January 2025' – (3) representative presumed final day fell on a Saturday and incorrectly extended deadline to the next business day (13 January 2025) – Commission observed reasonable for applicant to rely on expertise of representative [*Office Works*] – Commission acknowledged it was 'nothing short of astounding' that applicant was provided with such advice, given experience of representative –

Commission found applicant's awareness of date of dismissal on 19 December 2024, lack of response to dispute dismissal and merits of application weighed against an extension of time per s.394(b)(c)(e) – Commission concluded impact of representative error weighed against other criteria – representative made multiple mistakes in a time critical matter – Commission found 'no excuse' for representative error given applicant first sought legal advice from representative before she was dismissed – Commission held exceptional circumstance of representative error to be acceptable explanation of delay – out of time jurisdictional objection dismissed – extension of time granted.

U2025/487 [2025] FWC 677
Durham C Brisbane 6 March 2025

Linegar v World Wide Waste & Recycling P/L atf World Wide Waste Unit Trust

TERMINATION OF EMPLOYMENT – Merit – s.394 Fair Work Act 2009 – applicant employed since 2016 as Operations Manager – applicant terminated on 16 October 2024, after he was absent from work for six weeks during which time applicant was certified unfit for work due to illness – on 28 August 2024, respondent conducted an evaluation in relation to applicant's work performance – on 30 August 2024, applicant commenced absence from work due to illness which continued until end of employment – Commission observed respondent confirmed in evidence its practice when provided with a medical certificate was to send an email to relevant clinic to verify certificate – it was confirmed this occurred in respect of each of applicant's certificates and verification was received – further medical certificate was provided by applicant dated 3 September 2024 which described applicant as having a 'medical condition' and unfit for work or study until 6 September 2024 – on 6 September 2024, applicant provided another medical certificate which said he was unfit for work or study until 10 September 2024 – another medical certificate was provided by applicant dated 10 September 2024, certifying him unfit for work until 16 September 2024 – on 15 September 2024, applicant sent email to respondent which said he had no access to emails, Teams or 'Wastedge' – respondent replied stating there was nothing wrong with access to emails and Teams – another medical certificate was provided by applicant dated 16 September 2024 indicating he was unfit for work until 20 September 2024 – on 18 September 2024, applicant was sent a letter from respondent noting amongst other things applicant had not provided information as to nature of his illness – Commission observed applicant said in evidence he phoned respondent a number of times during his absence to provide more detail about situation, which respondent confirmed – on 23 to 24 September 2024, applicant and respondent exchanged series of text messages relating to efforts to obtain certain items of company equipment – nature of messages suggested employment relationship continued to deteriorate – respondent decided they wanted company laptop, phone and computer monitor in applicant's possession returned, since they were missing 'important customer information' – on 23 September 2024 at 4.24pm, applicant contacted respondent to advise of his medical status – medical certificate dated 23 September 2024 was provided by applicant indicating he was unfit for work until 27 September 2024 – on 24 September 2024, applicant was sent letter from respondent requesting he provide consent to obtain a medical report from his doctor – letter contained necessary authorisation and material for applicant's Doctor to provide report, including questions respondent sought answers to, and copy of his job description – applicant did not respond to letter – in applicant's evidence he explained he decided not to provide this consent due to personal reasons, since he did not wish respondent to access his medical files – on 25 September 2024, applicant was sent a letter from respondent described as a 'warning' regarding conduct – letter referred to a telephone conversation which occurred between applicant and respondent in which it was said applicant raised his voice – medical certificate dated 28 September 2024 was provided by applicant indicating he was unfit for work until 4 October 2024 – on 3 October 2024, applicant was sent another letter from respondent, this time advising him of a direction he attend an independent medical examination (IME) – applicant submitted he was not contacted with details of IME appointment, and had he been provided with details, he would have been prepared to undertake it – respondent

explained, as applicant did not respond to letter, that appointment was not booked as there was significant non-refundable cost involved and respondent did not know applicant would attend appointment – on 6 October 2024, applicant attempted to phone respondent again and left voicemail message indicating he was going to Doctor that morning and should get results from his cardiologist at that time and would provide an update the following day – on 7 October 2024, applicant phoned respondent again and his voicemail message said he would have a further update 'on Friday' – medical certificate dated 7 October 2024 was provided by applicant which indicated he was unfit for work until 11 October 2024 – on 12 October 2024, respondent sent applicant letter which was headed 'requirement to return to work' – on 16 October 2024, applicant was sent letter from respondent which advised his employment was terminated – Commission did not agree it could be said applicant was unresponsive or uncommunicative during period of his absence, including with respect to nature of his illness or medical condition – Commission observed it could not be said applicant did not provide respondent with information about his medical condition due to medical certificates provided and phone calls on more than six occasions – Commission found it did not appear applicant provided information to respondent that might have allowed it to understand how long his ongoing absence was likely to last – Commission observed it was appropriate this failure be taken into account in consideration of whether reason for dismissal was sound, defensible and well-founded, but there were several factors which mitigated, to some extent against this failure: (1) it was not clear in evidence before Commission as to whether applicant had this information; (2) applicant provided respondent with information in form of medical certificates, supplemented by contact with respondent about his illness, to the extent he was comfortable revealing what would otherwise be private, personal information – Commission noted heart of matter was respondent's tendency to exaggerate applicant's faults – Commission observed based on information applicant provided his employer, there was no objective basis for respondent to conclude he falsified his illness or incapacity for work at time his employment was terminated – Commission held reason for dismissal was unsound and unfounded – Commission found: (1) applicant did not refuse to attend IME; (2) termination letter sent to applicant alleged on a number of occasions he failed to contact his manager personally, and the basis of this allegation was unclear and; (3) there was evidence provided, and submissions made to the effect applicant should have been aware of requirements of policy because he himself had, in the past, been required to administer it in relation to other employees – Commission did not consider this submission assisted respondent's case to any great degree – Commission reached these conclusions based on view that what motivated respondent's decision to terminate applicant's employment was belief he was falsifying his illness and reason for being absent from work – Commission found no evidence to support conclusion applicant's absence from work was not genuine and that his employment should be terminated because of his perceived duplicity – held no valid reason for dismissal – Commission satisfied dismissal of applicant harsh, unjust and unreasonable and applicant was unfairly dismissed – reinstatement inappropriate – compensation considered per s.392 – no evidence provided regarding viability of respondent's enterprise – applicant employed for 8 years with unproblematic employment relationship until recently – if employment relationship not suddenly deteriorated no evidence why it would not have continued indefinitely or at least for a further six months – estimated applicant would have remained employed for at least a further six months – remuneration applicant would have received or would have been likely to have received during this period was $57,970.00 gross plus superannuation – calculated applicant likely earned $29,526.76 since termination of employment up until date Commission ordered he be paid compensation – compensation granted to applicant in amount of $28,443.24 gross plus superannuation.

U2024/13038 [2025] FWC 421
Redford C Melbourne 4 March 2025

Stien v Hire a Hubby Pakenham

TERMINATION OF EMPLOYMENT – genuine redundancy – Small Business Fair

Dismissal Code – ss.83, 388, 389, 394 Fair Work Act – applicant employed from 15 August 2022 as office administrator – applicant fell pregnant around June 2023 and began working from home – applicant began parental leave on 23 October 2023 – no discussion between applicant and respondent about length of parental leave, 12 months assumed – no contact between parties about applicant's return to work for entirety of leave period – applicant sent letter to respondent on 1 October 2024 seeking 12 month extension to parental leave – respondent submitted letter not received until 20 November 2024 – sent acknowledgement to applicant on 22 November 2024 – respondent advised applicant on 9 December 2024 request for extension to parental leave declined – on 11 December 2024, applicant contacted respondent to provide reason for why her request was declined – respondent replied to applicant on same day and informed her that her role was made redundant due to downsizing – applicant's employment terminated on 11 December 2024 – respondent submitted he assumed that because he had not heard from applicant during her parental leave she may have decided not to return – respondent made no attempt to contact applicant to clarify assumption – respondent submitted he decided in mid-October 2024 applicant's office administrator role would be made redundant – Commission considered whether dismissal genuine redundancy per s.389 – held role no longer required to be performed due to operational requirements – held applicant's duties fitted within definition of clerical work in *Clerks-Private Sector Award 2020* (Award) and applicant covered by Award – Commission held respondent failed to advise applicant of decision made in October 2024 to terminate her employment – found consultation requirements in clause 38 of Clerks Award not met – held dismissal not within definition of genuine redundancy in FW Act – Commission considered whether dismissal consistent with Small Business Fair Dismissal Code (SBFDC) per s.388 – found respondent appeared to equate consultation with providing applicant with notification on date of termination – found dismissal not aligned with several requirements of SBFDC – Commission determined dismissal not genuine redundancy or consistent with SBFDC – whether dismissal was harsh, unjust or unreasonable – Commission considered s.387 – held valid reason for dismissal because applicant's role was made redundant – held applicant was not informed of reason for dismissal until almost two months later – held applicant not given opportunity to respond to decision to terminate employment – Commission considered consultation with employee on unpaid parental leave per s.83 of FW Act – found respondent failed to comply with its obligation to consult with employee on unpaid parental leave – Commission satisfied dismissal was harsh, unjust or unreasonable – concluded applicant was unfairly dismissed – remedy considered – Commission ordered compensation to applicant of $1,920.00 gross plus superannuation of $220.80.

U2024/15793 [2025] FWC 510
Redford C Melbourne 26 February 2025

Laughlin v Murray Grey Beef Cattle Society Ltd and Ors

ANTI-BULLYING – worker – definition of worker – s.789FC Fair Work Act 2009; s.7(1) Work Health and Safety Act 2011 – applicant director of respondent – applicant claimed she was bullied by President of respondent – respondent denies applicant was bullied at work – respondent claims applicant not a 'worker' for purposes of s.789FC of FW Act – s.789FC worker defined as having same meaning as s.7(1) of *Work Health and Safety Act 2011* (WHS Act) – worker defined as a person who performs work 'in any capacity for' the person conducting a business or undertaking (PCBU) – definition goes beyond employees and includes volunteers – respondent claimed applicant was not remunerated and term 'worker' or 'employee' did not apply to position of director – respondent contended its constitution indicates directors not to be remunerated for work – applicant provided examples of work she did for respondent – Commission observed neither party grappled with WHS Act definition of 'worker' or s.789FC requirements – common ground applicant was a volunteer – Commission found applicant carries out work for respondent – respondent did not argue it was not a PCBU – Commission referenced respondent's constitution and satisfied respondent was conducting a business or undertaking and as a director, the

applicant carries out work for it – found respondent was not a volunteer association for purpose of WHS Act – Commission dismissed respondent's jurisdictional objection – held respondent is a PCBU and applicant is a worker – allowed application for a stop bullying order to proceed to be heard and listed for directions.

AB2024/844 [2025] FWC 668
Sloan C Sydney 6 March 2025

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Websites of Interest

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

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