# FWC Bulletin

7 August 2025 Volume 8/25 with selected Decision Summaries for the month ending Thursday, 31 July 2025.

## Contents

## New community language resource for food delivery workers in collaboration with the Fair Work Ombudsman

The Fair Work Commission and Fair Work Ombudsman have collaborated to develop a flyer for employee-like workers who deliver food and drinks or parcels via an app.

The flyer explains the roles of the Fair Work Commission and Fair Work Ombudsman under workplace laws that create rights for employee-like workers. The flyer can be distributed and displayed in hardcopy (for example, on noticeboards) and digital forms, and includes QR codes linking to relevant information.

Read the Food delivery workers flyer (pdf). We have also translated the flyer into 6 community languages to assist our culturally and linguistically diverse (CALD) users. The flyer is available in:

- Chinese traditional (pdf)
- Chinese simplified (pdf)
- عربی (Arabic) (pdf)
- Français (French) (pdf)
- Español (Spanish) (pdf)
- हिंदी (Hindi) (pdf)

We will distribute the flyers through our social media and stakeholder networks nationally, including organisations that support CALD communities.

This resource continues our shared commitment with the Fair Work Ombudsman to provide information and resources that meet the diverse needs of the Australian community. It aligns with our strategy to deliver the right information, at the right time and in the right format.

'The Commission is proud to present this resource in collaboration with our colleagues at the Fair Work Ombudsman as part of our ongoing commitment to improving access to justice for culturally and linguistically diverse communities. We will continue to work closely with other agencies and community representatives to improve our tools and resources over time.' – Murray Furlong, General Manager, Fair Work Commission

'We urge all workers to understand their workplace rights – especially those in non-English speaking communities. They can seek our free advice and assistance if they need it. Protecting migrant workers is a priority for the Fair Work Ombudsman as we know they can be vulnerable to exploitation. We are pleased to work with the Commission on this resource.' – Anna Booth, the Fair Work Ombudsman

### CALD community engagement and resources

This resource supports our existing community language resources. We have information in 28 community languages, including animations and factsheets. See Information in your language.

You can use the Translating and Interpreting Service to contact us. You can also access interpreting services at each stage of your case, including at:

- hearings
- conferences
- conciliations.

See Help in your language.

We encourage you to read our Community engagement strategy 2025–27 (pdf) for more information about our commitment to CALD users and community engagement.

**Other support for employee-like workers**

We have developed a range of information for employee-like regulated workers. This includes FAQs and animations on our Regulated workers and business hub.

## General Manager's statement on the registered organisations review

The General Manager has released his final statement in response to the Registered Organisations Governance and Compliance External Review conducted by independent reviewers Anna Booth and Jonathan Hamberger.

The review was commissioned following the transfer of the functions of the Registered Organisations Commissioner to the General Manager in March 2023. The reviewers consulted with registered organisations, their peak bodies and Commission staff to identify opportunities to improve service delivery and identify barriers to promoting best practice governance and the democratic functioning of registered organisations.

The reviewers delivered their final report on 21 August 2023, and on 28 September 2023 the General Manager published the review report and committed to closely examining the feasibility of implementing each of the recommendations. These documents can be accessed here:

- Registered Organisations Governance and Compliance External Review Report
- General Manager's response to the review findings and recommendations

The vast majority of the recommendations that do not require legislative reform have now been implemented in full including:

- the development of a new Compliance and Enforcement Policy
- increased stakeholder engagement through regular quarterly meetings with the Registered Organisations Advisory Committee and the Compliance Practitioners' Reference Group, as well as increased engagement with other stakeholders like the Australian Electoral Commission
- the creation of a model financial statement
- several education items including the Compliance Practitioner's Induction Kit and an additional update to the Officer Induction Kit
- significant reduction in the time taken to process right of entry permits, with the median time dropping from 28 days to 14 days; and
- the creation of two sets of model election rules, which we are confident will aid organisations in reducing the time and complexity associated with rule changes.

The General Manager has provided detailed information to the Department of Employment and Workplace Relations on the recommendations that require legislative change for consideration.

The General Manager specifically wishes to thank the registered organisations and their peak bodies for their time spent providing their insights and feedback, as well as the reviewers for their expertise and experience during this period of significant transformation.

Read the full statement below:

- General Manager's statement: Implementation of recommendations from the Registered Organisations Governance and Compliance External Review (pdf).

## 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 Thursday, 31 July 2025.

**1** CONDITIONS OF EMPLOYMENT – regulated labour hire arrangement – s.306E Fair Work Act 2009 – Full Bench – Mining and Energy Union (MEU) and Australian Manufacturing Workers' Union (AMWU) (Unions) applied for regulated labour hire arrangement orders (RLHAO's) under s.306E to apply to employees of entities (OS Maintenance, OS Production, WorkPac and Chandler Macleod Group) employed at Goonyella Riverside mine, Peak Downs mine and Saraji mine (Mines) in Central Queensland (QLD) – Mines are operated by BM Alliance Coal Operations P/L (BMACO) on behalf of Central Qld Coal Associates Joint Venture (CQCAJV) – Mines are open cut coal mines and among largest in Australia – CQCAJV appointed entity known as BM Alliance Coal Operation P/L (BMA) as manager and agent in relation to particular matters – regulated host for each of the RLHAO's sought by Unions is BHP Coal, covered by the *BMA Enterprise Agreement 2022* (BMA Agreement/host employment instrument) – hearing regarding applications conducted over 9 days with evidence given by over 30 persons, further 6 witness statements tendered by persons who were not required for cross-examination – issues raised in matter: (1) BHP and OS parties (OS Maintenance and OS Production) submitted Commission cannot be satisfied performance of work by employees of OS parties is not or will not be for provision of a service, rather than supply of labour for purposes of s.306E(1A); and (2) WorkPac parties and Chandler Macleod Group parties submitted Commission should be satisfied that it is not fair and reasonable in all circumstances to make orders that will apply to them and their employees for purposes of s.306E(2) – in relation to applications regarding OS parties – employees of OS parties perform work at the Mines – total of 9 applications before Commission regarding OS parties – MEU made separate applications with respect to OS Production and OS Maintenance at the Mines and AMWU made separate applications with respect to OS Maintenance at the Mines – OS parties are part of BHP Group of companies and established in 2018 and first deployed to Mines in 2019 – OS parties employ approximately 3,797 employees who work across various BHP Group operations in Australia – most BHP Coal employees who perform work at the Mines are covered by the BMA Agreement, other than those in administrative, supervisory or professional roles – OS Production employees primarily engaged in work associated with load and haul overburden mining, involving waste or overburden removal, also referred to as pre-strip operations – OS Maintenance employees primarily engaged in providing maintenance and repair services in relation to high usage mining machinery and equipment at various mines operated by BHP – OS parties have contractual arrangements with BMA which facilitate the operations undertaken by those entities and the work performed by their employees – no dispute that employees of BHP Coal who work at the Mines perform work which is of same kind as performed by employees of OS parties at Mines – for purposes of s.306E(1), BMA Agreement would apply to employees of OS

parties if they were employed directly by BHP Coal – observed BHP Coal is not a small business employer – Full Bench satisfied work performed by employees of OS parties at Mines is not or will not be for provision of a service, rather than supply of labour for purposes of s.306E(1A) – Full Bench considered matters of s.306E(7A) – in relation to s.306E(7A)(a) performance of work – found OS parties have some involvement in matters relating to performance of work, because they are consulted and provide feedback regarding mine and maintenance planning – however, mine and maintenance plans are determined by BMA, and determine matters including timing, priority and nature of work to be performed by employees – in relation to s.306E(7A)(b) direction, supervision and control – found OS parties' supervisors play an important role in day-to-day supervision and direction of OS employees, however, they are required to perform work in accordance with detailed and highly prescriptive requirements imposed by BMA in form of standard operating procedures and safe work instructions, and an array of other policies and procedures, and are subject to monitoring, intervention and direction by BHP's Integrated Remote Operations Centre (IROC) through Minestar and Modular systems – in relation to s.306(7A)(c) use of systems, plant or structures – acknowledged employees of OS parties performing work at the Mines use plant, equipment and systems provided by BMA in performance of their duties, which are the same as those used by employees of BMA in operation of the Mines – in consideration of s.306E(7A)(d) industry or professional standards or responsibilities – found the only 'industry standard' relating to work of regulated employees referred to in evidence concerns health and safety obligations – BHP and OS parties acknowledged BMA is the coal mine operator for the Mines under the *Coal Mining Safety and Health Act 1999* (Qld), and s.41 imposes certain obligations on BMA – observed statutory safety obligations of BMA are relevant to assessment and should be taken into account – in relation to s.306E(7A)(e) extent work is of specialist or expert nature – found work performed by OS employees is capable of being described as of a speciality or expert nature in a general sense, however, work is of same nature and involves same specialised and expert skills as are exercised by employees of BHP Coal performing same work in the same Mines – Full Bench satisfied requirements of s.306E(1) met – satisfied performance of work by employees of OS parties is not or will not be for provision of service, rather than supply of labour for purposes of s.306E(1A) – required to make RLHAO's with respect to OS employees – BHP and OS parties did not submit it was not fair and reasonable to make such orders for purposes of s.306E(2) – Full Bench considered applications with respect to WorkPac and Chandler Macleod Group parties – MEU made three separate RLHAO applications with respect to WorkPac employees at Mines – WorkPac is one of Australia's largest privately owned workforce services businesses and provides traditional recruitment services and directly employs on-hire employees – as at December 2024, WorkPac supplied over 600 employees to perform work at the Mines – MEU also made RLHAO application with respect to Chandler Macleod Group employees with respect to Peak Downs Mine – Chandler Macleod Group provides contingent labour to clients and is part of global business known as RGF Staffing, which provides human resources services internationally across multiple industries and sectors – as of October 2024, Chandler Macleod Group provides approximately 138 employees to perform work at Peak Downs Mine – WorkPac and Chandler Macleod Group parties accept they are employers who supply employees to perform work for BMA and that if those

employees were directly employed by BHP Coal, the BMA Agreement would apply to their employment – Full Bench satisfied requirements of s.306E(1) met – Full Bench satisfied work performed by employees of WorkPac and Chandler Macleod Group at Mines is not or will not be for provision of a service, rather than supply of labour for purposes of s.306E(1A) – Full Bench considered matters of s.306E(7A) – in relation to s.306E(7A)(a) – no evidence WorkPac or Chandler Macleod Group has substantial involvement in matters relating to performance of work by its employees working at Mines – in relation to s.306E(7A)(b) – evidence suggested BMA directs, supervises and controls work of WorkPac and Chandler Macleod Group employees who are supplied to perform work at the Mines – in relation to s.306E(7A)(c) – found WorkPac and Chandler Macleod Group employees operate the same equipment and machinery as BMA employees and subject to same work safety policies, inductions, access to site and site policies and procedures – in relation to s.306E(7A)(d) – found no evidence WorkPac or Chandler Macleod Group is or will be subject to industry or professional standards or responsibilities regarding work of their employees supplied to Mines – in relation to s.306E(7A)(e) – even if for specialist or expert nature, satisfied performance of work not for provision of service, rather than supply of labour per s.306E(1A) – Full Bench considered s.306E(2) and (8) in relation to WorkPac – not satisfied it is not fair and reasonable to make RLHAO with respect to WorkPac employees supplied to perform work for BMA – WorkPac employees are performing same work in the same crews as BMA employees and receiving substantially lower remuneration because of identity of their employer – Full Bench not satisfied that it is not fair and reasonable to make orders sought by MEU, taking into account WorkPac's industrial arrangements and financial impact on WorkPac – Full Bench also considered s.306E(2) and (8) in relation to Chandler Macleod Group – not satisfied it is not fair and reasonable to make RLHAO with respect to Chandler Macleod Group employees supplied to perform work at Peak Downs Mine – found Chandler Macleod Group employees performing same work in the same crews as BMA employees and receiving substantially lower remuneration because of identity of employer – considered impact of RLHAO on Chandler Macleod's pay and industrial arrangements, whether order is likely to interfere with claimed advantages of its labour hire arrangements and financial impact on Chandler Macleod Group – Full Bench not satisfied it is not fair and reasonable to make the orders sought by MEU – held RLHAO's granted with respect to each of the applications – parties to confer and communicate in relation to proposed timetable for resolution of any issue as to timing of operation of orders.

Applications by the Mining and Energy Union and the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) re: Goonyella Riverside Mine, Peak Downs Mine and Saraji Mine

C2024/3846 and Ors
Asbury VP
Gibian VP
Durham C

Brisbane

[2025] FWCFB 134
7 July 2025

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**2** ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – disciplinary process – ss.739, 604 Fair Work Act 2009 – permission to appeal – appeal – Full Bench – respondent

proposed to dismiss appellant for misconduct – appellant involved in incident where she engaged in serious verbal abuse against a worker employed by a third party at a café – café situated in Dandenong Botanical Gardens, Victoria, where appellant worked – dispute centred on misconduct process conducted under clause 29 of *Parks Victoria Enterprise Agreement 2021* (Agreement) – clause 29.7(b) of Agreement required a disciplinary outcome which 'must be fair and reasonable in all circumstances and not disproportionate to the seriousness of the matter' (correctness standard) – respondent determined following misconduct process that appellant should be terminated – parties requested Commission to determine firstly whether requirements of procedural fairness had been met and secondly, whether the outcome was fair, reasonable and proportionate to misconduct – Commission determined appellant not afforded procedural fairness at all stages during misconduct investigation – Commission also determined proposed termination of appellant was a 'discipline outcome' that is 'fair and reasonable in all circumstances and not disproportionate to the seriousness of the matter' – appellant worked for respondent as a team leader which involved managing a gift shop at Dandenong Botanical Gardens – appellant worked for respondent for 21 years prior to dismissal – appellant was primary contact between a nearby café and respondent, including for customer complaints – following restructure, complaints were dealt with by another team at respondent – appellant continued to receive customer complaints despite not being responsible for dealing with them – allegations against appellant were: (1) appellant entered café in circumstances where she knew she was not permitted to; (2) appellant aggressively shouted and swore while trying to find café worker; (3) appellant re-entered café with customer while telling the customer that she was not allowed in the café, whilst café worker was not present; (4) when the café worker returned, appellant swore at him and demanded to know where he had been, other customers also shouted at café worker about delay and appellant took no action to prevent repeated abuse of café worker – during respondent's investigation, café worker stated he had since left his job due to incident, since he felt 'ashamed' – appellant appealed first instance decision and claimed: (1) Commission erred by finding that proposed termination of appellant's employment was a 'discipline outcome' that is 'fair and reasonable in all circumstances' and not disproportionate to seriousness of matter – (2) appellant denied procedural fairness by finding that her conduct caused serious consequences for café worker and relying on that finding to assess severity of appellant's misconduct, in circumstances where the café worker was not a witness and appellant did not have opportunity to cross-examine him, nor was appellant put on notice of finding – both parties submitted discipline outcome must be fair and reasonable in all circumstances and not disproportionate to seriousness of matter – Full Bench noted how correctness standard applies even though reasonable minds may differ about the matter – if one of the standards was not met, correct answer to question on appeal needs to be no – Commission considered mitigating circumstances whether proposed outcome of termination was fair – appellant was long-term employee of 21 years – unblemished disciplinary record – performance development plans established appellant had excellent performance record – appellant suffered difficult personal issues including deaths of close family members and was recovering from a respiratory illness – appellant was unsettled by aggressive and threatening complaints received by customers because no one was in attendance at the café – appellant was

genuinely remorseful for her actions – found disciplinary outcome would have detrimental consequences for appellant – appellant derived her sense of identity and community from work – appellant's age would impact her capacity to find other work – Full Bench noted prospect of repeat behaviour was remote – Full Bench considered appellant's misconduct regarding fourth allegation was significant and inexcusable – acknowledged appellant had also tried to de-escalate situation – found Commission had erred in relying on café worker's incomplete draft record of interview – café worker stated in interview he had to leave his employment because of appellant's conduct – Full Bench considered Commission had given too much weight to café worker's interview, as café worker was not a witness in the case and failed to confirm the accuracy of the interview notes (despite investigator's efforts to do so) – Full Bench observed it remained the case appellant subjected café worker to 'brutal public humiliation' – seriousness of appellant's conduct not diminished by absence of direct evidence of impact – noted numerous and countervailing considerations in appellant's favour – appellant had unblemished disciplinary record following more than 20 years of employment – appellant of 60 years of age and genuinely contrite – appellant's verbal outburst occurred in context of personal circumstances exacerbated by her respiratory illness – noted standard required disciplinary outcome that was fair and reasonable in all circumstances and not disproportionate to seriousness of matter – noted concepts are distinct but may overlap – proportionality focuses on relationship of sanction to disciplinary offence – observed distinction in clause 29 of Agreement between 'fair' and 'reasonable' is a fine one – reasonableness differs from fairness and is concerned with a decision that is the product of sound judgement – fairness concerned with interests of parties and café worker who was abused – Full Bench found appellant's continued employment not unfair to respondent – satisfied no risk of repetition of misconduct – café worker would suffer no unfairness as he no longer works at café – observed loss of job for appellant would be a heavy and life changing penalty which she would unlikely recover from, given limited prospects of gaining other employment – in all of the circumstances, dismissal would be unfair – Full Bench concluded Commission did not arrive at correct answer to question of whether proposed termination of appellant was a 'discipline outcome' that is 'fair and reasonable' in all the circumstances and not disproportionate to the seriousness of the matter for purposes of clause 29.7(b) of Agreement – Full Bench noted question on appeal ultimately involves a value judgment – different conclusion of Full Bench does not imply Commission made any objectively verifiable mistake – first limb of ground 1 of appeal upheld, sufficient to dispose of appeal – permission to appeal granted – public interest provisions of enterprise agreements to be correctly construed and applied, and determined Commission did not reach correct result – appeal allowed – first instance decision quashed – on rehearing, concluded disciplinary outcome for appellant was not fair and reasonable in all the circumstances and disproportionate to the seriousness of the matter.

Appeal by Woodlock against decision of Perica C of 6 December 2024 [[2024] FWC 3424] Re: Parks Victoria

C2024/9310 [2025] FWCFB 126
Asbury VP Brisbane 26 June 2025
Colman DP
O'Neill DP

**3** TERMINATION OF EMPLOYMENT – Misconduct – ss.394, 400, 604 Fair Work Act 2009 – permission to appeal – appeal – Full Bench – appellant lodged appeal against first instance decision of Commission – at first instance, Commission dismissed appellant's unfair dismissal application and found respondent had valid reason for termination of appellant, and dismissal was not harsh, unjust or unreasonable – appellant employed with respondent since 2008 as side loader garbage truck driver and commenced full time work since September 2014 – appellant's termination resulted from series of incidents between October 2023 and July 2024 – appellant involved in minor accidents on 9 October 2023 and 11 October 2023 whilst driving garbage truck, and received warning letter on 27 October 2023 – on 14 and 15 February 2024, appellant was observed seated in operator/pickup side whilst operating vehicle and not yet on a run – on 28 February 2024, appellant observed travelling more than speed limit of 10km/h on road adjacent to yard, and received second warning letter on 19 March 2024 – on 10 April 2024, a stop work incident over safety concerns took place – on 12 April 2024, appellant received stand down letter and failed to keep stand down letter confidential – on 21 June 2024, appellant subject to drug and alcohol testing in early hours of morning and returned a blood alcohol content (BAC) reading of 0.013% and a second reading of 0.007% later that day – on 27 June 2024, appellant was issued show cause letter for BAC test results, however responded by stating his second test was below company policy of 0.00% – on 16 July 2024, appellant attended disciplinary meeting and was terminated with immediate effect – appellant raised six grounds of appeal that Commission: (1) denied him procedural fairness by making adverse findings against him about conduct in circumstances where respondent did not contend for those findings by way of evidence or cross-examination – (2) failed to consider substantial and articulated arguments advanced by him regarding harshness – (3) erred in failing to consider under s.387(b) and (c) whether he had been notified of reasons for termination and whether he was given opportunity to respond to reasons in making findings of 12 April 2024 – (4) made significant errors of fact: (a) in finding there would have been somewhere for him to pull over and change driving sides on 14 February 2024; (b) in finding Commission not satisfied there were any places to pull over and change sides on 15 February; (c) in finding he was not genuinely remorseful about returning 0.007% BAC reading; (d) in finding he was aware there was a 10km/h speed limit imposed by respondent on the road adjacent to yard; (e) and in finding speed limit requirement was regularly communicated to drivers at toolbox talks – (5) failed to take into account evidence of Collections Manager when it considered appellant's conduct on 15 February 2024 – (6) similar to ground 3, failed to take into account under s.387(b) and (c) that he was not afforded opportunity to respond to allegation of speeding on 28 February 2024 – Full Bench considered permission to appeal – satisfied in public interest to grant permission to appeal per s.400 – satisfied grounds of appeal raise issues of wider importance to conduct of unfair dismissal proceedings before Commission, in relation to approach to be adopted if Commission proposes to make findings or rely upon matters not advanced by parties – Full Bench considered appellant's grounds of appeal – in relation to ground (1) procedural fairness – Full Bench observed it is up to Commission to find there is a different valid reason for dismissal other than the one put forward by respondent [*Newton*] –

however, if Commission determined a valid reason for dismissal exists, which has not been put forward by respondent, the Commission must act judicially and afford the parties procedural fairness, and appellant must be put on notice and have fair opportunity to address a matter the Commission proposes to rely upon adverse to appellant's case [*Newton* and *Steed*] – observed procedural fairness does not require a tribunal to give running commentary upon what it thinks about the evidence that is given or issues which arise in proceedings [*SZGUR*] – found Commission made further findings in relation to appellant's conduct on 12 April 2024, including appellant threatening manager with loss of his house and his manager's manager with loss of his job, refused more than one reasonable and lawful direction to leave site, attempted to make 50 copies of his stand down letter to put in each driver's pigeon hole and caused commotion that caused work to be delayed for all drivers in yard up to three hours – Full Bench satisfied appellant denied procedural fairness in relation to additional findings Commission made in relation to 12 April 2024 incident, due to manner in which proceedings were conducted – written submissions filed on behalf of respondent did not identify it contended there was a valid reason for dismissal as a result of appellant's conduct on 12 April 2024, other than manner set out in allegations letter of 23 April 2024 and final warning letter of 9 May 2024 – counsel for respondent did not make opening oral submissions or suggest it intended to run a case which departed from the written submissions filed in advance of the hearing, and respondent did not squarely cross-examine appellant in relation to additional allegations – counsel for appellant limited final oral submissions to addressing allegation appellant breached confidentiality, oral submissions for respondent made reference to appellant's threats to managers, however in reply, counsel for appellant objected to the submission being made on grounds the matter had not been subject to cross-examination – Full Bench satisfied appellant denied procedural fairness, and appellant should have been put on notice that Commission was considering additional findings, since appellant may have made additional submissions and conducted cross-examination differently, which could have changed outcome – however, Full Bench rejected appellant's claim he was denied procedural fairness due to Commission finding he engaged in 'degree of recklessness' in drinking alcohol night before work, since Commission's comment was in relation to appellant's decision to drink night before work in context of amount of sleep he was to get, and this point was put to appellant's representative who had opportunity to make submissions on point – in relation to ground (2) failure to consider harshness – Full Bench did not discern any error in Commission declining to separate drug and alcohol policy breaches from other safety related policy breaches – found Commission considered BAC result was low-level, noting appellant would be legally able to drive as a normal road user – found Commission considered sanctions imposed on two other employees who breached the drug and alcohol policy (Policy) and distinguished the disciplinary outcomes on the basis neither of them had a history of safety related breaches – found Commission considered appellant's evidence that he was committed to never drinking in evenings before work again, despite putting little weight to claim, Full Bench found no discernible error in conclusion made by Commission that appellant should have known better, being a health and safety representative (HSR) – Full Bench rejected ground 2 – in relation to grounds (3) and (6) misapplication of s.387(b) and (c) – Full Bench found additional findings of appellant's conduct of 12 April 2024 and appellant's speeding on

public road on 28 February 2024 were not matters put to appellant in show cause letter or termination letter – observed where Member finds there is a valid reason for dismissal related to conduct or capacity other than the reason put forward by the employer, the Member must consider how that finding affects the nexus of s.387(b) and (c) being whether appellant was notified of that reason and whether given an opportunity to respond to reason – found Commission erred in finding appellant had been notified of and had opportunity to respond to reasons for dismissal in circumstances which Commission found there was a valid reason on basis which differed from reasons relied upon by respondent at time of dismissal – in relation to grounds (4(a)), (4(b)) and (5) alleged significant errors of fact and failure to take into account relevant consideration – Full Bench considered findings of Commission that appellant contravened respondent's policies by driving vehicles on operator/pickup side on 14 and 15 February 2024 – Full Bench found Commission made conclusion there must have been at least one safe place to stop on 14 February 2024 based on appellant's comments that there were 'very few' places to stop legally – Full Bench found not open for Commission to draw conclusion on evidence that there was a safe place for appellant to stop and change sides – in relation to evidence by Collections Manager about pickup location on 15 February 2024, Full Bench found not open for Commission to reject that there was no safe place for appellant to stop and change sides prior to commencing his run – grounds 4(a) and 4(b) upheld – unnecessary to consider ground 5 – in relation to ground (4(c)) significant error of fact – Full Bench rejected appellant's argument that significant error of fact was made in finding he was not genuinely remorseful – up to Member to decide what weight should be placed on expression of remorse in evaluating harshness – email of 2 July 2024 indicated appellant's limited regret for past actions – in relation to grounds (4(d)) and (4(e)) speeding and significant error of fact – Full Bench rejected appellant's argument about his awareness of 10km/h speed limit sign on public road adjacent to yard – open to Commission to find speed limit sign was put up in January 2024 and that appellant, as an experienced driver, was aware or should have been aware that speed limit sign corresponded to speed limit on road – open to Commission to find speed limit was regularly discussed during toolbox meetings – Full Bench considered it appropriate to redetermine matter – considered valid reason per s.387(a) – considered traffic crashes in October 2023 provided little weight in final assessment of valid reason for termination, since appellant appropriately disciplined for incidents and no further incidents of same kind occurred – accepted 10km/h speed limit on public road adjacent to yard was imposed by respondent rather than being a legal speed limit – despite appellant's admission to driving 20km/h, Full Bench did not consider admission to amount to valid reason for dismissal, given appellant agreed to slow down and observe speed limit in future – Full Bench found direction for appellant not to discuss stand down or engage with other persons in workplace was unrealistic for him as a union delegate, and did not constitute valid reason for dismissal – Full Bench satisfied low-level positive BAC of 0.007% was valid reason for dismissal – satisfied appellant notified of reason for termination via stand down letter, show cause letter and termination letter – Full Bench considered other factors per s.387(h) – agreed with first instance decision that appellant's position as HSR and being a long-standing employee meant a higher level of compliance was expected of him in relation to Policy – however, considered BAC result was low-level, was appellant's first breach of Policy,

appellant would have been legally able to drive with a result of 0.007%, and appellant gave evidence he was committed to compliance with Policy in future – Full Bench satisfied dismissal harsh, despite low-level positive BAC result, particularly due to lesser sanctions for the two other employees under the same Policy – observed appropriate course would have been for appellant to receive written warning and subject to self-testing or random BAC testing in future – considered appellant's age (mid-50's), 16 years' experience working for respondent, mortgage and responsibilities for children, and being union delegate and HSR weighed in favour of harshness – Full Bench satisfied dismissal was harsh and applicant was unfairly dismissed – first instance decision quashed – reinstatement ordered for appellant to position he was employed in immediately prior to dismissal, with continuity of employment and service maintained – appropriate to make order under s.391(3) in relation to remuneration lost – appellant to provide further evidence regarding quantum of backpay.

Appeal by Barber against decision of McKinnon C of 12 February 2025 [[2025] FWC 403] Re: Veolia Recycling and Recovery P/L

C2025/1347 [2025] FWCFB 141
Gibian VP Sydney 10 July 2025
Lake DP
Slevin DP

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**4** CASE PROCEDURES – Harman undertaking – leave to use documents produced in Commission proceedings in related Federal Court proceedings – ss.590, 604 Fair Work Act 2009 – appellant was dismissed by respondent and made a general protections application involving dismissal per s.365 – in preparation for hearing regarding jurisdictional objection in general protections application, Commission made order for production on 14 March 2025 under s.590(1) and (2)(c) of FW Act directed at respondent – documents to produce included documents related to: appellant's personnel file, decision to conclude appellant's employment, concerns raised by appellant about his safe return to work, medical certificates and investigation – respondent produced documents on 17 March 2025 – respondent withdrew its jurisdictional objection during hearing – matter proceeded to conference – following conference, Commission issued a certificate under s.368(3) on 24 March 2025 – on 7 April 2025, appellant commenced proceedings in Federal Court of Australia – appellant alleged respondent contravened various provisions of FW Act (ss.117, 340 and 351), including by terminating his employment for reasons prohibited under ss.340 and/or 351 – appellant also alleged certain breaches of contract as well as contraventions of *Corporations Act 2001* (Cth) and *Work Health and Safety Act 2011* (Qld) – Federal Court proceedings remain on foot – on 17 July 2025, appellant applied to Commission for order that leave be granted for him to use certain documents produced pursuant to order for production issued by Commission in his general protections application, for purpose of Federal Court proceedings – respondent's solicitors consented to appellant's request – appellant submitted leave is not required, because of interconnection between proceedings, and use of document in relation to Federal Court proceedings would not constitute a collateral or ulterior purpose – however, appellant sought formal order that he be released for implied undertaking to use the documents for purpose of Federal Court

proceedings to ensure 'abundant clarity' – Commission observed 'Harman undertaking' obligation – where a party to litigation is compelled to produce documents or information during litigation, other parties having access to the documents or information are subject to an implied obligation not to use the documents or information for a collateral or ulterior purpose unrelated to proceeding [*Harman* and *Hearne*] – s.590(1) and (2)(c) of FW Act permit Commission to inform itself by 'requiring a person to provide copies of documents or records, or to provide any other information to the FWC' – conduct that contravenes an order of Commission is an offence under s.675(1) of FW Act – Commission observed it is generally impermissible to use documents or information produced in one proceeding for purpose of separate proceeding without obtaining leave – however, leave may not be required where there is sufficient connectedness between first and second proceedings such that use in second proceeding is not collateral or improper [*Hazell-Wright*] – Commission acknowledged relationship between Commission proceedings and Federal Court is clear – unless application includes claim for interim relief, a person who alleges they have been dismissed in contravention of Part 3-1 of FW Act cannot make a general protections court application unless the person first applies to Commission under s.365 and Commission has issued a certificate under s.368(3) – claims sought by appellant in Federal Court proceedings include that he was dismissed in contravention of ss.340 and/or 351 of FW Act, which fall within Part 3-1, being the same matter alleged in Commission proceedings – found use of documents produced in Commission proceedings in Federal Court proceedings is for purpose of determination of same dispute between same parties, and would not involve breach of implied undertaking – acknowledged another reason why leave is not required – when consent is clearly given, the consent of producing party is sufficient to release party in receipt of documents from obligations owed [*Dagi* and *Lovell*] – respondent had consented to leave being granted for appellant to use documents for Federal Court proceedings, which is sufficient to release appellant from his obligations with respect to use of documents – out of 'abundance of caution', Commission considered whether leave should be granted for appellant to be relieved from implied undertaking – acknowledged party concerned must demonstrate 'special circumstances' [*Liberty Funding*] – Commission satisfied that, if required, leave should be granted for appellant to use documents produced to Commission for purposes of Federal Court proceedings – (1) respondent consented to order being made granting leave for appellant to use documents in Federal Court proceedings – (2) application to Commission was essential prerequisite to bringing Federal Court proceedings, and Federal Court proceedings involve determination of same dispute between same parties – (3) documents produced all relate to appellant's employment with respondent and concern him – (4) documents are likely to facilitate resolution of issues in Federal Court proceedings, including reasons for conduct complained of by appellant – (5) solicitors for appellant indicated documents may assist parties in conduct of alternative dispute resolution processes, which should be encouraged – Commission held it is appropriate that an order be made granting leave for appellant to use relevant documents for purposes of Federal Court proceedings.

**5** TERMINATION OF EMPLOYMENT – Merit – reinstatement – s.394 Fair Work Act 2009 – applicant employed by respondent as a professor and chair of reservoir engineering in respondent's Department of Infrastructure Engineering – in 2017, applicant was academic supervisor of student who was undertaking PhD – in May and June 2017, applicant and student sent one another numerous intimate texts and emails – during that period, applicant had recently separated from his partner and student was also recently separated – later in 2017, student told another professor that she was concerned about applicant's behaviour and no longer wanted him to be her supervisor – in 2018, respondent's human resources (HR) department was informed of situation and met with student to discuss matter – student indicated to HR she did not want to make a formal complaint and was assigned a new PhD supervisor, and no further action was taken – in January 2024, student sent an email to respondent which alleged applicant had sexually harassed her in 2017 – respondent appointed external investigator, which found no basis for sexual harassment allegation, but concluded applicant's messages to student in May and June 2017 had been highly inappropriate and contravened the respondent's Appropriate Workplace Behaviour (AWB) policy – on 17 December 2024, respondent summarily dismissed applicant due to serious misconduct – applicant submitted: behaviour was private 'out of hours' conduct and could not be a valid reason for dismissal; respondent's use of his private messages to student had breached his right to privacy; dismissal unfair because it was disproportionate and occurred 7 years after the conduct, and he otherwise had an unblemished record – respondent submitted: conduct was serious misconduct which warranted dismissal; applicant sent highly inappropriate and unprofessional messages and comments to student that clearly contravened AWB policy, including sending a photo of himself in boxershorts; applicant deliberately diverted correspondence with student to private channels of communication so respondent could not see it; given nature of relationship between supervising professor and PhD student, it was untenable to suggest communications were 'out of hours'; inappropriate messages were sent in context of significant power imbalance between applicant and student, who was foreign; messages only came to respondent's attention in 2024, so it could not have dealt with matter earlier – Commission considered criteria for harshness per s.387 – Commission rejected applicant's argument that conduct was 'out of hours' and in private domain – observed PhD student reliant on applicant who held significant power over student – acknowledged relationship between supervisor and PhD student is an intense one that requires much time spent together, and research would take place largely outside of lecture halls and tutorial rooms – found workplace of an academic supervisor is present during any interaction with a PhD student – rejected applicant's submission he wore 'different hats at different times', when communicating with student applicant wore only 'one hat', which was respondent's hat – found all interactions between applicant and student took place in context of ever-present academic relationship and in domain of work – acknowledged applicant's conduct highly inappropriate and contravened AWB policy – observed any reasonable person would understand relevant constraints preclude supervisors from having intimate personal relationships with students, because it compromises objectivity

and requirement to protect interests of students, and is unprofessional – found valid reason for dismissal made out per s.387(a) – found s.387(b)-(g) factors not controversial – Commission considered other relevant matters per s.387(h), including historical conduct from over 7 years ago – found significant time gap between 'crime and punishment' unfair [*Owczarek*] – found applicant had demonstrated misconduct was isolated because no further incidents or complaints occurred since that time – considered impact of applicant's insight into his behaviour – found applicant accepted his conduct was wrong and was genuinely sorry – observed applicant 62 years old and was deprived of opportunity in seeking new employment 7 years ago, and it was not forgone conclusion respondent would proceed to terminate his employment for his conduct 7 years ago – Commission acknowledged although applicant's contravention of AWB policy was serious misconduct, due to significant time gap between conduct and dismissal and his unblemished record over that time, dismissal was harsh and therefore unfair – Commission considered remedy – respondent submitted reinstatement inappropriate due to loss of trust and confidence between parties made relationship untenable – Commission found respondent's argument about loss of trust and confidence not sound and rationally based – rejected respondent's contention that there was a real risk that applicant would engage in similar behaviour again – found relationship between applicant and respondent not irreparably damaged by applicant's misconduct, due to otherwise unblemished record – Commission considered it appropriate to make order that applicant be reinstated to position he held prior to dismissal per s.391(1) – considered order for lost remuneration appropriate – period of six weeks considered appropriate taking into account degree of applicant's attempts to mitigate loss – amount not reduced by misconduct due to passage of time – orders for reinstatement, continuity of employment and period of continuous service, and lost remuneration of $28,098.12 (less taxation) issued.

Matthai v The University of Melbourne

U2024/15632 [2025] FWC 1938
Colman DP Melbourne 7 July 2025

## Other Fair Work Commission decisions of note

Appeal by DP World Sydney Limited against decision of Wright DP of 3 February 2025 [[2025] FWC 294] Re: Witherden

TERMINATION OF EMPLOYMENT – Misconduct – standard of appellate review – ss.394, 400, 604 Fair Work Act 2009 – permission to appeal – appeal – appellant challenged first instance decision to reinstate respondent – appellant operates international container stevedoring terminal – respondent employed by appellant for almost 25 years – respondent selected for random drug and alcohol test – returned non-negative result for cocaine – dismissed for breach of appellant's Alcohol and other Drugs Policy (AOD Policy) – at first instance Commission found appellant had valid reason for dismissal but other factors rendered dismissal harsh and unreasonable – other factors included respondent's length of service, inadequate information in AOD Policy regarding drug hangover effects and appellant's failure to consider rehabilitation – reinstatement and continuity of employment ordered – appellant filed numerous grounds of appeal – appeal can only be made with permission – Full Bench satisfied permission to appeal in public interest per s.400 and warranted for two reasons – (1) appeal raised issue of importance in relation to standard of appellate review of decisions made under Part 3-2 of FW Act – (2)

respondent's dismissal followed non-negative result for illegal substance while at work in safety critical environment – Full Bench satisfied circumstances supported permission to appeal – permission to appeal granted – Full Bench considered standard of appellate review – appellant contended questions of whether dismissal 'harsh, unjust or unreasonable' for purpose of s.385(b) and whether reinstatement 'inappropriate' for purpose of s.390(3)(a) involve application of evaluative statutory norm or legal standard to findings of fact, such that they admit only one correct answer and are subject to correctness standard of appellate review – such findings not discretionary and do not attract application of principles in *House v The King* on appeal – Full Bench noted if appellant's submission correct, would be sufficient to uphold an appeal if Full Bench formed different view to Commission at first instance – subject to permission to appeal, would require Full Bench to consider in every case whether dismissal was harsh, unjust or unreasonable and question of remedy irrespective of whether any error could be identified in approach, reasoning or decision-making process of first instance member – appellant noted Commission has consistently found discretionary standard of appellate review applied in unfair dismissal case appeals – appellant contended Commission was wrong to form that view in the past – crux of appellant's submission was in other contexts questions similar to finding that an applicant's dismissal was harsh, unjust or unreasonable, or whether reinstatement was inappropriate, have been found to attract correctness standard of review – pointed to examples including statutory definition of 'unjust'; whether a party behaved 'unconscionably' within meaning of statute; whether restraint of trade was 'reasonable' and so on – appellant contended finding as to whether dismissal harsh, unjust or unreasonable, or whether reinstatement inappropriate, are of similar nature and should attract same correctness standard on appeal – Full Bench noted determination of which standard of review applies not dependant on whether reasoning to be applied is evaluative or was one in which reasonable minds may differ – determination turns on whether legal criterion to be applied demands a unique outcome, in which case the correctness standard applies, or tolerates a range of outcomes, in which case the *House v The King* standard applies – correctness standard will apply to questions where there is only one permissible legal answer even if that answer involves a value judgment – Full Bench indicated a number of features in FW Act generally and in Part 3-2 in particular, inconsistent with appellant's submission on correctness standard – noted number of features in FW Act contemplate determination of whether dismissal harsh, unjust or unreasonable, or whether reinstatement inappropriate, intended to be determined by way of discretionary assessment by individual Commission member – (1) assessment for purposes of s.385(b) made by reference to broad standards of harshness, injustice and unreasonableness – breadth of decision-making power afforded to primary decision maker is relevant – such broad and value-laden statements consistent with FW Act contemplating different decision-makers may permissibly reach different outcomes – (2) FW Act requires Commission to take into account matters listed in s.387, including 'any other matters the FWC considers relevant' – Full Bench observed fact that matters to which Commission may have regard confined only to what it considers relevant supports conclusion resultant determination is discretionary – (3) when determining application for unfair dismissal remedy Commission not adjudicating existing legal rights – Part 3-2 creates new rights in certain circumstances – task of Commission to determine whether new rights and obligations should be created in circumstances where person has been unfairly dismissed – FW Act does not contain statutory prohibition on unfairly dismissing an employee or confer a right to a remedy – (4) object of Part 3-2 includes 'to establish procedures for dealing with unfair dismissals that … are quick, flexible and informal' and procedures, remedies, and manner of deciding are intended to ensure 'a fair go all round' – further, s.400 requires appeal of Part 3-2 case can only be granted permission to appeal if Full Bench satisfied it is in public interest to do so and an appeal concerning factual findings can only be made on ground there was a significant error of fact – Full Bench observed if, subject to permission to appeal, Full Bench required to redetermine each case without identification of error this would be antithetical to object of Part 3-2 and intent behind s.400 – (5) whether person unfairly dismissed does not turn on whether person's dismissal was, in fact, harsh, unjust or unreasonable but rather whether Commission 'satisfied' of that matter – fact that 'satisfaction' built into s.385(b) supports view that section permits range of

permissible outcomes – Commission's power to inform itself in any manner it considers appropriate also relevant for this purpose – for these reasons Full Bench held finding that dismissal was harsh, unjust or unreasonable involves exercise of discretion in a broad sense and such determination can only be overturned on appeal by identification of relevant error in decision-making process as contemplated in *House v The King* – Full Bench stated answer even more straightforward in case of decision as to whether Commission satisfied reinstatement 'inappropriate' for purposes of s.390(3)(a) – Full Bench observed other parts of FW Act supported its conclusion – Commission 'may' order reinstatement or order compensation if s.390(1) requirements are met, suggestive of discretion – Full Bench also noted question touched on by the Court in context of judicial review being sought against an earlier Full Bench decision wherein it stated 'in appeals in some other fields of judicial enquiry which involve a two-step examination (satisfaction of conditions for judicial examination, followed by discretionary relief) appellate review of the first stage (as well as the second) also depends on *House v The King* principles even where the first stage may be described as a question of ultimate fact, or "jurisdictional"' [*Toms*] – Full Bench embraced observations of Buchanan J (with whom Allsop CJ and Siopis J agreed), as while no party in *Toms* contended the correctness standard applied to that question, the standard of review was central to the Full Court's decision – as a result of above conclusions, Full Bench rejected appellant's grounds relating to standard of appellate review – remaining grounds considered, contrary to appellant's prior submissions, consistent with *House v The King* error principles – after detailed consideration Full Bench rejected remaining grounds of appeal, finding variously: failure to consider alternatives to dismissal was relevant to question whether dismissal was harsh or unreasonable; there was no denial of procedural fairness; the Commission did not err in assessing the adequacy or otherwise of the AOD Policy; Commission did not take into account an irrelevant consideration regarding intoxication; and rejected suggestion Commission's decision was unreasonable or plainly unjust and liable to be set aside on that basis – held no errors at first instance demonstrated – appeal dismissed.

C2025/1269 [2025] FWCFB 133
Gibian VP Sydney 4 July 2025
Lake DP
Slevin DP

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Hotak v Rasier Pacific P/L

CONDITIONS OF EMPLOYMENT – unfair deactivation – power to dismiss – ss.536LU, 587 Fair Work Act 2009 – Full Bench – matter referred by President to Full Bench per ss.582 and 615(1) of FW Act – applicant worked for respondent (Uber) as a driver from 18 November 2020 – on 24 March 2025, at around 11pm applicant picked up a rider and two of their guests – Uber later received reports via Uber Driver Platform from applicant and rider with respect to an alleged physical altercation (alleged safety incident) – applicant asked rider and guests to stop using drugs in vehicle and asked them to leave – rider complained applicant threatened them with a baseball bat – rider and guests allegedly assaulted applicant from behind and exited vehicle – applicant denied possession of weapon or threatening rider and guests – applicant called triple zero and formally reported alleged safety incident to Police – on 27 March 2025, applicant provided Uber with further details regarding alleged safety incident – on 29 March 2025, Uber issued applicant a preliminary deactivation notice per s.11 of *Fair Work (digital labour platform Deactivation Code) Instrument 2024* regarding alleged safety incident – applicant responded in writing the same day in relation to deactivation notice – on 8 April 2025, Uber issued a final deactivation notice to applicant from Uber Driver Platform – on 9 April 2025, applicant applied to Commission for unfair deactivation remedy – on 28 April 2025, applicant discontinued initial application – on 5 May 2025, Commission served applicant's new application on Uber – on 19 May 2025, Uber reactivated applicant's access to Uber Driver Platform and applicant recommenced performing work as driver for Uber – applicant has completed over 150 trips for Uber since account reactivated – Uber submitted application should be dismissed because of unreasonable prospects of success due to:

(1) reactivation of account and (2) limited remedies, since the FW Act only provides one remedy for unfair deactivation (reactivation) per ss.536LP and 536LQ – Uber noted lost remuneration can only be considered per s.536LQ(3) only after an order for reactivation has been made, and the FW Act prohibits ordering compensation in unfair deactivation proceedings – applicant submitted he was deactivated and matters set out in s.536LQ(1)(a) to (c) are intended to be illustrative rather than exhaustive or conclusive of types of orders the Commission can make in order to restore a person to the position they would have been in, but for deactivation – applicant submitted import of s.587(2) is to carve out from power under s.587(1) applications premised on grounds in ss.587(1)(b) to (c) in relation to classes of application detailed – submitted provision operates to prohibit Commission exercising power under s.587(1) on grounds detailed in s.587(2) [*Munjoma*] – indicated Uber's application for dismissal grounded on s.587(1)(c), and not contended nor suggested application was not made in accordance with FW Act per s.587(1)(a), hence bases of s.536LW do not apply – Uber submitted phrase of 'no reasonable prospects of success' did not indicate reliance on s.587(1), but reflected Uber's assessment of the relative weakness of applicant's case – Uber contended Commission has suite of powers available to it to determine question referred to Full Bench and that s.587(1) provides that the grounds set in paragraphs (a) to (c) do not limit when the Commission may dismiss an application – Full Bench decided not to accede to request from parties to have matter listed for hearing at this stage, so that parties could make oral submissions – Full Bench found parties were given fair opportunity to make submissions in writing and would be given another opportunity at final hearing to make oral submissions on any point – found Uber's submissions in chief contended that application has no reasonable prospects of success and must be dismissed, however, did not make reference to s.587(1) of FW Act – noted s.587 is the only source of power which Commission has to dismiss an application on basis that there are no reasonable prospects of success and that Commission may dismiss an application on other grounds – Full Bench did not consider other grounds to have been identified or relied on by Uber – observed s.587(2) imposes a clear injunction on Commission not to dismiss an unfair deactivation application made under s.536LU on grounds it has no reasonable prospects of success – Full Bench held no power to dismiss unfair deactivation application on basis it has no reasonable prospects of success – rejected Uber's contention that application should be dismissed on basis Uber reactivated applicant's account on driver platform – matter to be programmed for final hearing to deal with merits of application and relief sought by applicant.

UDE2025/53 [2025] FWCFB 151
Saunders DP Newcastle 21 July 2025
Farouque DP
Thornton C

Applications by the Health Services Union and Australian Education Union

ENTERPRISE BARGAINING – supported bargaining authorisation – ss.242, 243 Fair Work Act 2009 – Full Bench – supported bargaining authorisation application made jointly by Australian Education Union (AEU) and Health and Community Services Union (HACSU) branch of HSU for 14 employers performing disability work in Victoria – employees proposed to be covered by authorisation perform work within coverage of *Social, Community, Home Care and Disability Services Industry Award 2010* (SCHADS Award) and *Social, Community and Disability Services Industry Equal Remuneration Order 2012* (ERO) which applies to employees covered under Schedule B of SCHADS Award – each employer opposed making of authorisation – in November 2023, Full Bench listed matter for directions and invited filing of submissions – because application was first of its kind to be contested, Full Bench invited Australian Government, peak employer organisations, and Australian Council of Trade Unions (ACTU) an opportunity to make submissions – in February 2024, applicants sought leave to remove 5 employers from 19 employers originally named in application, which was granted by Full Bench – matter listed for hearing across two days in November 2024 – AEU gave evidence at hearing of historical context for industry and employees, discussed introduction of National Disability Insurance Scheme and its

Disability Support Worker (DSW) cost model which caps cost of disability support workers and does not fund all conditions under SCHADS Award – contended DSW cost model has almost completely shut down sectoral bargaining, with employers reporting to HACSU that they cannot pay DSW's more than ERO minimum rates of pay as employers are funded by NDIS payments which are aligned with ERO – AEU also explained that applicants were approached by Jobs Australia (employer organisation with members providing disability services in Victoria) in 2017, who informed them that some of their members were engaging staff on zombie agreements with above-Award terms and conditions, which they were struggling to afford due to NDIS DSW Cost Model – discussions with Jobs Australia led to parties commencing interest-based bargaining process through New Approaches Program (now called 'Collaborative Approaches Program') – in 2019, Commission approved *Victorian Disability Services (NGO) Agreement 2019* (2019 VDSEA), which was followed by a 2023 Agreement (2023 VDSEA) with terms rolled over and added to – AEU contended that work performed under coverage of 2023 VDSEA is similar or identical to work under proposed supported bargaining agreement – parties to 2019 and 2023 VDSEA's had identified importance of securing funding for work of employees in interest-based bargaining for VDSEA's and included in them a bargaining charter, which espoused a commitment to multi-employer bargaining as a principle – as 2023 VDSEA expired on 30 June 2024, applicants set out to bargain with its employers – in 2023 HACSU wrote to majority of employers explaining they were covered by soon-to-expire zombie agreements that were more beneficial than Award conditions, and sought to ascertain interest in applying for a supported bargaining application to deal with issues presented by DSW cost model not funding above Award conditions – Full Bench addressed each applicable requirement in s.243 – Full Bench considered whether AEU and HACSU entitled to make application pursuant to s.243(1)(a) – Full Bench observed no dispute that HACSU had standing to make application, but noted contention of two employers (Mambourin and McCallum) that AEU did not have standing to make application, being not entitled to represent industrial interests of their employees who would perform work under Proposed Agreement – AEU submitted DSW's covered by AEU eligibility rule 5(4)(f) – Mambourin submitted its DSW's are not required to hold education qualifications and as such are not 'employed to teach' for purposes of AEU rule 5(4)(f) – McCallum submitted AEU has no coverage in general disability services and only has coverage in disability services education, McCallum does not operate any programs relating to disability education or teaching, and reference in AEU rule 5(4)(f) denies AEU coverage of McCallum employees – McCallum submitted while it operates under AEU zombie agreement, nature of services provided has changed since joining NDIS in 2017, and employees no longer described as 'instructors', but are now DSW's – Full Bench discussed findings and noted question of AEU coverage not one to be determined in present matter – Full Bench found s.242(2) simply requires application be made by employee organisation entitled to represent industrial interests of an employee in relation to work performed under the Agreement – no requirement application be made by a union entitled to represent industrial interests of an employee working for each of the employers who will be covered by Agreement – Full Bench considered it highly likely that AEU entitled to represent at least one employee in application, and in any case noted HACSU entitled to represent industrial interests of an employee to be covered by Agreement – Full Bench therefore satisfied valid application made per s.243(1)(a) – Full Bench considered whether under s.243(1)(b) it is appropriate for employers and employees that will be covered by Agreement to bargain together, noting broad evaluative judgement required towards matters specified in subsections (i)-(iv) – Full Bench considered prevailing pay and conditions within industry (including whether low rates of pay prevail) per s.243(1)(b)(i) – Full Bench observed precedent that reference to 'relevant industry or sector' in s.243(1)(b)(i) indicates assessment extends beyond pay and conditions of employees proposed to be covered by authorisation – applicants relied on Disability Royal Commission Final Report and NDIS DSW cost model to submit majority of disability workforce employed under SCHADS Award and paid in accordance with ERO, and any sectoral Agreements rarely exceed those rates of pay – applicants argued Award rates below national average weekly earnings and insufficient to recognise complexity of disability work – ACTU provided supporting labour market data which indicated full-time workers in sector earn less than national average across multiple metrics, especially women – respondents submitted sector

not low-paid – employers (ASTERIA, Community Accessability, Windarring and others) argued ERO rates for SCHADS Award Level 2 were relatively high compared to other industries and reflective of prior pay equity reforms – further submitted ERO rates higher than equivalent qualifications in sectors such as aged care and child care – Life Skills, George Gray and others submitted increases under ERO over 2012-2020 period significant and not consistent with low pay characterisation – Windarring argued ERO reflects proper valuation and negates finding of low pay – Full Bench reviewed submissions and accepted prevailing rates of pay and conditions in disability sector largely aligned with ERO and SCHADS minimums – found sector remained highly Award-reliant – accepted disability support workers predominantly employed at Level 2 and paid ERO minimums – Full Bench found despite ERO uplift, disability support workers remain low-paid when benchmarked against national averages – referenced ABS data which showed average weekly earnings across all industries significantly exceeded earnings in disability sector – rejected proposition that ERO rates should be considered high simply because they exceed other Award rates – further noted characterising pay as high due to funding caps effectively reverses logic of supported bargaining stream – Full Bench reiterated findings from UWU, AEU and IEU that 'low pay' exists where pay is at or near Award minimums, unless Award rate unusually high; SCHADS Award and ERO rates not unusually high – Full Bench accepted previous decisions as precedent for finding low rates of pay and noted Expert Panel findings that rates in SCHADS Award do not properly reflect value of work and are product of historical gender undervaluation – Full Bench found work of disability support workers complex, relational and skilled, undervalued and further found that in absence of proper work value assessment or capacity for bargaining above Award, current rates remained low – Full Bench concluded prevailing pay and conditions in disability sector low within meaning of s.243(1)(b)(i), weighing in favour of finding authorisation appropriate – Full Bench found inability to bargain individually supported conclusion that supported bargaining is necessary to address structural impediments – Full Bench turned to whether employers had clearly identifiable common interests per s.243(1)(b)(ii), assessing existence of shared characteristics across employers – applicants submitted employers shared Award coverage, NDIS funding model, disability service purpose, and Victorian geographic base – argued prior industrial history also relevant – respondents contended operational differences, organisational structure, and service delivery diversity precluded finding of common interests – Full Bench reviewed statutory criteria and relevant examples – noted s.243(2) provides non-exhaustive examples of common interests including shared geography, enterprise nature, and substantial government funding – Full Bench accepted that common interests under s.243(1)(b)(ii) need not be identical or universal; test is whether employers can be said to share identifiable interests relevant to bargaining appropriateness – applicants submitted all respondents funded under NDIS DSW Cost Model, with shared inability to offer above-Award terms – most employers relied exclusively on NDIS individualised payments, no longer receiving block funding – model limits income per client based on prescribed hourly rates aligned to ERO – applicants further submitted that employees of respondents perform comparable work within scope of SCHADS Award and often subject to legacy zombie agreements – applicants highlighted consistent industrial history across employers and argued continued reliance on outdated Agreements or Award minimums reflected shared industrial challenge – Full bench accepted that industrial history formed part of shared interest context – employers argued common interests not met – ASTERIA, McCallum, Windarring, Community Accessability and others submitted operational differences in business size, internal structures, and services offered; some provide residential care while others focused solely on day services – some employers submitted they had not participated in prior Agreements and thus lacked relevant shared history and that existing Agreements or recent bargaining activity indicated distinct industrial paths – several employers objected to being grouped for bargaining with other employers with whom they had no relationship – employers submitted that service region variation undermined geographic commonality – Full Bench considered all submissions – acknowledged variations in size, scope and delivery model, but held these did not preclude common interest finding – Full Bench accepted funding structure as significant, found all employers substantially reliant on NDIS payments – Full Bench determined uniformity in funding constraint a powerful shared industrial feature – further accepted that employees of all respondents performed work within

same Award coverage, accepted this functional similarity outweighed structural differences – Full Bench found classification and pay structures under SCHADS Award and funding alignment to ERO created shared employment frameworks – Full Bench also recognised geographical nexus with all employers operating exclusively or primarily in Victoria, which would enhance manageability and industrial cohesion in multi-employer negotiations – Full Bench acknowledged not all employers had identical bargaining histories but held this did not defeat broader shared context – Full Bench determined capacity to participate in joint bargaining process, especially where sector-wide issues such as funding and Award dependency are dominant, satisfies statutory test – Full Bench ultimately found common industrial context, shared funding constraints, consistent Award classification use, and overlapping workforce functions sufficient to satisfy s.243(1)(b)(ii) – Full Bench considered whether likely number of bargaining representatives for Agreement consistent with a manageable collective bargaining process per s.243(1)(b)(iii) – Full Bench noted consideration would require some speculation given capacity of employees and employers to choose, and change, bargaining representatives under s.176 of FW Act – Full Bench also observed prospect of agreement being reached not relevant to consideration, being instead concerned with bargaining process and not outcome – most respondents contended that process would not be manageable – Full Bench noted only one respondent, Mambourin, had a recent history of bargaining, though all have engaged in bargaining in past – Full Bench noted all employers covered by SCHADS Award, and predicted bargaining to therefore not be legally or industrially complex, despite time needed to work through all parties' claims – Full Bench noted evidence established applicants had long history of bargaining in disability sector – taking all matters into account, Full Bench satisfied likely number of bargaining representatives for proposed Agreement consistent with a manageable collective bargaining process, weighing in favour of granting authorisation sought – Full Bench noted broad discretionary scope as to weight and relevance of other matters to be taken into account, and considered whether any other matters appropriate per s.243(1)(b)(iv) – ACTU submitted low rates of bargaining in industry and presence of consent between parties to authorisation should weigh in favour of granting authorisation – HACSU submitted promotion of gender equality, access to additional powers available within supported bargaining scheme (Commission may direct a person who is not an employer specified in authorisation to attend a conference at a specified time and place, if Commission satisfied person exercises degree of control over terms and conditions of employees covered in proposed Agreement) – employers variously submitted Full Bench should take into account: respondents' incapacity or unwillingness to bargain or be a part of authorisation, NDIS funding uncertainty amidst a possible wholesale redesign of NDIS system, that DSW funding is fixed with little capacity for employers to supplement or increase, that VDSEA's did not increase rates of pay, that making authorisation would not be in public interest due to risk of market fragmentation, that issues highlighted by applicants would be better dealt with by broader industry level changes, that it appears from applicants' submissions that purpose of proposed Agreement is to preserve more beneficial zombie agreement conditions – Full Bench reasoned that employers would have opportunity to vote on Agreement; unlikely that an employer covered by authorisation would vote for conditions unacceptable to them – regarding NDIS pricing model review, Full Bench noted a year since final report of independent review into NDIS, with no indication that findings would be implemented; therefore not a matter weighing against making of authorisation – Full Bench accepted respondents' capacity to fund conditions greater than SCHADS Award severely constrained by NDIS pricing model, but noted some respondents do in fact provide more generous conditions than Award – apart from generous conditions from zombie agreements, the more generous conditions cited by Full Bench are not provided for in an industrial instrument, so they are not regulated by FW Act – noted it would be consistent with objects of FW Act to enshrine above-Award conditions in an industrial instrument to provide certainty, weighing in favour of making authorisation – Full Bench accepted it difficult for employers to negotiate above-Award conditions if no increase in NDIS funding, but Full Bench observed power under s.246(3) to compel a person to attend bargaining conferences if they hold such a degree of control over terms and conditions of employees covered by Agreement – Full Bench cited bargaining conferences for supported bargaining agreement *Early Childhood Education and Care*

*Multi-Employer Agreement 2024-2026* (ECEC Agreement), where representatives from Commonwealth Government were directed to attend, and announced a 15% wage increase grant for early childhood educators, incorporated into terms of ECEC Agreement – Full Bench found NDIS funding and respondent's lack of capacity to fund above-Award entitlements to not weigh against finding it appropriate for employers to bargain together – regarding employers' contention that applicants could bargain individually with employers, Full Bench observed that one employer (Mambourin) had commenced single-enterprise bargaining and this should weigh against including them in authorisation, however it is not a factor weighing against finding it appropriate that other employers bargain together – Full Bench noted employers covered by zombie agreements likely to suffer some disadvantage when those Agreements terminate; access to bargaining to preserve those entitlements consistent with objects of FW Act, weighing in favour of finding it appropriate that employers bargain together – also in favour of finding it appropriate for employers to bargain together, Full Bench found granting authorisation would open prospects of improving rates of pay in female-dominated workforce and low uptake of bargaining in disability sector – noted finding that employers covered by zombie agreements should bargain to preserve beneficial conditions, Full Bench acknowledged that three employers (Amicus, Menzies and Mambourin) not covered by zombie agreements should not be part of authorisation – Full Bench satisfied in relation to applicable requirements of s.243(1) that restrictions in s.243A do not apply – held bargaining authorisation sought by AEU and HACSU granted.

B2023/1235 [2025] FWCFB 131
Wright DP Sydney 1 July 2025
Yilmaz C
Allison C

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Corless-Crane v Aurenne Management Services P/L

TERMINATION OF EMPLOYMENT – Misconduct – remedy – compensation – s.394 Fair Work Act 2009 – applicant employed as a Pit Technician in geology team at respondent's gold mine site in Western Australia since October 2023 – significant part of role was to monitor and ensure mining undertaken in appropriate locations – a particular location in mine was wrongly marked – consequently, 54 ounces of gold was taken to waste piles rather than to the plant for processing (an estimated value loss of $200,000) – applicant dismissed on 22 January 2025, following an investigation into loss of ore – applicant had some alleged history of previous performance issues, however these issues were not clearly articulated, and applicant was awarded 23% salary increase – Commission considered criteria for harshness per s.387 – Commission found respondent failed to provide applicant with correct map for mining location intended to be mined – no dispute that wrong mining location was marked up and that applicant was not responsible for that error – Commission observed applicant had been employed in mining sector for only 15 months and previously had background in hairdressing and DJing – Commission found applicant not responsible for loss of 54 ounces of gold: ore had been lost before she arrived on mining site, loss of ore caused by error in markup by employees far more senior, experienced and qualified than her – observed opportunity to identify error earlier was missed by excavator operators and geology team members operating during day light hours with better visibility and more experience than applicant – applicant was last line of defence in 'chain of successive failures' of systems and employees – applicant not provided with opportunity to respond to alleged performance deficiencies – satisfied valid reason did not exist for applicant's dismissal per s.387(a) – found allegations put to applicant substantially differed from grounds of dismissal in termination letter and those relied on in submissions – satisfied applicant not appropriately notified of reason for dismissal per s.387(b) and not provided proper opportunity to respond to reason for dismissal prior to decision to dismiss being made per s.387(c) – Commission considered other relevant matters per s.387(h) including applicant being employed in mining sector for only 15 months, ore having already been lost before applicant commenced her spotting duties, applicant's caring responsibilities, and fact applicant treated differently to more senior employees

responsible for incident – Commission satisfied dismissal was harsh, unjust and unreasonable – held dismissal was unfair – considered remedy – observed reinstatement inappropriate due to mutual loss of trust and confidence between parties – considered compensation as remedy – applicant contended compensation appropriate due to emotional and financial hardship, inconsistency in her treatment compared to other employees, and respondent's refusal to resolve matter via conciliation – respondent submitted compensation should be at lower end of the range because applicant did not mitigate her loss – Commission acknowledged applicant should have been able to secure similar employment within 16 weeks of dismissal – Commission ordered compensation to applicant of 16 weeks' pay.

U2025/1088 [2025] FWC 986
Binet DP Perth 2 July 2025

Turner v Darebin City Council

TERMINATION OF EMPLOYMENT – Merit – s.394 Fair Work Act 2009 – applicant dismissed for serious misconduct on 3 June 2024 – applicant employed as a full-time Sweeper Driver for respondent since 8 April 2019 – respondent notified applicant of investigation and stand-down by letter on 14 May 2024 – investigation related to behaviour during Toolbox Meeting on 17 April 2024 – respondent alleged applicant had: (a) interrupted Acknowledgement of Country to question its use at Toolbox Meetings; (b) made a derogatory comment about colleague; and (c) inappropriately discussed same colleague's employment details in group setting, by referencing colleague's licenses and salary – respondent held meeting with applicant on 21 May 2024 – respondent stated their strong expectation of Acknowledgement of Country being done before all formal meetings – applicant questioned why respondent had not done Acknowledgement of Country at beginning of 'this meeting' – respondent sent applicant show cause letter on 22 May 2024 – respondent considered three allegations substantiated – concluded serious breach of respondent's Code of Conduct (Code) and Equal Employment Opportunity Policy (EEOP) – applicant met with respondent and provided written show cause response on 31 May 2024 – raised lack of procedural fairness and deficiency of investigation process, denied and countered context attached to respondent's allegation regarding Acknowledgement of Country allegation, denied other allegations, and asserted respondent had not complied with Code and EEOP obligations – respondent concluded applicant's actions constituted serious breach of Code and EEOP and asserted applicant had previously received a final warning for same breaches – Commission considered criteria for harshness per s.387 – considered whether valid reason for dismissal related to conduct [*Hilder*] – concluded respondent's contention that applicant should have been well-informed of appropriate workplace behaviour not compelling – considered respondent's allegations of applicant's behaviour – in relation to allegation (a), observed applicant's comments were spontaneous expression of his opinion that Acknowledgements of Country are appropriate on special occasions, but not necessary at the Toolbox Meeting, and that his frustration was in relation to various issues pertaining to his work – not persuaded applicant's comments were disrespectful or aggressive or perceived by attendees to be so – not persuaded that applicant's nature and delivery of response at 21 May 2024 meeting constituted valid reason for dismissal – in relation to allegation (b), acknowledged applicant's comments were ill-advised and inappropriate, however not persuaded that comments about a colleague who was not present, constituted valid reason for dismissal – in relation to allegation (c), noted licences required to be held by respondent's cleansing team and consequent implications for work they perform, plus salary band appear to have been source of ongoing debate and disputation – found neither colleague's name nor quantum of his salary were raised by applicant during Toolbox Meeting – not persuaded that respondent's reliance on a final warning issued in October 2023 advanced its case – found no valid reason for dismissal per s.387(a) – found applicant not notified of reason per s.387(b) and not provided opportunity to respond to reason related to capacity or conduct per s.387(c) – Commission satisfied dismissal was unreasonable because there was no valid reason, and harsh because it was disproportionate considering context and circumstances – Commission held applicant unfairly dismissed per s.385 – directions to issue to

determine appropriate remedy.



Collins v Intersystems Australia P/L

CONDITIONS OF EMPLOYMENT – flexible working arrangement – ss.65, 65A, 65B Fair Work Act 2009 – applicant sought order permitting him to work from home two days per week – application was subject of conciliation, but dispute not resolved – respondent runs global software company operating an online record system (TrakCare) – applicant provides technical support to frontline staff for complex issues with TrakCare – applicant worked remotely for two days per week – respondent issued memorandum requiring all staff to return to office five days per week starting 1 February 2025 – respondent justified memorandum as strategic measure to enhance customer service delivery – applicant submitted formal request for flexible working arrangement to continue to work from home two days per week – respondent informed applicant request could not be accommodated – respondent provided counter offer to allow applicant to work from home one day per week – applicant did not accept alternative arrangement – applicant disputed respondent had reasonable business grounds to reject request – Commission considered whether employee's desire for change in working arrangements was because of a relevant circumstance (s.65(1A)) – Commission required to determine: (1) whether applicant's request for flexible working arrangement was validly made and (2) whether respondent's refusal of request was based on reasonable business grounds – applicant is parent of two school aged children and shares caring responsibilities with wife – applicant claimed he consistently met performance expectations and did not receive any negative feedback – claimed able to do his job effectively remotely and noted colleagues in a different team were permitted to work remotely – claimed no objective evidence to justify treating his job differently – respondent contended applicant did not establish nexus between his request and relevant circumstances – claimed refusal was based on reasonable business grounds – submitted applicant failed to provide information about any caring duties or other responsibilities that he would miss if required to work from office – return to office justified in order to facilitate exchange of information and support mentoring opportunities for employees – implementation of software relied heavily on collaboration of different departments – staff from both departments working in same office allowed for faster decision making and resolution of customer issues – respondent concerned by feedback they received from their customers indicating 28% decline in customer satisfaction of their services – respondent took steps to improve customer efficiency, satisfaction, and attendance of staff at office to achieve this – respondent submitted Commission must consider whether respondent has established reasonable business grounds for its decision and whether an order should be made, taking into account fairness between employee and employer – respondent claimed there should be a focus on conciliation rather than arbitration on parties to weigh up what is required to be done to accommodate both parties given their circumstances – submitted request must be made on a sufficient nexus to the particular circumstances of employee – claimed Commission required to have regard to fairness between employer and employee – respondent highlighted that part of its refusal was on basis of alternative flexibility mechanisms to accommodate applicant's parental responsibilities – applicant conceded on cross examination that he had no specific caring duties between the core-working hours of 9am to 5pm – applicant and wife both work for respondent – found applicant and wife able to manage school drop-offs and pick-ups through existing flexibility arrangements such as adjusted start and finish times – flexibility arrangements allowed applicant to meet his parental responsibilities – Commission not satisfied applicant had established a requisite nexus between his stated circumstances: his parental responsibilities and the change in working arrangements applicant sought – found applicant's written request an expression of preference to continue with pre-existing remote work pattern and failed to articulate how working from home two days per week specifically supported or related to his parental responsibilities – Commission considered respondent made genuine attempts to

engage with applicant's request – not satisfied applicant's request met requirements of ss.65(1), (1A) and 3(b) – request was not validly made and Commission lacks jurisdiction to deal with dispute – even if request was validly made, satisfied respondent had reasonable business grounds to refuse applicant's request (s.65A(3)) – Commission reached conclusion having regard to respondent's operations, its organisational needs, fairness between parties and practical alternatives offered to applicant – application dismissed.

C2025/2239 [2025] FWC 1976
Dean DP Canberra 14 July 2025

Shehata v Australian Capital Territory (represented by Transport Canberra and City Services Directorate)

TERMINATION OF EMPLOYMENT – Misconduct – reinstatement – s.394 Fair Work Act 2009 – applicant employed by respondent since November 2004 as General Services Officer at Tuggeranong bus depot – applicant dismissed on 12 August 2024 following alleged misappropriation of property found on a bus at depot, namely a pink bag – respondent relied primarily on CCTV footage and a report made by a colleague, who allegedly witnessed applicant exit bus holding the pink bag and run to the carpark – applicant denied the allegation, claimed he placed pink bag in low-value lost property bin – applicant explained he had received distressing call from hospital regarding his disabled son, which triggered reflux symptoms, and prompted him to retrieve medication from his car whilst carrying pink bag – applicant stated he then placed pink bag in designated bin, consistent with lost property protocols – CCTV footage reviewed was incomplete due to respondent's failure to preserve CCTV footage in timely manner, despite report being made the following day – applicant was not shown full CCTV footage during disciplinary interviews, only still images – original CCTV footage of bin area was unrecoverable – applicant maintained his explanation throughout the investigation and hearing – applicant represented by Australian Manufacturing Workers' Union (AMWU) – submitted prior work history included instances of returning high-value lost property including cash and electronics – applicant's former supervisor of 18 years gave evidence that applicant had a spotless record, never taking leave except to care for disabled son, and consistently handed in lost property without issue – supervisor confirmed low-value items were routinely placed in unsecure tray near fuelling bay – Commission found evidence indicated poor relationship between applicant and colleague witness, including past incident where applicant reported racially insensitive remark by colleague, who referred to applicant's Muslim background – respondent did not call colleague to give evidence – Commission considered that colleague's complaint should have been treated with caution in the circumstances – applicant's limited English comprehension also considered relevant in assessing responses provided throughout investigation – Commission accepted applicant's version of events as consistent and credible – CCTV footage found to be unclear, inconclusive and insufficient to establish misconduct – Commission held that respondent had not discharged its onus of establishing misconduct which it relied on to dismiss applicant – Commission not satisfied there was a valid reason for dismissal under s.387(a) – criteria under s.387(b)-(g) satisfied – Commission considered other relevant matters under s.387(h) – took into account applicant's 20 years of unblemished service, respondent's delay in investigating allegation which resulted in majority of CCTV footage being deleted, and applicant's age and difficulty finding alternative employment – Commission held dismissal harsh, unjust and unreasonable – held applicant was unfairly dismissed – Commission considered remedy – held reinstatement appropriate – reinstatement to applicant's former position ordered, with continuity of employment and period of continuous service – lost remuneration ordered to be paid by respondent, less any remuneration earned during period of dismissal until reinstatement and any notice paid – parties to confer on quantum of lost remuneration.

U2024/10340 [2025] FWC 2133
Dean DP Canberra 23 July 2025

Bakar v Rasier Pacific P/L

CONDITIONS OF EMPLOYMENT – unfair deactivation – ss.536LD, 536LU Fair Work Act 2009 – applicant performed Uber Eats delivery work from around July 2023 to 12 March 2025 under a services agreement with Portier Pacific P/L – from 12 March 2025, applicant performed Uber Driver Partner work under a services agreement with respondent – applicant undertook both types of work through Uber online Application (Uber App) – applicant deactivated from Uber App on 2 May 2025 – applicant made application for unfair deactivation remedy – respondent raised jurisdictional objection that applicant did not perform work through or by means of a digital labour platform on a regular basis for a period of at least six months per s.536LD(c) – Commission observed that use of word 'period' in s.536LD(c) suggests a single period of work leading up to deactivation, rather than multiple periods of work that add up to at least six months [*Jibril*] – Commission considered meaning of 'performing work on a regular basis' – Commission observed it is not necessary for work to be performed frequently or often in order for work to be performed on a regular basis – Digital Labour Platform Deactivation Code (Code) considered – Code provides three hypothetical examples to illustrate circumstances in which work is performed on a regular basis – observed work must be performed sufficiently often, or in a readily identifiable pattern – Commission satisfied Uber App is a 'digital labour platform' per s.15L of FW Act – Commission accepted evidence that Uber App is the only digital labour platform through which a person may perform Uber Eats delivery driver or Uber Driver Partner work – Commission rejected respondent's submission that because applicant entered into separate contracts with separate companies to perform different work he did not meet the six month minimum requirement – acknowledged s.536LD(c) does not differentiate between types of work or different legal entities, however instead focuses on performance of work through or by means of a digital labour platform, or under one or more contracts, arranged or facilitated through or by means of digital labour platform – Commission satisfied applicant had performed work through a digital labour platform, on a regular basis for a period of at least 6 months leading up to his deactivation (3 November 2024 to 2 May 2025) – found work was performed regularly during six month period because it was performed multiple times almost every week during that period – applicant protected from unfair deactivation – matter listed for directions.

UDE2025/59 [2025] FWC 1874
Saunders DP Newcastle 2 July 2025

Liu v Commonwealth Bank Australia

TERMINATION OF EMPLOYMENT – extension of time – exceptional circumstances – s.394 Fair Work Act 2009 – applicant was employed with respondent since April 2001 – applicant dismissed without notice for alleged serious misconduct on 20 March 2025 – applicant lodged unfair dismissal application on 28 April 2025 – application lodged 18 days outside 21-day statutory time limit – Commission considered criteria for exceptional circumstances per s.394(3) – considered reason for delay – applicant submitted his mental capacity (depression, anxiety and insomnia) in period following dismissal was reason for delay – applicant provided medical evidence from clinical psychologist and general practitioner – Commission agreed with respondent's submissions that applicant's reasons for delay did not properly explain why he filed application 18 days late – accepted applicant aware of dismissal on day it took effect – found no evidence that applicant took action to dispute dismissal prior to filing application – found no evidence respondent to suffer prejudice as a result of delay – Commission considered merits of application – applicant submitted he disputed transactions on his personal credit card as a customer of respondent and not as an employee, as he did not recognise merchants involved and transaction description did not match venue name – applicant submitted transaction disputes cannot be withdrawn once lodged – respondent submitted it investigated the transactions and dismissed the applicant for serious misconduct after it was established applicant was responsible for transactions, and applicant breached code of conduct by acting with fraudulent intent and dishonesty to gain a financial benefit – applicant claimed he is

unlikely to be employed within banking industry in future, as his dismissal for serious misconduct is disclosed to other bank employers as part of the Australian Banking Association's 'Banking Industry Conduct Background Check Protocol' (Banking Conduct Protocol) – Banking Conduct Protocol prohibits respondent from reversing or amending employment record to remove dismissal or serious misconduct from employment records – Commission held merits of application in relation to disputed transactions weighed strongly in favour of exceptional circumstances, as significant ambiguity existed as to whether applicant was responsible for disputed transactions, whether he had requisite fraudulent intent when he disputed transactions, whether or not his conduct in disputing transactions occurred in course of employment, and whether application of Banking Conduct Protocol is fair and justified – Commission noted applicant employed for almost 24 years with respondent and sole income earner for his family – observed situation unsatisfactory in circumstances where applicant's career prosects in banking industry have been curtailed – fairness as between applicant and other persons in similar position treated as neutral consideration – Commission satisfied exceptional circumstances exist [*Nulty*] – Commission granted applicant an extension of time to file his application – matter to be listed for conciliation conference.

U2025/5180 [2025] FWC 1828
Boyce DP Sydney 4 July 2025

Wykes v Wilmar Sugar P/L

TERMINATION OF EMPLOYMENT – Misconduct – reinstatement – ss.387, 394 Fair Work Act 2009 – applicant employed as Pan Boiler at Plane Creek Mill since 30 May or 3 June 2019 – in July 2024, applicant suffered a crushed finger (workplace injury) and experienced ongoing physical pain – on 10 September 2024, applicant left work early due to emotional distress from bullying and stress from colleagues related to her work injury – applicant notified her supervisor before leaving site – on 14 September 2024, applicant was notified in writing of dismissal, which took effect that same day – dismissal letter cited sleeping on job during shift, leaving station without proper notification, leaving unqualified trainee in charge which affected mill production, failure to follow procedures, and neglect – applicant argued allegations of misconduct were false – applicant lodged unfair dismissal application on 25 September 2024 – applicant sought reinstatement, continuity of service and lost pay – Commission considered criteria for harshness under s.387 – respondent submitted applicant's conduct constituted serious misconduct, repudiated employment contract and breached work health and safety – Commission found allegations of misconduct not substantiated – respondent had provided written warning and reprimand to applicant about unsatisfactory standard of work performance in November 2023 – Commission found 2023 warnings alone insufficient to justify dismissal in 2024 – found termination notice incorrectly stated applicant had not informed her supervisor prior to leaving site on 10 September 2024 – noted applicant did not engage in misconduct or poor performance by leaving work, and did not accept her departure constituted a valid reason for termination – found termination letter also incorrectly stated applicant had left unqualified employee to man station – observed difficult to acknowledge that taking of unanticipated personal leave constituted misconduct where person taking leave does so in circumstances where they are training someone else – Commission found applicant did not engage in serious misconduct as alleged and had not breached contract – acknowledged applicant did not contravene work health and safety obligations – Commission found no valid reason for dismissal per s.387(a) – found respondent decided to dismiss applicant prior to performance meeting on 11 September 2024, and applicant was not notified of reason for dismissal per s.387(b) – acknowledged applicant had no opportunity to respond before decision to dismiss her was made per s.387(c) – satisfied dismissal was harsh, unjust and unreasonable – held applicant was unfairly dismissed – Commission considered remedy -ordered applicant be reinstated to former position per s.391(1) – appropriate to maintain continuity of employment and period of continuous service per s.391(2) – applicant awarded lost pay, adjusted for earnings and payments received since dismissal per s.391(3).

Callow v M People (QLD) P/L

TERMINATION OF EMPLOYMENT – Misconduct – reinstatement – s.394 Fair Work Act 2009 – applicant worked at respondent's Mine as dump truck operator – applicant organised fundraiser for sick colleague diagnosed with advanced cancer – fundraiser involved sale of work shirts where proceeds went to either sick colleague or one of two nominated charities – applicant sent mass email from her personal email account to the personal email addresses of 850 employees and contractors – applicant terminated for serious misconduct on basis applicant breached respondent's Privacy Policy, Confidentiality Agreement and Employment Agreement – personal email addresses of employees and contractors were all carbon copied and not blind carbon copied in applicant's email – respondent submitted applicant knowingly disregarded instructions to refrain from obtaining employee information, leading to significant breach of privacy – applicant submitted she made a genuine mistake – Commission considered criteria for harshness per s.387 – found applicant signed various polices on commencement in role, however received no refresher training on various policies – observed applicant's duties did not require her to use email and respondent did not train her in relation to email usage – applicant had sent enquiries regarding emailing employees and progressing the fundraiser to a supervisor, however multiple queries were not responded to – respondent submitted supervisor was waiting for approval, however supervisor did not inform applicant of this – found manager of Mine was not optimum manager to oversee fundraiser due to his disinterest, which led to applicant being in position to operate independently and erroneously – applicant submitted fundraiser was time sensitive due to colleague's illness – respondent submitted applicant accessed email addresses without authorisation – found another employee provided email addresses to applicant at her request – employees' email addresses were accessible on a computer in a communal area – passwords were taped on and profiles including home address, telephone number, and date of birth were accessible – email addresses and phone numbers also included in rosters – found two previous instances where management staff had sent mass emails with employees' email addresses visible, no evidence of disciplinary action taken – HR superintendent previously sent three emails containing confidential employee information, including an employee's performance management details, to incorrect email addresses, with no evidence of disciplinary action taken – applicant submitted she was treated more harshly – found respondent had authorised fundraiser and did not provide guidance to applicant – respondent lacked precision in referring to what policies were breached when providing termination letter – Commission found it was procedurally unfair that supervisor who did not respond to applicant's enquiries was the final decision maker in her dismissal – acknowledged respondent could not establish connection between the applicant's email and reputational damage – held no valid reason for applicant's dismissal per s.387(a) – found applicant not notified of reason for dismissal, due to respondent's lack of precision in referring to policies and absence of information in termination letter per s.387(b) – found applicant not given opportunity to respond to matters which directly informed her dismissal, such as breach of Employment Agreement and previous disciplinary matters per s.387(c) – satisfied dismissal was harsh, unjust and unreasonable – held applicant was unfairly dismissed – Commission considered remedy – orders issued for applicant to be reinstated to position she was employed in immediately prior to dismissal, with continuity of employment and service to be maintained – no order made for lost pay.

U2024/15172 [2025] FWC 2031
Spencer C Brisbane 15 July 2025

Barbara v Australian Taxation Office and Ors

GENERAL PROTECTIONS – dismissal dispute – agency transfer – ss.365, 386 Fair Work Act 2009; s.26 Public Service Act 1999 – applicant commenced employment

with Australian Taxation Office (ATO) in 2007 – applicant held senior position of Director in Solutions from April 2024 – applicant alleged bullying and harassment occurred over a number of years, which when raised, was not sufficiently dealt with by ATO – applicant stated this forced her to seek new role, resulting in transfer from ATO to the Australian Electoral Commission (AEC) under s.26 of *Public Service Act 1999* (Cth) (PSA) – contended this represented a termination of her employment by her employer per s.386(1)(a) or a forced resignation or forced transfer per s.386(1)(b) – application form named ATO and an individual who worked at ATO as respondents (respondents) – respondents raised jurisdictional objection that applicant had not been dismissed within meaning of s.386 – contended applicant was employed by Commonwealth of Australia while working for the AEC and ATO, and as applicant had voluntarily transferred under s.26 of the PSA, applicant's employment relationship had been maintained – Commission considered whether AEC and ATO are same employer – observed, pursuant to s.22 of PSA, employees are engaged by agencies on behalf of Commonwealth of Australia – refuted applicant's argument that payments made using separate ABN's by agencies reflective of engagement by two distinct entities – found payments made using separate ABN's is common accounting practice – found procedural matters associated with transfer such as signing a new contract and being subject to different work entitlements per a new enterprise agreement are not intrinsically indicative of new employment relationship – further, applicant retained the same Commonwealth employee number during transfer, and continued to accrue leave entitlements, indicative of maintenance of an employment relationship – noted s.4A of *Taxation Administration Act 1953* (Cth) and s.29 of *Commonwealth Electoral Act 1918* (Cth) confirm statutory agencies, which both AEC and ATO are, do not engage employees themselves but engage employees of the Australian Public Service – considered whether respondents terminated applicant's employment per s.386(1)(a), or if respondents' conduct forced applicant's resignation per s.386(1)(b) – found transfer was voluntarily initiated by applicant, who was assisted by the respondents at the applicant's request – found, in light of circumstances where employee voluntarily transferred, respondents' conduct cannot be understood to have intended, nor on balance of probabilities caused the cessation of employment relationship – respondents' jurisdictional objection upheld – application dismissed.

C2025/752 [2025] FWC 1843
Spencer C Brisbane 27 June 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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