FWC Bulletin

19 January 2024 Volume 1/24 with selected Decision Summaries for the month ending Sunday, 31 December 2023.

Contents

Closing Loopholes Act has commenced

15 Dec 2023

The *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* received Royal Assent on 14 December 2023.

From today (15 December 2023), the Closing Loopholes Act:

- empowers the Commission to consider applications relating to some labour hire workers
- amends the general protections provisions to:
    - strengthen discrimination protections for employees who have been, or are being, subjected to family and domestic violence
    - introduce a general protection for workplace delegates when carrying out their role
- empowers the Commission to make a model term for modern awards relating to delegate rights
- makes amendments to provisions regarding protected action ballot order conferences.

We have published a new Closing Loopholes – what's changing page on our website.

Relevant forms will be published as soon as they're available. Until then, parties can make an application using Form F1 – General application form.

The President will make a statement early next week setting out how we intend to implement the new measures.

President's statement about the Closing Loopholes Act issued

20 Dec 2023

Our President, Justice Hatcher, has issued a statement about the impact of the recently passed *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* on the Commission. The Closing Loopholes Act changes existing functions and confers new functions on the Commission.

You can read more about the changes in our previous news item: Closing Loopholes Act has commenced.

Today's statement provides an overview of the relevant amendments and outlines the approach we intend to take to implement amendments relevant to our work.

Justice Hatcher discusses our strong organisational capability and our ongoing commitment to implementing change in an open and transparent way with the needs of our users in mind.

- Read the President's statement (pdf)
- Read information about the Closing Loopholes Act changes

Joint Media Statement of the General Manager of the Fair Work Commission and The Australian Workers' Union

21 Dec 2023

On 21 December 2023 the Federal Court of Australia imposed a civil penalty totalling $290,000 on The Australian Workers' Union (AWU) for 27,140 contraventions of the *Fair Work (Registered Organisations) Act 2009*.

The contraventions covered a nine-year period between 2009 and 2017, during which the AWU admitted that it did not meet its statutory obligations to keep accurate copies of its membership register.

The AWU and the General Manager of the Fair Work Commission, Murray Furlong, reached an agreed position on the penalty to be imposed by the Court. The AWU understands the importance of its compliance obligations, including those relating to keeping and providing accurate information for its members.

To find out more read the joint media statement that was published today.

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

22 Dec 2023

Justice Hatcher, President has issued an end-of-year statement about the Commission’s 2023 work and 2023-24 performance.

The statement provides information about:

- The Commission’s operational performance for the 2023-24 reporting cycle to date
- Some major cases
- The Commission’s implementation of the Secure Jobs Better Pay Act reforms
- Service delivery initiatives over the 2023 calendar year.

Read the President’s statement (pdf)

Read more about:

- Secure Jobs Better Pay changes and
- Closing Loopholes Act changes

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 Sunday, 31 December 2023.

1 RIGHT OF ENTRY – non-member records – ss.483AA, 604 Fair Work Act 2009 – appeal – Full Bench – whether production of non-member records necessary to investigate suspected contravention – appeal of Commission's refusal to grant order requiring respondent produce non-member records for inspection – at first instance: appellant lodged an application under s.483AA to access non-member records held by respondent – application alleged contraventions where respondent had required employees to work beyond rostered hours – extra hours argued to have contravened an enterprise agreement under s.50 and constituted failure to pay employees in full under s.323 – applicant had sought non-member records with belief that contraventions were 'systematic and widespread' – application arose following proceedings brought by appellant in FCCA, where court found certain employees had been required to undertake work tasks prior to commencement of shifts – at first instance, Commission held definition of 'necessary' in s.483AA(2) to carry the meaning that suspected contravention could not be investigated without production of non-member records – found at first instance evidence did not support this finding – also considered significant effort required to produce 'extensive' records sought – Commission declined to grant order sought at first instance – appeal filed on following grounds: Commission had erred in finding order not necessary to investigate suspected contraventions, especially given finding of FCCA, Commission had failed to address submission that applicant suspected respondent of contraventions necessitating the production of non-member records, Commission had erred in noting that order extended to certain employees with access to time off in lieu, and that Commission erred in considering extensive effort required to produce the non-member records – respondent submitted that test for access to non-member records is whether it is necessary for the proper conduct of the investigation into the suspected contravention that the permit holder have access to non-member records – respondent submitted Commission's role was to make a decision on the application it had before it – respondent further submitted that an order to access non-member records must include a requirement for an employer to allow a permit holder to inspect and make copies of specified non-member records or documents – Full Bench noted that decision at first instance was of a discretionary nature, and could only be challenged if error in decision-making process [*Coal and Allied Operations*] – it must appear that Commission had made some error in exercising discretion [*House*] – appellant further submitted that permission to appeal should be granted as appeal raised matters of general importance in respect of the appropriateness of orders relating to the inspection of records concerning suspected serious contraventions of the Act – Full Bench considered s.483AA(2), noted it apparent that member records were never requested by appellant – Full Bench also held that it would have been

impossible to find reliance on member records insufficient to investigate suspected contravention – further to this, a finding could not be made as to necessity without any evidence on appellant's membership coverage at respondent – Full Bench also held that Commission was correct to consider effect of the proposed order on respondent, noting that certain employees of respondent are entitled to time off in lieu of overtime, and therefore it was unnecessary to access records concerning them, given the time and effort needed to produce and inspect such records – permission to appeal granted as matter raised issues of importance regarding s.483AA – nonetheless, Full Bench found no issues with Commission's decision making at first instance – appeal dismissed.

Appeal by Shop, Distributive and Allied Employees' Association against decision of Dean DP [[2023] FWC 1671] Re: ALDI Foods P/L as General Partner of ALDI Stores (A Limited Partnership) t/a ALDI

C2023/4513 | [2023] FWCFB 164
Catanzariti VP | Sydney | 28 November 2023
Saunders DP
Cross DP

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2 GENERAL PROTECTIONS – extension of time – ss.366, 586, 604 Fair Work Act 2009 – appeal – Full Bench – on 19 December 2022, appellant filed a blank form F2 Application for unfair dismissal remedy accompanied by completed F80 waiver of application fee form – on 22 December 2022, Commission advised appellant that the F2 received was blank – later that day appellant filed a completed Form F8 Application for general protections involving dismissal – as a result of this incident, appellant's general protections application was filed outside 21-day filing period required under the Act – general protections matter did not settle at staff conciliation conference – matter was allocated to Dobson DP to determine extension of time -Commission advised parties that extension of time matter would be determined on papers rather than heard – on 3 April 2023 Commission issued decision finding there were no exceptional circumstances which justified granting an extension of time – Commission found mere ignorance of statutory time limit is not exceptional circumstance and lack of prejudice to respondent does not necessarily weigh in favour of concluding exceptional circumstances exist – appellant's first instance application dismissed – appellant subsequently filed appeal, arguing that he incorrectly attached the blank form F2 in his original lodgment email on 19 December when he should have attached a completed F8 Application in MS Word format – appellant added that he would have been able to correct error if Commission informed him in time, and that given Commission did not inform him of error until 22 December, delay from Commission should be considered as exceptional circumstances – appeal hearing listed and directions issued – appellant did not follow directions and did not attend hearing – at appeal hearing, respondent submitted grounds of appeal sought to relitigate matter and did not raise legal or appealable errors, and decision was not counterintuitive and there was no disharmony with Commission's decisions – respondent further submitted, considering limited material filed by appellant, Deputy President adequately stepped out matters, considered relevant authorities, and reasoning that applies to present case – Full Bench granted permission to appeal as matter raised issues of importance, including whether appellant's blank F2 and completed F80 filed on

19 December constituted a general protections application 'made' on that date, whether the application could have been corrected, amended or waived under ss.586(a), 586(b) of the Act, and whether such matters were exceptional circumstances justifying grant of extension of time – Full Bench reviewed internal procedural processes for dealing with incomplete applications and relevant case law – found Fair Work Commission Rules 2013 distinguish between documents being 'lodged' and applications being 'made' with Commission, and lodging a document does not automatically equate to making an application – Full Bench found that in cases where Commission required to determine whether an application was 'made', Commission must consider whether steps taken and material lodged by person attempting to make application are sufficient to be considered in substance, an application for the purposes of the Act – Full Bench found form in which material is provided is relevant, but not determinative of whether in substance, an application was made – Full Bench reiterated that defective applications are still capable of being made and Commission can exercise discretion under s.585 to amend an application or waive irregularities – further found s.585 does not give Commission power to amend application made under a specific statutory provision that it becomes application under a fundamentally different provision – Full Bench found that given form provided by appellant was blank and no further details were provided to clarify the appellant's intention to file a General Protections application, it was open for the Commission to conclude Appellant had not, in substance, made a general protections application involving dismissal – Full Bench held exceptional circumstances are not found merely because the appellant lodged a document he did not intend to lodge – Full Bench concluded that Deputy President erred in not considering whether appellant's belief that he made an application within time required was genuine and reasonable belief, and whether that belief constituted a reasonable explanation for the delay – considering there were disputed facts in the case, Full Bench found Commission should have held a hearing to determine the factual issues – permission to appeal granted – however, appeal dismissed as appellant did not prosecute it or respond to contact from Commission.

Appeal by Hedger against decision of Dobson DP of 3 April 2023 [[2023] FWC 802]
Re**:** The Trustee For Perrott Trust T/A Perrott Engineering P/L

C2023/5486 [2023] FWCFB 231
Asbury VP Brisbane 4 December 2023
Masson DP
O'Neill DP

3 INDUSTRIAL ACTION – suspension of protected industrial action – s.425 Fair Work Act 2009 – bargaining for replacement of four enterprise agreements commenced March 2023 – Construction, Forestry and Maritime Employees Union (CFMEU) was the employee bargaining representative – negotiations made limited progress and employees took protected industrial action (PIA) in October and December 2023 – applicant refused to meet with CFMEU while employees undertook PIA from September 2023 – application for orders to suspend PIA for a cooling off period of 90 days – applicant submitted that PIA was distracting parties from negotiating a resolution, that PIA was contrary to the public interest and that PIA's duration weighed in favour of suspension – submitted that suspension would allow applicant to take stock and

assess consequences of PIA, provide employees with a more objective evaluation of applicant's proposals, allow parties to resolve matters between themselves with the threat of external intervention neutralised and provide a circuit breaker – CFMEU submitted that the FW Act authorises PIA and recognises public interest in allowing parties to bargain – submitted that suspension would be against public interest as it would reward a party who refused to negotiate during PIA – submitted that suspension would result in a loss of industrial leverage, delayed pay increases, lessen pressure on applicant to resolve outstanding claims and allow applicant to implement roster changes before employees could secure alternative arrangements via bargaining – Commission considered FW Act, noting that suspension order should not be issued lightly and that suspension must assist resolution of issues – found that PIA had been a feature of bargaining between parties for decades, rejecting applicant's submission that suspension would allow it to take stock – observed that longer periods of PIA are more likely to lead to employees making concessions – found that 90 day suspension period may indicate applicant's lack of motivation for a speedy resolution – found that threat of external intervention, a driver for compromise, would be lost if suspension were granted – Commission not satisfied that PIA created impediment to resolution – noted that suspension would benefit applicant commercially and operationally and that suspension of PIA would remove employee bargaining power [*Orora*] – evidence of a loss of bargaining power opposes view that suspension would benefit bargaining representatives [*Australian Paper*] – Commission found that loss of bargaining power would extend period of time to resolve outstanding issues – Commission considered duration of PIA noting duration must be considered in context of negotiations including parties' conduct [*Patrick Stevedores*] – noted applicant's refusal to negotiate during PIA – Commission satisfied that suspension would not be in the public interest and that suspension of PIA would be inconsistent with the objects of the FW Act – Commission considered other relevant matters relevant to application, including impact of PIA on community and applicant – noted FW Act provides mechanisms to deal with the impact of PIA, applicant's opportunities for mitigation, period of notice of PIA provided by CFMEU and that CFMEU offered to suspend PIA during negotiations – Commission not satisfied that suspension of PIA was appropriate – application dismissed.

Application by DP World TA DP World Brisbane P/L, DP World (Fremantle) Ltd, DP World Melbourne Ltd, DP World Sydney Ltd

B2023/1357 [2023] FWC 3314
Binet DP Perth 13 December 2023

4 TERMINATION OF EMPLOYMENT – misconduct – employer policies – ss.385,387 and 394 Fair Work Act 2009 – applicant claimed he was unfairly dismissed by the respondent – applicant dismissed after testing positive for a cocaine metabolite – respondent required employees to comply with Drug and Alcohol policy and Code of Conduct – Code of Conduct allowed for disciplinary action including dismissal if employee returned a positive drug test – respondent followed Australian Standards for drug testing – applicant was a work group leader and held position of responsibility and trust – applicant had been on four days of leave – took cocaine on first night of leave – applicant believed drug would have left his body before he returned to work – applicant

contended he was not impaired by cocaine – applicant was notified of disciplinary action – applicant apologetic – claimed he took customer and worker safety seriously – applicant's expert witness (in pharmacology) testified applicant would not have been impaired by cocaine when he returned to work – witness testified that a cocaine metabolite (benzoylecgonine) would have stayed present in applicant's body – benzoylecgonine was pharmacologically inactive and had no impairing effects – respondent's Chief Health Officer (CHO) gave evidence explaining testing procedure – CHO noted respondent tested for presence of drugs – respondent also presented expert evidence from a toxicologist specialising in drug and alcohol testing – toxicologist noted that the cocaine metabolite would have been eliminated from applicant's system if he had consumed cocaine four days prior to test – respondent witness (Mr Bugeja) testified that he was part of the panel that recommended to decision maker to dismiss applicant – Mr Bugeja considered applicant did not understand the safety aspect of his role despite training provided – Mr Bugeja considered that when a worker returns a positive drug test that they ought to be dismissed – of eight previous disciplinary panels he was involved in, six employees were dismissed and two resigned – respondent's director for network standards also testified employees not provided with access to the Australian Standard, list of drugs tested and not advised that the test is for presence of metabolites rather than impairment – applicant submitted positive test for benzoylecgonine did not make applicant a safety risk – applicant cited *Sydney Trains v Hilder*, *Harbour City Ferries v Toms* and *Sharp v BCS Infrastructure* – noted that this matter could be distinguished from *Hilder*, *Toms* and *Sharp* because a different drug (cannabis) rather than cocaine at issue – suggested applicant was not reckless in his breach of drug and alcohol policy – reasonable and honest belief that enough time had passed – failure of respondent to adequately explained drug and alcohol policies – cited *Hilder* where Full Bench of Commission warned Sydney Trains that it needed to explain in comprehensible terms what 'drug free' meant to its employees – respondent submitted applicant's circumstances were not distinguishable from *Hilder* – Full Bench in *Hilder* held that respondent's drug and alcohol policy was reasonable and lawful – breach of policy provided valid reason for dismissal – Commission considered *Toms*, *Sharp* and *Hilder* – noted in *Toms* that Full Bench held that applicant's dismissal was due to his deliberate disobedience of a significant policy and that only mitigating factor was use of marijuana as pain relief – Full Bench took a similar approach in *Sharp* where applicant was dismissed after testing positive to cannabis use that had occurred prior to return to work – in *Hilder*, Full Bench found dismissal was harsh due to inconsistency between Sydney Trains' zero tolerance to trugs but professed policy of considering mitigating factors when taking disciplinary action – Deputy President held that the test simply reflected that applicant had taken cocaine at some point in the previous days – Deputy President held respondent must establish that there was risk applicant was impaired at work – Deputy President held that there was valid reason for dismissal – applicant was given opportunity to respond – held that other matters relevant included applicant's lengthy and unblemished employment history – applicant's expression of remorse and having taken responsibility for his actions – absence of risk of applicant being impaired – respondent's closed mind in the disciplinary process – failure of respondent to consider other options other than dismissal – Deputy President cited *Hilder* noting that Full Bench had found Hilder's dismissal unfair because

other mitigating factors applied were ignored or disregarded by Sydney Trains – respondent's approach was procedurally unfair because applicant's responses were not fairly considered – respondent had not explained its drug and alcohol policy tested for use rather than impairment – respondent did not consider alternative disciplinary options – dismissal harsh and unreasonable – reinstatement order issued and compensation minus 20 percent recognising applicant's failed drug test.

Goodsell v Sydney Trains

U2022/9973		[2023] FWC 3209
Easton DP	Sydney	4 December 2023

Other Fair Work Commission decisions of note

Appeal by United Firefighters' Union of Australia against decision of Wilson C of 29 May 2023 [[2023] FWC 1235] Re: Fire Rescue Victoria

ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – ss.604, 739 Fair Work Act 2009 – appeal – Full Bench – at first instance Commission determined not to grant an order compelling respondent to enter a service contract – appellant seeking to establish the Victorian Professional Career Firefighters Registration Board (VFRB) – appellant established a company to manage the VFRB – appellant proposed a service contract with respondent for providing VFRB services – respondent submitted Minister for Emergency Services (the Minister) refused to consent to respondent to enter into contract – Minister submitted contract would fetter Minister's powers under the *Fire Rescue Victoria Act 1958* (Vic) – on 2 December 2022 Commission declined to make order due to fettering of Minister's powers (fettering decision) – appellant made second application after altering contract to address fettering issue – on 29 May 2023 Commission declined to make the order – first as it was not yet satisfied that service agreement did not impermissibly fetter the FRV – second there was no utility in issuing an order due to Minister's direction to FRV to not enter the service contract – order would not settle the dispute – appellant appealed the second decision – power to appeal only exercisable if there is an error on the part of the primary decision-maker [*Coal and* Allied] – Full Bench noted appellant had right to appeal per clauses 21.7 of Division A and 26.7 Division B of the *Fire Rescue Victoria Operational Employees Interim Enterprise Agreement 2020* (the Agreement) – permission to appeal not required based on the Agreement – appellant claimed Member at first instance had not exercised jurisdiction to settle the dispute – Full Bench held first instance Member addressed the immediate dispute by declining to issue the orders sought – Member had not addressed underlying dispute between appellant and respondent at that point in time – Full Bench held Member was also able to take into consideration Minister's submissions before making a decision – respondent submitted Member erred by not correctly determining changes made to supply contract fixed fettering issue – Full Bench held Member had addressed the issue as respondent was not able to enter into the contract – Full Bench held Member did not err in finding that they were not yet satisfied fettering issue could be resolved – appellant submitted Member erred in finding Ministerial Direction prohibited the appellant from finalising negotiations over the supply contract – appellant claimed Member should have determined validity of contract – Full Bench agreed with finding Ministerial Direction was valid and making requested order would widen the underlying dispute rather than resolve it – Full Bench observed Agreement said little about the VFRB – respondent had met their Agreement obligations by sending letter to appellant endorsing VFRB establishment – Full Bench also questioned who the parties to the dispute actually were – noted appellant and respondent did not have a dispute about the services contract – dispute in substance between the appellant and the Minister – dispute not able to be resolved under Agreement – first instance decision free from appealable error – appeal dismissed.

C2023/3422
Asbury VP
Colman DP
O'Neill DP

Brisbane

[2023] FWCFB 225
30 November 2023

Appeal by Pen against decision and order of Schneider C of 10 October 2023 [[2023] FWC 2610] Re Octopus Fishing No.2 P/L

CASE PROCEDURES – natural justice – s.604 Fair Work Act 2009 – appeal – Full Bench – appeal against decision and order to dismiss unfair dismissal application due to jurisdictional issue of no dismissal – at first instance respondent raised jurisdictional objection appellant was not dismissed and the minimum employment period had not been met – directions issued at first instance addressed minimum employment period objection – during first instance hearing the Commissioner expressed hearing to deal with minimum employment period objection – further expressed hearing would not deal with no dismissal objection – first instance decision dismissed application on basis appellant had not been dismissed – appeal sought on basis of lack of procedural fairness – Full Bench considered nature of unfair dismissal applications described in *Lawler* and *GlaxoSmithKline* and considered s.400 where the Commission must not grant permission to appeal a decision unless it is in the public interest to do so – Full Bench noted it is necessary to engage with appeal grounds to consider any appealable error – Full Bench accepted that appellant did not identify appealable error in submissions – appellant submitted Notices of Listing provided to parties – Full Bench noted Notices of Listing sent to parties on two occasions which stated purpose of first instance hearing was to determine if the minimum employment period was met – first instance Member commenced hearing by introducing only the minimum employment period issue – Full Bench accepted procedural unfairness occurred – public interest enlivened – permission to appeal granted – Full Bench noted each party should be given a reasonable opportunity to present its case – Commissioner's decision dealt with the jurisdictional objection that the appellant was not dismissed, however parties were only notified of the issue of minimum employment period – as a result appellant filed submissions that did not relate to the subject matter of the decision – Full Bench determined appellant was denied reasonable opportunity to present case – Full Bench satisfied that appellant denied natural justice – not satisfied that the denial of natural justice could have made no difference to the outcome of the decision – Full Bench determined the denial of natural justice was a jurisdictional error – appeal upheld – Decision and Order of Commissioner quashed – application for unfair dismissal remedy remitted for redetermination.

C2023/6614
Beaumont DP
O'Keeffe DP
Lim C

Perth

[2023] FWCFB 253
14 December 2023

Treleani v Richtek Melbourne P/L

TERMINATION OF EMPLOYMENT – jurisdiction – dismissal – s.394 Fair Work Act 2009 – applicant employed as roofer under contract of employment – respondent asked applicant to 'come off the tools' and undertake sales work – applicant believed he was being promoted – later respondent required applicant return to roofing work – applicant refused, considered this was demotion – contended contract of employment repudiated and dismissed at initiative of employer – respondent raised objection applicant was not dismissed – contended roofers could be required to undertake sales work and applicant was moved back to roofing due to downturn in sales work – whether applicant dismissed considered – Commission accepted respondent's evidence it had separate contracts for roofers and quoters, with roofers receiving higher hourly rate but quoters receiving higher commissions – during period working in sales applicant declined respondent's invitation to accept quoter contract – found applicant opted to retain higher hourly rate in roofer contract – Commission observed

if applicant had accepted quoter proposal this would have changed basis of employment – Commission found respondent's State Manager told applicant he was being 'demoted' back to roofing position however disagreed that roofing was a demotion – observed roofing was substantive work undertaken by qualified tradespeople – held State Manager's use of word 'demoted' did not mean he was correct to do so – accepted respondent's evidence applicant was returned to roofing work as alternative to making applicant redundant when sales work slowed – held respondent's request applicant undertake sales work did not vary applicant's contract – contract only variable in writing – no written variation to contract made – held sales work within scope of applicant's roofer contract – held changes in respondent's system to refer to applicant as 'roofing quoter' did not alter contractual analysis – concluded applicant's contract not repudiated when respondent required he return to roofing work – original contract remained in effect – applicant not forced to resign – applicant ended employment relationship, not respondent – no dismissal – application dismissed.

U2023/9101 [2023] FWC 3279
Colman DP Melbourne 7 December 2023

Aboud v Nickal P/L T/A Plan & Grow

TERMINATION OF EMPLOYMENT – extension of time – choice of application – s.394 Fair Work Act 2009 – s.394 application filed 311 days after statutory deadline – s.394 application not first filed by applicant concerning dismissal from respondent – previous s.365 application filed – Commission noted background of employment and dismissal – background included allegations involving applicant which were reported to Western Australia Police and an NDIS Banning Order – applicant arrested and charged in June 2021 – applicant found not guilty and charges withdrawn in October 2022 – prior to charges being withdrawn applicant suggested he suffered severe mental health issues, irretrievable marriage breakdown, being shunned from Sierra Leone community and ongoing sense of shame – s.365 matter did not settle and certificate issued under s.368 – applicant's first representative withdrew after s.365 matter did not settle – applicant engaged second representative – second representative sought respondent's consent to arbitrate dispute in Commission rather than Federal Court – respondent refused to consent – following refusal applicant discontinued s.365 application and filed s.394 application on same day – whether circumstances exceptional – applicant suggested he did not know Federal Court could decide his application once s.368 certificate issued – contended he always believed application would be decided by Commission – Commission noted purely preferential decision to pursue alternative cause of action because it would have more merit and prospects of success constitutes acceptable reason for delay [*Soubra*] – applicant also contended representative error explained delay – suggested first representative should have explained to applicant Federal Court may decide general protections matter if respondent did not agree to Commission arbitration – Commission noted test for representative error is not whether an applicant received good or bad advice, but whether representative's action or inaction caused the delay [*Biddle*] – found applicant's preference was for general protections application to remain in Commission and when that was not possible he veered to make s.394 claim – found delay not result of wrong jurisdiction or incorrect application, but applicant's view of jurisdiction – held not credible reason for delay – whether health caused delay considered – applicant provided evidence of mental health impact during and following criminal proceedings – Commission found during delay period applicant was able to participate in the earlier s.365 proceeding, including jurisdictional hearing and attending one or more conferences – held applicant's health not credible explanation for delay – held circumstances not exceptional to support extension – application dismissed – Commission passed final observation dismissal of application should not be interpreted that applicant's circumstances leading up to and after dismissal were not challenging or stressful, rather that circumstances are not exceptional.

U2023/9816 [2023] FWC 3216
Beaumont DP Perth 5 December 2023

Vetiyatil v Agripower Australia Ltd

TERMINATION OF EMPLOYMENT – performance – ss.387, 394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant employed as Finance Manager from November 2021 – applicant's duties involved submitting Single Touch Payroll (STP) reports to Australian Taxation Office (ATO) – respondent experienced cash flow issues – wages would remain unpaid – ATO website indicates STP reports should be sent through irrespective of when wages are received by employees – applicant reported employee's wages as paid – negative implications for employees receiving social security benefits – Centrelink adjusted payments for those employees based on STP reports – applicant requested to rectify report with ATO – applicant refused – applicant argued he was correct in reporting and could not alter the reports after the fact – applicant summarily dismissed – respondent considered applicant's prior performance issues as a result of incident – applicant considered incapable of performing role – respondent alleged historic performance concerns from August 2022, which were not raised with applicant, contributed to valid reason for dismissal – Commission considered whether applicant's dismissal was harsh, unjust or unreasonable – observed an employee's single act of defiance may be viewed differently if employee had long history of compliance compared to prior history of unsatisfactory conduct – performance issues raised by respondent were insufficient – Commission not satisfied that applicant knowingly made false statements to ATO – no valid reason for dismissal – alternative actions available to redress applicant's actions – applicant unfairly dismissed – reinstatement inappropriate [*Lee*] – applicant's loss mitigated by new employment [*Sprigg*] – Commission required to ensure level of compensation appropriate having regard to all the circumstances [*Double N*] – held compensation of one week appropriate given applicant unfairly dismissed.

U2023/6837 [2023] FWC 3367
Easton DP Sydney 14 December 2023

Royal Flying Doctor Service (Queensland Section) Limited v Australian Nursing and Midwifery Foundation

INDUSTRIAL ACTION – termination of protected industrial action – ss.409, 418 Fair Work Act 2009 – Commission issued protected action ballot order (PABO) in October 2023 – this application was third s.418 application filed in relation to that PABO – first concerned vote conducted by ballot agent – second dealt with whether notice of intention to take protected industrial action was defective – in second application Commission found notice was defective – order to stop some of intended industrial action issued – current application contended latest notice of intended industrial action (Notice) proposed ban outside scope of question balloted in accordance with PABO – Notice stated ban on recording '(a) the time that the door of the aircraft closes at the base. (b) The time that the crew is ready' – the PABO included question proposing ban or partial ban on correctly recording 'non-clinical data' including times for 'crew read' and 'aircraft door close at base' – applicant submitted all data recorded by nurse during duty is in clinical context and is clinically relevant – respondent submitted language in question was specific and familiar to members and 'non-clinical data' covered any data not specifically clinical data – contended clinical data concerned 'observation and treatment of disease in a patient' – Commission rejected respondent's submission action is protected if authorised by members through ballot – Commission observed sections of Act requiring PABO itself to authorise action, including s.460 immunity for persons acting in good faith on protected action ballot results where results authorise particular industrial action – whether intended bans authorised by PABO – observed nurses are knowledgeable about importance of clinical versus non-clinical factors – however found action proposed ban on collecting clinical data (specifically time that door of aircraft closes at base and time that crew is ready) – found Notice warns of intention to ban recording of clinical information – found inconsistent with relevant question in PABO – found Notice defective and not protected – found industrial action contemplated in defective Notice was threatened, impending or probable and/or being organised – order to stop intended industrial

action issued.

C2023/7957 [2023] FWC 3457
Dobson DP Brisbane 21 December 2023

Rabadi v The Trustee for The YBL 2020 Trust

GENERAL PROTECTIONS – contractor or employee – s.365 Fair Work Act 2009 – jurisdictional objection to general protections application on basis applicant was not an employee and therefore was not dismissed from her employment – Commission considered whether applicant was an employee – where parties' relationship comprehensively committed to written contract, employment relationship characterised by terms of the contract – but where relationship has not been committed comprehensively to written agreement, question of whether employee or contractor determined by totality of the relationship – in examining totality, whether putative employee's work was so subordinate to the employer's business that performed as employee rather than part of an independent enterprise; and the existence of a right of control by a putative employer over the activities of putative employee relevant – [*CFMMEU, ZG Operations*] – finding no written contract, Commission considered totality of relationship – Commission observed applicant's work hours aligned with employees of respondent, applicant didn't complete work for any entity other than respondent, applicant did not make decisions of authority or determine her salary, and was subject to direction and control by respondent in the work she performed – Commission also considered mode of remuneration, provision and maintenance of equipment, obligation to work, provision for holidays, and deduction of income tax – Commission found applicant was employee for the purpose of the Act – jurisdictional objection dismissed.

C2023/2025 [2023] FWC 3322
Wright DP Sydney 12 December 2023

Hickey v Mt Alexander Timber & Hardware P/L

TERMINATION OF EMPLOYMENT – misconduct – out of hours conduct – ss.387, 394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant employed as General Manager from 13 December 2017 to 11 April 2023 – became director of the respondent around 6 November 2020 – applicant terminated for failing to disclose sexual relationship with estranged wife of respondent's co-director, who was a subordinate, as well as dishonestly in repeatedly denying sexual relations – applicant received show cause letter on 21 March 2023 – letter detailed four allegations pertaining to out of hours conduct – misuse of position, conflict of interest, dishonesty, serious reputational damage to the business – on 22 March 2023, respondent blocked applicant's IT access – applicant provided show cause response on 23 March 2023 – termination letter issued on 11 April 2023 due to serious misconduct but provided 4 weeks' payment in lieu of notice 'in good faith' – on 4 May 2023, applicant removed as director – Commission considered whether valid reason for dismissal existed – 'conduct complained of must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee' [*Rose*] – connection between conduct and employment must relate to inherent employment requirements [*Ventia*] – conduct must involve incompatibility, conflict or impediment to employment relationship or destruction of confidence – Commission maintained that entire factual matrix of applicant's out of hours conduct must be considered – Commission observed two reasons for dismissal given – respondent submitted applicant had duty to disclose sexual relationship as it could be a matter that would affect employment relationship, likely to cause serious damage to relationship, amounted to misuse of position – respondent submitted applicant, a senior employee, had greater obligation of good faith and fidelity and continuous denial demonstrated inherent dishonesty and erosion of trust – applicant submitted decision to terminate formed prior to show cause meeting therefore alleged dishonesty cannot be valid reason – applicant maintained actual reason was jealousy and therefore was capricious, spiteful, and prejudiced – applicant stated they have

right to silence about nature of relationship – Commission noted no policy existed governing out of hours conduct and no written employment contract between parties is apparent – Commission found applicant's sexual relationship connected with employment and applicant had duty to disclose it – Commission also held that applicant was dishonest in relation to the characterisation of the relationship – Commission found that conduct indicated a 'rejection or repudiation of the employment contract' – found that there was a sound, defensible and well-founded reason for dismissal – found applicant was given notice of the reasons for dismissal – Commission also considered whether applicant was given an opportunity to respond – respondent contended applicant was given an opportunity to respond through show cause process – due to short time frame for show cause response, Commission not satisfied applicant given opportunity to respond to allegations – considered other relevant matters – applicant submitted dismissal disproportionate due to private character of relationship and impact on applicant's personal and financial situation – Commission found failure to disclose not itself sufficiently serious to constitute valid reason for dismissal – found applicant was dishonest during show cause process which was itself sufficient to constitute valid reason for dismissal – Commission found procedural errors and significant personal and economic harm, which weighed in favour of applicant, outweighed by valid reasons for dismissal – held that dismissal not harsh, unjust or unreasonable – application dismissed.

U2023/3708 [2023] FWC 3059
Cirkovic C Melbourne 29 November 2023

Blomberg v Omni Pathways P/L The Trustee for Omni Pathways Unit Trust T/A Silk & Macro Consulting

CASE PROCEDURES – costs – ss.365, 366, 375B Fair Work Act 2009 – application for costs filed by applicant in s.365 matter – primary matter filed 26 April 2023 – respondent raised objection in primary matter that application filed outside statutory timeframe – applicant dismissed 4 April 2023 – final day to file was 25 April 2023 – 25 April was declared public holiday; ANZAC Day – where final day falls on public holiday timeframe extended to next business day – on 16 June 2023 Commission provided this information to parties and invited respondent to advise whether out of time jurisdictional objection was pressed – respondent confirmed it pressed jurisdictional objection – objection to be determined on the papers – prior to determination applicant made *Calderbank* offer to settle matter – respondent refused – Commission determined primary application filed within time by operation of *Acts Interpretation Act 1901* s.36 (as in force 25 June 2009) – jurisdictional objection dismissed – applicant sought indemnity costs pursuant to s.375B – contended respondent pressing jurisdictional objection was unreasonable act or omission – suggested Commission's communication regarding relevant timeframe and applicant's *Calderbank* letter made clear application filed within time – respondent suggested it acted on advice from Fair Work Ombudsman (FWO) – FWO had no record of contact from respondent at relevant time – relevant costs authorities considered – observed costs power under s.375B intended to be exercised only where clear evidence of unreasonable act [*Keep*] – noted key question was whether respondent pressing jurisdictional objection beyond 16 June 2023 was unreasonable act or omission – found respondent given clear advice on 16 June 2023, via Commission's communication, that application was filed within time – found respondent could have availed itself of other public Commission resources for further information on timeframe for lodgment – held pursuing jurisdictional objection was unreasonable – found this unreasonable act caused applicant to incur costs – held appropriate to order costs against respondent – costs on indemnity basis ordered.

C2023/2355 [2023] FWC 3201
Hunt C Brisbane 1 December 2023

Applicant v Respondent

GENERAL PROTECTIONS – application to dismiss by employer – ss.365, 725, 729 Fair

Work Act 2009 – matter subject to confidentiality order – protracted history between parties – applicant previously lodged s.394 application – s.394 application dismissed by Member – applicant appealed decision to dismiss the s.394 application – Full Bench dismissed appeal – applicant then brought s.365 dismissal dispute – respondent objected on grounds application lodged outside 21-day period required by s.366(1) – Commission granted extension, satisfied exceptional circumstances existed – respondent then raised jurisdictional objection under s.725 preventing multiple actions, noted applicant already applied for unfair dismissal remedy – respondent submitted applicant frustrated s.394 process by failing to attend conciliation, comply with directions to file material, or participate in original hearing – further thwarted appeal procedure by not providing submissions or medical evidence regarding absence – respondent raised ss.725, 729 prohibit applicant from additional application after unfair dismissal action dismissed for want of prosecution – Commission to consider whether applicant's previous s.394 application is jurisdictional bar to current s.365 application – observed purpose of ss.725 'to prevent an employer from being "twice vexed". However, it should not be used to enable an employer to avoid being vexed entirely' [*Cugura*] – applicant substantiated they were afflicted with significant mental health condition, requiring extended hospitalisation at time of s.394 proceeding – Commission found reasonable to conclude applicant was not in mental state to adequately address termination – Commission rejected respondent's submission that because applicant made prior applications, they were capable of doing so within time or only lodged due to failure of previous matters – Commission accepted evidence applicant suffered from schizophrenia for 7 weeks prior to termination, untreated for five months after – applicant unable to provide explanation for behaviour during show cause process, and period immediately following termination – held unfair dismissal application was never heard, Commission unable to make any findings regarding merits of matter due to inability of applicant to competently pursue application – existence and severity of applicant's condition not clearly articulated to Commission in previous application, hence initial matters dismissed – held not circumstance where respondent must defend itself against multiple applications concurrently, nor where applicant has failed at previous attempt to secure remedy – Commission noted respondent had not yet been required to defend itself against merit of application – held circumstances surrounding application do not fall within confines of s.725 intention – jurisdictional objection dismissed, matter programmed accordingly.

C2022/5303 [2023] FWC 3198
Schneider C Perth 4 December 2023

Retaining Solutions Design Construct P/L T/A Retaining Solutions Design Construct P/L

ENTERPRISE AGREEMENTS – termination of agreement – ss.225 and 226 *Fair Work Act 2009* – application to terminate Retaining Solutions Design Construct P/L Enterprise Agreement 2016-2020 (Agreement) – Agreement's nominal expiry date 14 March 2020 – relying on s.226(1)(a) of the FW Act, applicant submitted Agreement was unfair for employees and should be terminated because the *Building and Construction General On-site Award 2020* (Award) provided better employment conditions – Commission noted requirement to take into account views of employees and considered employee petitions supporting termination submitted by the applicant – Commission noted several classification levels likely to have greater minimum entitlements under Agreement than Award – considered petition inaccurate and misleading – given circumstances Commission concluded petitions could not be given significant weight as evidence of employees' genuine and informed views – Commission considered meaning of 'unfair' in s.226(1)(a) of the FW Act – considered *R v Swaffield* and *Em v The Queen* – Commission found assessment required by s.226(1)(a) of the FW Act solely directed to interests of relevant employees and entails a wholistic overall assessment of 'fairness' taking into account the impact of continuing or terminating the Agreement for each employee or class of employee – Commission found that evidence showed details for 13 employees who would be covered by the Agreement and assessed 7 of them may be significantly worse off in

terms of their minimum safety net instrument if the Agreement was terminated – Commission found Agreement conditions were superior to the conditions in the Award for certain employees' classifications – Commission did not have sufficient evidence to conclude whether employees receiving Award base rate of pay pursuant to s.206 of the FW Act would be better off if the Agreement was terminated – Commission concluded it had no jurisdiction to terminate the Agreement under s.226 of the FW Act because s.226(1) not made out – found other criteria in s.226(1A), (3), (4) and (5) did not need to be considered since Commission's discretion to terminate Agreement not enlivened – application dismissed.

AG2023/3762 [2023] FWC 3200
Crawford C Sydney 1 December 2023

Kumar v RFMC P/L T/A Kingsway Bar and Bistro

TERMINATION OF EMPLOYMENT – misconduct – employer policies – ss.385, 387, 394 Fair Work Act 2009 – incident occurred in workplace on 21 July 2023 – applicant and head chef engaged in heated argument over slow food service – applicant left kitchen, spoke with venue manager then returned home – applicant arrived for next shift on 23 July 2023, called into duty manager's office for meeting with head chef and duty manager – no advance notice of meeting – head chef told applicant behaviour was unacceptable following multiple formal warnings for physical altercations – head chef gave applicant final warning for walking out mid shift, which they considered effectively doubled as termination of employment – applicant requested one to two weeks' notice which was rejected, told they would no longer work at business – applicant sought unfair dismissal remedy – applicant previously issued verbal warnings for biting other staff and disruptive behaviour – fighting incident with co-worker recorded in personnel file dated 3 July 2023, signed by applicant – respondent asserts this represents formal written warning – Commission held file note not written warning in sense of not cautioning applicant about behaviour or consequences, yet applicant would have known negative record of behaviour – Commission contemplated whether there was a valid reason for dismissal – respondent submitted they terminated applicant for misconduct – Commission noted applicant's actions on 21 July 2023 on their own do not warrant termination – however Commission held prior violent acts towards other employees constituted a valid reason for dismissal – whether applicant was notified of a valid reason and provided an opportunity to respond – held respondent did inform applicant part of dismissal due to prior conduct and warnings, yet termination decision made before meeting on 23 July 2023 without applicant having opportunity to respond under s.387(c) – Commission also held verbal warning regarding performance and personnel file note amounted to valid warnings concerning performance – Commission held procedural deficiencies of termination outweighed by valid reason for dismissal – dismissal not harsh, unjust or unreasonable – application dismissed.

U2023/7378 [2023] FWC 2918
Lim C Perth 1 December 2023

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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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