FWC Bulletin

6 April 2023 Volume 4/23 with selected Decision Summaries for the month ending Friday, 31 March 2023.

Contents

Changes to the Fair Work Commission's functions

05 Mar 2023

From today, a number of changes to the functions of the Fair Work Commission come into operation. These changes are a result of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*.

As set out in the President's Statement of 8 December 2022, the Commission is committed to implementing these legislative amendments in an open and transparent way and with the needs of our users in mind.

Prohibiting sexual harassment in connection with work

The *Fair Work Act 2009* now includes a prohibition against sexual harassment in connection with work. The Commission can deal with sexual harassment disputes by:

- making a stop sexual harassment order
- otherwise dealing with the dispute, or
- both making a stop sexual harassment order and by otherwise dealing with the dispute.

We have published application forms for the new sexual harassment jurisdiction. These are available on the Forms page of our website. A new email address: ABSH@fwc.gov.au has also been created for parties to file documents with the Commission and contact case managers.

Detailed information on our role in dealing with sexual harassment in connection with work is now available on our website. A number of changes have been made to materials following the consultations, and we will continue to review the feedback that has been provided and update material as the jurisdiction develops.

We welcome ongoing feedback in relation to materials and processes. Feedback can be sent to consultation@fwc.gov.au.

Updated case law benchbooks will be published shortly.

We thank the members of our Sexual Harassment Working group for their input during this process. We also thank the organisations that responded in writing and those that gave their time to meet with us to provide feedback. All organisations will receive a direct response to their feedback.

Expert Panels for Pay Equity and the Care and Community Sector

An Expert Panel will be required when the Commission is considering changes to modern awards which relate to gender pay equity or the Care and Community Sector and when deciding whether to make an equal remuneration order.

A newly created Pay Equity and Awards Team within the Commission will support the work of the Expert Panels. The team can be contacted at awards@fwc.gov.au.

New application forms to vary a modern award and apply for an equal remuneration order are available on the Forms page of our website.

Information about gender pay equity, the work of the expert panels and equal remuneration orders have also been added to our website.

We intend to engage in a research project on occupational segregation and gender undervaluation. Further details concerning the research program will be announced in due course.

Absorbing the functions of the Registered Organisations Commission

The functions of the Registered Organisations Commissioner have now transferred to the General Manager of the Commission.

The obligations of registered organisations do not change.

All ongoing investigations, inquiries and litigation will transfer to the General Manager who will be assisted by staff transferring from the Registered Organisations Commission into the newly formed Registered Organisations Governance and Advice Branch. Conduct that occurred prior to the transfer of these functions may be subject to a potential inquiry, investigation or proceeding by the General Manager.

A new email address has been established for all registered organisations matters: regorgs@fwc.gov.au. Staff in the registered organisations teams at the Fair Work Commission can be contacted on 1300 341 665. Further information can be accessed at regorgs.fwc.gov.au .

We have also established a Registered Organisations Advisory Committee who will play an important advisory role over the coming months. We thank the members of the committee for their assistance.

Preparing for an unfair dismissal conciliation – online learning module launched today

30 Mar 2023

We have launched our new online learning module Preparing for an unfair dismissal conciliation .

This module is part of the expanding suite of resources available on our Online Learning Portal .
It has been designed to help employees and employers better prepare for an unfair dismissal conciliation conducted by a staff member of the Commission.

The module incorporates plain language principles to clearly explain the conciliation process, provide tips about how to prepare, outline the role of conciliators and other participants, manage expectations about potential outcomes, and provide referrals to more information and support.

The module includes interviews with conciliators and provides access to a downloadable checklist that reinforces the messages contained within the module.

We invite you to view the module the Online Learning Portal , and encourage you to send feedback or suggestions for future online learning content to us at onlinelearning@fwc.gov.au.

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 Friday 31 March 2023

1 CASE PROCEDURES – appeals – extension of time – ss.366, 585, 604 Fair Work Act 2009 – appeal – Full Bench – appellant sought permission to appeal against decision refusing to grant extension of time – appellant filed original application under s.365 FW Act – Deputy President determined at first instance that 21-day application period expired at 11.59pm AEST on 4 May 2022 – determined that application was lodged one day out of time because a readable document was not received by the Commission until 10.47am AEST on 5 May 2022 – not satisfied that exceptional circumstances existed – declined to grant extension of time and dismissed application – appeal commenced – appellant contended application was made within time and relied on s.37 *Acts Interpretation Act 1901* (AIA) – respondent submitted that determining when an application is 'made' requires focus on when application is received by Commission – submitted that s.37 AIA not relevant to determining whether original application was within time – Full Bench considered ss.36, 37 AIA and temporal aspects of s.366(1)(a) FW Act – observed that for a dismissal that took effect in Western Australia, 1) day of dismissal is excluded from 21-day application period, 2) a 'day' is a full 24-hour period, 3) 21-day application period begins and finishes in local time (AWST) – considered distinction between when an application is 'made' for purposes of s.366 FW Act and 'lodged' for purposes of FW Rules – noted that appellant's initial email at 11.59pm AWST attached a document that FWC Registry was unable to read – determined this to be an issue of 'lodgement' which did not affect application being 'made' – considered s.585 FW Act and observed that FW Rules do not displace or alter statutory time limit in s.366 – noted that delay in sending acknowledgement should not take application outside statutory time limit – determined that application was made in Western Australia and was received by Commission at legal time of 11.59pm AWST – found that original application was made within time – Full Bench found decision at first instance was in error – granted appellant extension of time to lodge appeal one day out of time – satisfied appeal enlivens public interest because decision at first instance was made in error – permission to appeal granted – appeal upheld – decision at first instance quashed – remitted to General Protections Team for allocation to conciliator.

Appeal by Hatch against decision of Young DP of 26 September 2023 [[2022] FWC 2572] Re: Woodside Energy Ltd

C2022/6960 [2023] FWCFB 51
Catanzariti VP Brisbane 9 March 2023
Bell DP
Lee C

2 ENTERPRISE AGREEMENTS – better off overall test – procedural

fairness – ss.185, 604 Fair Work Act – appeal – Full Bench – appeal brought against decision to approve Patches Asphalt Enterprise Agreement 2022 – 2025 (Agreement) – appeal contended CFMMEU was denied procedural fairness and otherwise that Agreement terms not better off overall compared to Asphalt Industry Award 2020 (Award) – issues of standing and whether to extend time to file – CFMMEU's standing to bring appeal considered – Full Bench considered whether CFMMEU was a person aggrieved – Full Bench noted person aggrieved, inter alia, must have interest that is not 'remote, indirect or fanciful and it needs to be beyond that of a general member of the public, an inter-meddler or a busybody' – Full Bench determined if CFMMEU entitled to enrol members covered by Agreement it would be person aggrieved – held CFMMEU had standing to appeal as rules covered at least some employees covered by Agreement – extension of time considered – relevant question whether, in all the circumstances, interests of justice favour an extension – Full Bench satisfied interests of justice warranted extension – extension of time granted – grounds of appeal considered – suggested procedural unfairness – CFMMEU suggested it was denied procedural fairness as not given opportunity to be heard on approval application – CFMMEU request made soon after approval application lodged – request noted on Commission file and CFMMEU advised this would be brought to attention of member – Deputy President not aware of CFMMEU request – Agreement approved without notification or involvement of CFMMEU – Full Bench noted administrative decision makers must accord procedural fairness to those impacted by decisions and focus 'is on what should be provided in the circumstances of a case to ensure the decision is made fairly' – found Deputy President did not deal with or determine CFMMEU application to be heard – held denial to speak to its interests was material denial of procedural fairness and amounted to jurisdictional error – ground of appeal upheld – better off overall test considered – Full Bench considered spread of ordinary hours in Agreement and Award – under Agreement ordinary hours of work could begin at 5:00am – same start time under Award would be overtime for an hour or entire shift considered a night shift – consequence on pay rate considered – found employees working 5:00am starts would not be better off overall – ground of appeal upheld – Full Bench quashed Agreement approval decision – noted many other issues relevant to assessment of better off overall test remain – matter remitted to Deputy President to rehear.

Appeal by Construction, Forestry, Maritime, Mining and Energy Union against decision of Boyce DP of 13 October 2022 [[2022] FWCA 3560] Re Norman McMahon Patches P/L t/a Patches Asphalt

C2022/8109 [2023] FWCFB 55
Gostencnik DP Melbourne 17 March 2023
O'Neill DP
Bissett C

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3 ENTERPRISE AGREEMENTS – ambiguity or uncertainty – standing – s.217 Fair Work Act 2009 – application to vary an agreement to remove an ambiguity or uncertainty applicant sought to vary a number of enterprise agreements under s.217 of the FW Act, despite these agreements being superseded and ceased operation – this was in response to the respondent, the CFMMEU, commencing proceedings against applicant in the Federal Court for breaches of superseded agreements – applicant submitted

provisions relevant to Federal Court matter were ambiguous and uncertain, thus applied to the Commission to have them varied – respondent argued that because the agreements had ceased, applicant was not an employer at time of the application and therefore did not have standing per s.217(1)(a) of the FW Act – respondent additionally submitted the provisions of the agreement were not ambiguous or uncertain – respondent relied on the ordinary meaning of 'employers covered by the agreement', and submitted this referred only to employers covered by agreement at time of application – respondent submitted that per s.53(5) of the FW Act, ceased agreements do not cover employers, employees or unions and application therefore did not satisfy requirement in s.217(1)(a) – respondent submitted that once an agreement ceases, its coverage also ceases and it is no longer possible to vary it – respondent submitted only those currently covered by an agreement could make an application to vary under s.217(1) – respondent relied on the Explanatory Memorandum of the *Fair Work Bill* – noting s.217(1) prescribes 'covered by an agreement' rather than 'is covered by an agreement' the applicant submitted the applicant party need not be presently covered by the agreement – applicant further submitted standing provisions generally define who can make an application rather than prescribing when an application can be made – the Commission identified the central controversy as whether 'covered by an agreement' in s.217(1) embraces past coverage – Commission identified that the word 'covered' is a past participle that forms the present perfect tense, which connotates an action that begun in the past and that has significance for the present e.g. 'the agreement has covered the workers' – given the context and text of s.217(1), 'covered by the agreement' does not include those covered in the past – the Commission considered the operation of s.53(5) and found one purpose is to prevent an application to vary from a party who would be covered by an agreement that ceased to operate – the Commission found s.53(5) supports the respondent's construction of s.217(1) – the Commission found that several other contextual considerations support the respondent's construction of s.217(1) – the Commission found it unlikely parliament would have intended to allow former employees or employers to apply to have an agreement varied – the Commission found the decisions in *Miller* and *Esso Australia P/L* did not support the applicant's interpretation – the Commission found s.217(1)(a) allows employers to make applications to vary enterprise agreements only if they are covered by said agreement at the time of the application – Commission found applicant was not an employer at the time of application and therefore did not have standing – Commission found it has no power to determine such an application – given this finding, the Commission did not find it necessary to decide whether provisions of the agreement were ambiguous or uncertain – application dismissed.

Qube Ports P/L

AG2022/4849 [2023] FWC 508
Colman DP Melbourne 1 March 2023

4 RIGHT OF ENTRY – non-member records – ex-parte – s.483AA Fair Work Act – application for an order to access non-member records – applicant, the United Workers Union, contended the respondent had underpaid employees, failed to accurately audit this underpayment and denied the union access to documentation

confirming the contravention had been remedied – Union submitted members approached them, concerned these underpayments had not been correctly back paid – union submitted respondent had not remedied this breach and thus had contravened s.50 of the FW Act – Under s.483AA(1)(b) applicant sought various documents with relevant employment details – union wrote to the respondent asking for time sheets of specific employees – respondent replied they were unable to provide such information without express consent from relevant employees – union was concerned about preserving anonymity of its members, to protect their position in upcoming bargaining and for possibility respondent may retaliate against members – under s.483AA, union applied for non-member records – union submitted documents sought, including timesheets, rosters and employment contracts, were necessary to accurately investigate alleged underpayment – documents available to employees (such as payslips) did not contain all relevant detail, such as additional hours worked – union distinguished its position from the applicant in *Maritime Union of Australia* – found there was a suspected contravention of relevant agreement – satisfied some of the documents sought, including timesheets and rosters, were necessary to investigate and applied *IEUA* [2016] FCA 140 – found some documents, including employment contracts of non-members, were not necessary applying the meaning in s.438AA(2), construed in *IEUA* – Commission acknowledged the union was attempting to protect itself from having to reveal the identity of its members, but found this unpersuasive as the legislation already sufficiently protects employees from adverse action – Commission issued an order for timesheets, rosters and an audit sheet – Commission found this necessary for union to investigate suspected breaches – order issued.

Application/Notification by United Workers' Union

RE2023/147 [2023] FWC 513
Beaumont DP Perth 10 March 2023

5 ENTERPRISE BARGAINING – scope order – s.238 Fair Work Act 2009 – two related applications for a scope order – The Australian Workers' Union (AWU) and "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) have each sought that the Commission make orders, in effect, to combine the scope of 2 bargaining processes that are presently underway regarding certain employees of Santos Ltd – the Cooper Basin is Australia's largest onshore oil and gas field development – it is located on the borders of northeast South Australia and southwest Queensland – it produces natural gas, gas liquids and crude oil – the AWU and AMWU (collectively the Unions) are bargaining representatives for members who are employed by Santos across various sites and facilities in the respondent's Cooper Basin and related operations – the Unions are currently engaged in bargaining with Santos over two proposed enterprise agreements – one covering workers employed at the Port Bonython and Moomba processing plants (Midstream) and one covering workers across oil and gas fields in the Cooper Basin (Upstream) – at present, the employees are all covered by the *Santos Ltd Cooper Basin Enterprise Agreement 2019* (2019 Agreement) – the Unions seek that one bargaining process be undertaken for both groups of employees on the basis that the current negotiations are not proceeding in a fair and efficient manner and that a change in the

scope of the negotiations would promote both of those objectives – the Unions presented common cases and relied upon the evidence and submissions advanced by each other – Santos contended that there are objectively justifiable reasons why it is seeking to bargain to replace the 2019 Agreement with the two Proposed Agreements – it further submitted that collapsing bargaining back into a single stream would itself create unfairness and inefficiency – Santos has recently announced a new organisational structure, which separates the organisation into what it has described as two businesses – the evidence revealed that these are, in effect, separate business units with individual budgets and reporting arrangements but that Santos remains the legal entity which employees all of the employees involved in these matters – the units are now 'Upstream Gas and Liquids', which covers gas and liquid production in the Cooper Basin's Upstream facilities; and 'Santos Energy Solutions' which covers the Cooper Basin's midstream assets – the 2019 Agreement reached its nominal expiry date on 4 July 2021 – on 31 May 2021, Santos distributed a Notice of Employee Representational Rights (NERR) for a single enterprise agreement to replace the Agreement with a scope that, in effect, reflected the 2019 Agreement – bargaining commenced on 9 September 2021 – also on 9 September 2021, Santos issued new NERRs for two separate enterprise agreements to replace the 2019 Agreement, the proposed Santos Ltd Cooper Basin Midstream Enterprise Agreement 2021 and the proposed Santos Ltd Cooper Basin Onshore Enterprise Agreement 2021 (now entitled the Upstream Agreement) respectively – approximately 200 employees of Santos are covered by the 2019 Agreement and the Santos Proposed Agreements – as at the hearing of this matter, there had been 23 bargaining meetings with Santos for the Santos Proposed Agreements – 12 bargaining meetings for the Midstream Agreement and 11 for the Upstream Agreement – Commission found that despite the many bargaining meetings over the course of more than a year, bargaining has not progressed to the point where there is any immediate likelihood of agreement between the Unions and Santos, or based upon present indications, an agreement likely to be approved by the majority of employees in each business unit – held that there had been very little progress in reaching agreement on the substantive bargaining issues between the major bargaining representatives – s.238(4)(b) of the FW Act provides that the Commission must be satisfied that making a scope order will promote the fair and efficient conduct of bargaining – not necessary that the present bargaining be considered to be unfair or inefficient – the applicant for a scope order must demonstrate that the making of the order would promote, that is encourage and facilitate, bargaining that is fairer and more efficient than if no order was made – *CEPU v Utilities Management* considered – Commission considered that the 2 parallel processes have led, and would continue to lead, to a less efficient bargaining process – found duplication of attendances, claims and counterclaims and negotiations between the 2 processes and this involves both the Unions and many of the Santos representatives – Commission satisfied that on balance, the change in scope as proposed would lead to fairer and more efficient bargaining when all of the circumstances and the interests of all parties are taken into account – Commission found that the jurisdictional prerequisites for the granting of the applications and the making of the Orders sought had been met – also found that the making of the Orders would lead to a fairer and more efficient bargaining process and that it was appropriate

to make the orders.

Australian Workers' Union, The and Anor v Santos Ltd

B2022/1240 and Anor		[2023] FWC 133
Hampton DP	Adelaide	9 March 2023

Other Fair Work Commission decisions of note

Goodenough v CXN Transport P/L t/a Con-X-Ion Airport Transfers

TERMINATION OF EMPLOYMENT – extension of time – date dismissal took effect – s.394 Fair Work Act 2009 – application lodged on 12 September 2022 – respondent raised jurisdictional objection that application was made out of time – parties in dispute about date dismissal took effect – respondent submitted application made 7 days outside statutory time frame as dismissal took effect when applicant was notified of his redundancy by email on 15 August 2022 – applicant submitted his application was made in time as his dismissal took effect on 29 August 2022 when he received his redundancy payment – Commission considered the proper meaning of 'within 21 days after the dismissal took effect' – dismissal does not take effect until it is communicated to the employee and cannot take effect retrospectively [*Ayub*] – Commission found primary reason for delay was that the dismissal was not communicated to the applicant in a clear and unambiguous manner – Commission rejected submission that on reasonable reading of email correspondence applicant should have known his employment was at an end – noted a clear and unambiguous email would not require consideration of how a reasonable person would understand the email – Commission found the applicant became aware of his dismissal after it had taken effect when he was notified by the respondent's lawyer on 29 August 2022, or in the alternative, when he met with the respondent on 22 August 2022 – Commission satisfied that exceptional circumstances existed to justify granting an extension – jurisdictional objection dismissed – extension of time granted.

U2022/9169		[2023] FWC 715
Asbury DP	Brisbane	24 March 2023

Workzone Traffic Control P/L Enterprise Agreement 2009

ENTERPRISE AGREEMENTS – ambiguity or uncertainty – s.217 Fair Work Act 2009 – application to vary the *Workzone Traffic Control P/L Enterprise Agreement 2009* to remove an ambiguity or uncertainty by Workzone Traffic Control P/L – sought an order varying cl 7.4.5 of the Agreement (Casual Employment) retrospective to the date the Agreement commenced, 4 February 2010 – in February 2022 a former casual employee raised a complaint with Workzone alleging underpayment – in March 2022 that employee took their complaint to the then Australian Building and Construction Commissioner (ABCC) – the former employee asserted that the Agreement required Workzone to pay casual employees a loading of 25% on top of the rates set out in Appendix A – Workzone had, for 12 years, been paying casual employees the hourly rate specified for casuals in Appendix A of the Agreement – Workzone had done so because it considered that the casual rates specified in Appendix A were inclusive of the casual loading – on 16 June 2022 an inspector of the ABCC advised Workzone that she had formed a view that the employer was in breach of the Agreement with respect to hourly rates paid to the former employee – the ABCC issued a compliance notice under the then s.99 of the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) – Workzone responded to the compliance notice and the ABCC's interpretation of the Agreement by making this application – Workzone sought an order that the Agreement be varied to correct an ambiguity or uncertainty by deleting cl 7.4.5 and inserting the following in lieu: '7.4.5 A casual Employee shall be paid at the rate as contained in Appendix A: applicable to the Employee's relevant classification. The casual loading of 20% transitioned up to 25% in accordance with the Modern Award, of the ordinary rate, is in lieu of all forms

of paid leave (with the exception of long service leave), jury service and public holidays not worked.' – in the alternative, Workzone sought an order that the hourly rates of pay in Appendix A be amended to remove the casual loading – approach to s.217 considered by the Full Court of the Federal Court in *Bianco Walling P/L v CFMMEU* – read in isolation, the text of cl 7.4.5 is straightforward – it states that a casual employee is to be paid the rate specified in Appendix A 'plus a casual loading' – however, assessing whether an ambiguity or uncertainty exists is not simply a consideration of one clause or one phrase in one clause read in isolation – the agreement as a whole must be considered and the relevant provision must be read in context having regard to its industrial purpose – cl 7.4.5 must be read in the context of Appendix A – that much is clear from the text itself; the clause expressly references Appendix A – with respect to traffic controllers, Appendix A (column 1) provides three classifications (referred to as 'Item Description0s'): Traffic Controller Level 1 CAS; Traffic Controller Level 3 CAS; and Traffic Controller Level 3 – uncontested evidence was that, at the time of making the Agreement and since, all Traffic Controllers Level 1 were and have since been casual employees – this was in contrast to Traffic Controllers Level 3 for which both casual and weekly hired provision was made – each of the item descriptions in Appendix A are contained in a table which also contains a construction worker classification – alongside the 'Construction Worker Gr 3' description is the abbreviation 'Perm' – Commission found that the letters 'CAS' in first two boxes of column 1 of Appendix A is an abbreviation of the word 'CASUAL', and that the letters 'Perm' in the third box is an abbreviation of the word 'Permanent' – the hourly rates set out in Appendix A (column 3) applicable to each described position are rates applicable to either a casual or a permanent employee as the case may be – found Appendix A provides differential hourly rates of pay between casual and permanent employees – Commission well satisfied that on a textual reading of the Agreement as a whole, and in particular cl 7.4.5 when read in conjunction with Appendix A, that an ambiguity exists with respect to the rate of pay for casual employees and in particular whether the rate specified for 'Traffic Controller – Level 3 CAS' and the rate specified for 'Admin – Casual – level 3' is inclusive of the casual loading required to be paid – further, as it is reasonably arguable that the hourly rate specified for 'Traffic Controller Level 3 CAS' includes the casual loading, then it is similarly reasonably arguable that 'Traffic Controller Level 1 CAS' likewise does so notwithstanding that no Traffic Controller Level 1 classification is specified for permanent employees – Commission found there to be ambiguity in the Agreement with respect to the rates payable to casual employees – concluded that the Agreement was uncertain within the meaning of s.217 – Commission found that ambiguity exists between the terms of cl 7.4.5 and Appendix A having regard to textual considerations – neither the employer nor employees can readily discern from the text of the Agreement what is to be the lawfully prescribed casual rate of pay given the ambiguity that exists – Commission found the Agreement was uncertain with respect to the rates payable to casual employees – a finding of ambiguity or uncertainty in an enterprise agreement is a condition precedent to the exercise of power under s.217 – in this matter the Commission found that both ambiguity and uncertainty exists – however, it does not automatically follow that because the relevant jurisdictional fact(s) are established, that the discretion to remediate the ambiguity or uncertainty must be exercised – after careful consideration the Commission concluded that the factors in favour of exercising a discretion weigh significantly more strongly than those against – found it was appropriate to exercise a discretion to vary the Agreement to remove, insofar as possible, the ambiguity or uncertainty – Commission considered that the primary variation sought would, insofar as possible, remove the ambiguity or uncertainty and be consistent with the common intention and established custom and practice – order made in the terms sought – the variation come into effect from 4 February 2010, being the date the 2009 Agreement commenced.

AG2022/2405 [2023] FWCA 758
Anderson DP Adelaide 9 March 2023

Reeve v PKF (Gold Coast) HR Services P/L

TERMINATION OF EMPLOYMENT – extension of time – mental health – s.394 Fair Work Act 2009 – applicant worked as Director of Audit and Assurance – applicant resigned on four weeks' notice alleging unreasonable conduct including workplace bullying and unethical conduct – resignation took effect on 25 November 2022 – applicant contended he was forced to resign and challenged dismissal – applicant filed application 28 days after alleged dismissal – application out of time by seven days – applicant diagnosed with attention deficit hyperactivity disorder and major depressive disorder well prior to resignation – after resignation applicant's clinical psychologist prepared report in support of applicant's claim for extension of time – applicant's treating psychiatrist also prepared report in support of extension – both gave evidence in support of applicant – applicant suggested exceptional circumstances existed as he was incapacitated due to illness and unable to file within time – whether exceptional circumstances considered – applicant suggested mental health illness precluded him from filing within time – two issues for consideration: 1) was applicant suffering mental health illness and 2) was condition such that applicant could not reasonably take advice and instruct solicitors to file proceedings within time or earlier than when he did – Commission satisfied applicant had pre-existing mental health conditions – whether this caused material impact on capacity to lodge [*Bianca Mamo*] – rejected respondent's submission that clinical psychologist's report should be disregarded as author was not a medical practitioner – Act does not require evidence of medical practitioner to establish a health condition – qualified and accredited health professional can provide such evidence provided there is a proper scientific basis for evidence – relevant issue is whether evidence establishes, on proper science, the fact of incapacity or impairment that reasonably explains delay in filing – Commission noted applicant was able to seek medical advice but not legal advice over relevant period – found applicant's mental health impaired his taking of advice and filing of claim in required period – weighs somewhat in favour of exceptional circumstances – other factors neutral or not relevant – period of delay not short or immaterial – satisfied pre-existing and diagnosed mental health condition was likely compounded by resignation and loss of employment – noted applicant's feelings not subjective self-assessment but were medically diagnosed and being treated prior to resignation – held exceptional circumstances exist – jurisdictional objection dismissed – matter to proceed.

U2022/12234		[2023] FWC 488
Anderson DP	Adelaide	28 February 2023

Jarouche v Lipa Pharmaceuticals Ltd

GENERAL PROTECTIONS – dismissal dispute – forced resignation – ss.365, 386 Fair Work Act 2009 – general protections application – respondent raised jurisdictional objection on grounds that applicant resigned and was not dismissed – applicant employed by respondent as Chief of Quality from 24 May 2021 – applicant submitted that at a meeting regarding ongoing performance concerns on 29 September 2022 her employment was terminated on the employer's initiative and she was dismissed within the meaning of s.386(1)(a) FW Act – submitted that, alternatively, if she resigned, she was forced to resign because of the conduct of the employer and was dismissed within the meaning of s.386(1)(b) FW Act – respondent submitted that applicant was not terminated at its initiative or forced to resign – submitted that raising exit options after losing confidence in an employee does not constitute termination at its initiative – submitted that resignation was raised at the meeting as 'one option' – submitted that its conduct did not place the applicant in the position where she had no effective or real choice but to resign – submitted that applicant communicated her agreement to resign on 5 October 2022 when she advised that the reference and message to staff were in acceptable terms – submitted that applicant's failure to sign the deed of release did not negate any resignation – Commission considered s.386(1) FW Act – determined that respondent did not give notice of dismissal on 29 September 2022 but gave notice that applicant had no continuing future with respondent and proposed a parting of ways by managed resignation – Commission found that respondent did not terminate applicant's employment within

meaning of s.386(1)(a) – noted that on 29 September 2022 respondent suggested option of managed resignation – noted that on 5 October 2022 applicant consented to additional terms and her resignation became a fact rather than a matter of private negotiation – did not accept it was not a resignation because applicant refused to sign the deed – noted that applicant was aware that she would forego the extra month's pay if she did not sign the deed of release – Commission satisfied that by authorising respondent to announce her resignation to staff and asking respondent to send a reference on agreed terms applicant resigned on 5 October 2022 – noted that on 29 September 2022 respondent proposed no outcome other than the applicant's exit from the business and no other objective existed or was communicated over the next 6 days – satisfied that employer's conduct between 29 September 2022 and 5 October 2022 was intended to bring applicant's employment to an end – Commission found that respondent's conduct was such that applicant had no choice but to resign and that applicant's resignation was forced within meaning of s.386(1)(b) FW Act – Commission found that applicant was dismissed from employment – jurisdictional objection dismissed – certificate issued.

C2022/7079 [2023] FWC 493
Anderson DP Adelaide 28 February 2023

Construction, Forestry, Maritime, Mining and Energy Union v MSS Strategic Medical and Rescue P/L

ENTERPRISE BARGAINING – bargaining order – ss.228, 229, 230 Fair Work Act 2009 – application for a bargaining order to restrain respondent from proceeding with employee vote on proposed enterprise agreement and to require respondent to attend further meetings with applicant – enterprise agreement concerned employees providing medical and emergency services at Loy Lang A power station and mine – parties held first bargaining meeting on 31 May 2022 and 11 more meetings occurred over 2022 – on 23 and 24 January 2023 respondent put offer to applicant and stated if offer rejected bargaining at impasse – applicant rejected proposed agreement – respondent put proposed agreement to employee vote in early February and agreement rejected – respondent asked employees for feedback on agreement's rejection – in late February and early March parties communicated about whether applicant would support agreement that addressed personal and annual leave issues raised by employees – conciliation conference on 3 March did not result in agreement – on 6 March respondent provided applicant proposed agreement with two additional items relating to personal and annual leave and stated bargaining at impasse and that, unless applicant indicated agreement to proposal by 7 March, it would put the agreement to employee vote – applicant replied with further offer – on 8 March respondent replied that bargaining at impasse – on 9 March respondent informed employees offer open for vote from 20 March – on 10 March applicant notified respondent of its belief respondent breached good faith bargaining requirements and requested respondent withdraw ballot and cease directly negotiating with employees – on 14 March respondent refused to withdraw ballot and said no utility in further meeting – Commission considered *Tahmoor Coal* – Commission satisfied applicant lodged a valid application, a majority support determination had been made and applicant complied with notification requirement – Commission rejected contention that respondent refused to attend bargaining meetings with applicant since 16 December – Commission rejected submission there was no stalemate and found bargaining reached impasse because, while applicant's compromise offer entailed substantial movement, respondent very clear it would not agree to remaining claims – Commission noted bargaining in train since May 2022 and respondent had replied to applicant's proposals in a timely manner and gave genuine consideration to proposals and reasons for its responses – Commission found respondent did not fail to attend and participate in meetings at reasonable times or to recognise or bargain with applicant – Commission found respondent's conduct not unfair, capricious, arbitrary or undermining of freedom of association or collective bargaining – Commission rejected submission respondent negotiated directly with employees because simply seeking feedback from employees does not equate to circumventing

bargaining representatives and is not inconsistent with good faith bargaining – Commission stated submission that casual employees may be artificially engaged to work during voting period in order to inflate 'yes' vote may be aired in s.185 application for approval of an agreement – Commission not persuaded order preventing employees voting on agreement reasonable – Commission not satisfied respondent did not meet good faith bargaining requirements – Commission's power to make a bargaining order not enlivened – application dismissed.

B2023/239		[2023] FWC 655
Colman DP	Sydney	17 March 2023

Chapman v Site Clean Management Services P/L

TERMINATION OF EMPLOYMENT – termination at initiative of employer – forced resignation – ss.386, 394 Fair Work Act 2009 – application for unfair dismissal remedy – respondent sought to move applicant to lesser role – applicant threatened with performance management plan – applicant told his role no longer required and that he should consider resigning – applicant ceased receiving instructions from supervisor – applicant's company vehicle removed – applicant advised redundancy likely – applicant required by respondent to return property – applicant queried work arrangements for next day – applicant never advised of work arrangements – applicant tendered resignation having already accepted new role – act of employer resulted directly or consequentially in termination of employment relationship [*Mohazab*] – action taken with intention of either forcing applicant into more junior role or bringing employment to an end – pattern of behaviour made clear to applicant he had no future with respondent – that applicant applied for and secured new role prior to end of employment does not mean decision to resign was not a consequence of respondent's conduct – not a genuine redundancy – no valid reason for dismissal – that applicant took calculated approach to exiting employment weighs against finding that dismissal unfair – found that dismissal was unfair – remedy considered – no loss of earnings – applicant's lack of candour toward respondent taken into account – no compensation awarded.

U2022/11640		[2023] FWC 541
Masson DP	Melbourne	7 March 2023

Micke v University of Western Australia

TERMINATION OF EMPLOYMENT – minimum employment period – ss. 384, 390 Fair Work Act 2009 – application for unfair dismissal remedy made by applicant who worked as a Casual Academic for respondent – applicant worked for the respondent from 1 July 2019 and was dismissed 1 November 2022 – respondent raised jurisdictional objection on the basis that minimum employment period was not met – minimum period of continuous service required at the time of dismissal was six months – respondent argued the nature of applicant's casual employment was "not of the kind" to constitute the required period of employment under s.384(2) FW Act – respondent also argued applicant was suspended in October 2021 and November 2021 severing continuity of service – regardless of suspension applicant's service was severed during breaks between semesters before being re-engaged – applicant's employment contract contained clause notifying of irregularity of the nature of employment – respondent's School of Molecular Science ('School') required numerous 'Demonstrators' each semester to participate in unit activities – number of Demonstrators depended on budget constraints and availability of permanent staff – those engaged with the School would be sent engagement emails informing the nature and conditions of their casual employment – on 19 October 2021 applicant faced disciplinary action for contravening respondent's Code of Conduct – on 1 November 2021 applicant received correspondence regarding the continuation of suspension during investigation – on 13 June 2022 two of the five allegations had been substantiated against the applicant – following cancelled appeal, applicant was terminated via email for serious misconduct – Commission to consider meaning of

period of employment as per s.384 FW Act – relevant consideration regarding days and hours of work and whether there was a reasonable expectation of ongoing employment [*Bronze Hospitality*] – applicant notified in advance of teaching engagements and as a casual employee, worked on a regular and systematic basis [*Yaraka*] – applicant's suspension was not a period of authorised absence to warrant continuity of service – Commission held applicant's continuous service was between July and October 2021 as a Demonstrator for the School and not since 2019 – Commission established there was no reasonable expectation of continuing employment after that semester period in October 2021 – Commission concluded that applicant did not complete a 'period of employment' of at least the 'minimum employment period' – application dismissed.

U2022/11192 [2023] FWC 200
Beaumont DP Perth 24 February 2023

Australian Ceramics Engineering P/L v Archer

CASE PROCEDURES – revoke or vary decision – incomplete evidence – s.603 Fair Work Act 2009 – application to revoke decision concerning unfair dismissal on basis it was decided on incomplete evidence – applicant failed to present its case at first instance – hearing proceeded in its absence – matter determined on basis of respondent's materials – decision concluded dismissal unfair despite valid reason as redeployment possible – ordered compensation of $34,200 – applicant argued it failed to present its case as it was misled by temporary HR contractor who said matter likely to fall away due to jurisdictional objection and did not use correct email address for correspondence – applicant contended dismissal was not harsh, there were no redeployment options and respondent did not attend discussion meetings – applicant contended revocation appropriate to ensure procedural fairness – Commission found had case been presented, different outcome may have unfolded – however, applications to revoke should not be used to re-litigate original case and a party should not be permitted to raise new argument it failed to put, either deliberately or by inadvertence, during original hearing [*Grabovksky*] – the following factors favoured Commission exercising its discretion to revoke – various findings made at first instance including valid reason for dismissal – plausible contention that respondent, by failing to engage in discussions about redeployment, contributed to his dismissal – decision was made on incomplete evidence – however, Commission found these were outweighed by the following countervailing factors – application had been on foot since 29 March 2022, decision handed down on 18 November and through no fault of respondent decision now being revisited – managing director and incumbent HR manager knew application was on foot – managing director approved content of F3 response and was provided with notice advising parties they would receive new notice of listing in due course – managing director did not receive new listing and had not been informed application discontinued, dismissed or determined – he opted to believe opinion of temporary HR contractor there was no case to answer however applicant clearly embroiled in litigation – no persuasive evidence adduced as to why it failed to exercise due diligence to enquire about status of application against it – Commission declined to exercise discretionary power to revoke decision – application dismissed – stay of decision and order previously granted removed.

C2022/8177 [2023] FWC 115
Beaumont DP Perth 27 February 2023

Dylan v Serco Australia P/L

TERMINATION OF EMPLOYMENT – misconduct – employer policies – ss.387, 394 Fair Work Act 2009 – applicant employed as correctional case officer – dog handler at NSW correctional facility – a correctional facility general purpose dog was injured and required surgery to its tail – applicant eager to find cause of injury and alleged a systemic cover up concerning how injury was sustained – respondent alleged applicant made inappropriate and damaging comments while escorting an inmate to

hospital – applicant denied making inappropriate comments – respondent witness made contemporaneous notes of comments in an email – Commission held respondent witnesses to be credible particularly in light of contemporaneous email – on balance of probabilities applicant made the inappropriate comments [*Brigginshaw*] – inappropriate comments amounted to breach of respondent's policies – allegation that inappropriate comments amounted to misconduct not accepted – allegation that applicant refused to answer questions during investigation substantiated – applicant secretly recorded investigation meeting – respondent only became aware of secret recording at hearing – applicant warned of right to refuse to answer questions about secret recording on grounds of self-incrimination – real and appreciable danger of conviction under Surveillance Device Act 2007 (NSW) – applicant initially answered questions – secret recording of meeting highly inappropriate [*Gadzikawa]* and contrary to duty of good faith and fidelity to employer and undermined trust and confidence [*Schwenke*] – applicant's inappropriate comments, refusal to comply with reasonable direction to answer questions and secret recording gave respondent valid reason for dismissal – procedural fairness afforded to applicant – Commission considered other relevant matters – theory of cover up regarding general purpose dog's injury not substantiated – applicant's conduct of such grave nature it warranted summary dismissal [*Sharp*] – countervailing factors including length of service, economic impact considered – dismissal not harsh unjust or unreasonable – application dismissed.

U2022/9781 [2023] FWC 674
Saunders DP Newcastle 21 March 2023

Paki v Howley Group P/L

TERMINATION OF EMPLOYMENT – genuine redundancy – s.389 Fair Work Act 2009 – application for unfair dismissal remedy pursuant to Part 3-2 of the Act – respondent objection as to dismissal being a case of genuine redundancy – in March 2022 applicant commenced in a new role with respondent as a Sales Training Officer (STO) – applicant was the only STO in respondent's business – Commission noted that consideration must be given as to whether a genuine redundancy within the meaning of s.389 of the Act can be made out – Commission also noted that if a genuine redundancy is made out, respondent will have a full defence to the application [*Ulan Coal Mines*] – on 30 November 2022 applicant was informed by respondent of her dismissal for reasons of redundancy by way of a letter of termination – applicant submitted that her role was still required as the training of new staff would still need to occur in respondent's business – respondent did not refute that training of new staff would still need to occur but submitted that the standalone STO role was no longer required as training could be facilitated in-store by other employees – Commission first considered whether applicant's job was no longer required to be performed by anyone because of operational changes in respondent's business pursuant to s.389(1)(a) of the Act – Commission noted that 'operational changes' is an extremely broad concept and that is solely for the managers or relevant decision-makers to decide what 'operational changes' are appropriate; Commission and other third parties have no ambit to determine the necessity of 'operational changes'[*Nettlefold*] – Commission satisfied that respondent had made genuine 'operational changes' to its business which resulted in the STO role no longer being required – Commission next considered whether respondent had any obligation in a modern award or enterprise agreement to consult with applicant regarding the redundancy pursuant to s.389(1)(b) of the Act – parties were in consensus that applicant's employment governed by the *Clerks – Private Sector Award 2020* (Award) – the Award noted that consultation would only be required if a 'major' change had 'significant effects on employees' – Commission was not satisfied on evidence that the redundancy of applicant made a 'seismic shift' to the activities of the employees of respondent collectively, therefore direct consultation with applicant was not necessary – Commission found that respondent had satisfied its consultation obligations pursuant to the Award – Commission finally considered whether it was reasonable in all of the circumstances for applicant to be redeployed in respondent's enterprise pursuant to s.389(2) of the Act – Commission noted that the consideration of whether

an appropriate redeployment was available mut be made with regard to *inter alia* the skills, qualifications, and experiences of applicant at time of the dismissal [*Ulan Coal Mines*] – respondent had offered three sales vacancies to applicant, which were ultimately rejected by applicant due to the scope of the role – Commission not satisfied on evidence that there was any vacant role for applicant to be redeployed into beyond those she had already rejected – Commission found a genuine redundancy pursuant to s.389 of the Act – application dismissed.

U2022/11709 [2023] FWC 466
Boyce DP Sydney 24 February 2023

Carter v Metro Trains Sydney P/L

GENERAL PROTECTIONS – dismissal dispute – ss.365, 386 Fair Work Act 2009 – applicant made application alleging adverse action involving dismissal – respondent objected on basis that applicant had not been dismissed within the meaning of s.386(1) – Commission to determine whether applicant was terminated on employer's initiative – if applicant was not terminated on employer's initiative Commission would not have jurisdiction to deal with dispute – applicant worked as Customer Journey Coordinator-Stations employee since 27 June 2002 – applicant complained about training provided in development program – materials were unclear and applicant was 'singled out' during training – performance issues arose during training – applicant participated in three training scenarios involving drama students from local high school – respondent alleged applicant acted inappropriately during scenarios – respondent spoke with applicant raising concerns for the training scenarios and her alleged behaviour – during conversation applicant indicated intention to resign – applicant stated "I will make your job easier" and returned access card and work phone – applicant did not confirm her resignation via letter with respondent – respondent accepted verbal resignation – applicant submits that respondent's adverse actions during employment caused immense stress and made her feel like there was no alternative to resignation [*Mohazb; Ashton*] – whether employer engaged in conduct with intention of bringing employment to an end or that termination was the probable result of employer's conduct so that the employee had no effective or real choice but to resign is the relevant test [*Bupa*] – Commission held that respondent's misstatements following the scenarios had the intention of bringing the applicant's employment to an end – CCTV demonstrated applicant did not act as alleged by respondent – Commission held applicant's resignation was expressed in 'heat of the moment' [*Tavassoli*] – Commission concluded applicant was dismissed by respondent.

C2022/5934 [2023] FWC 379
Cross DP Sydney 13 March 2023

Al Bankani v Western Sydney Migrant Resource Centre Ltd

TERMINATION OF EMPLOYMENT – valid reason – reinstatement – ss.387, 394 Fair Work Act 2009 – application for unfair dismissal remedy – respondent is not-for-profit company providing services to the migrant community and, as part of contract with Settlement Services International Limited (SSI), performs work as a sub-contractor to the Department of Social Services by providing services under the Commonwealth Government's Tier 3 Humanitarian Support Program – terms of contract between respondent and SSI required respondent to maintain client records for at least seven years and prohibited destruction or disposal of records relating to Tier 3 clients – Procedure Manual prohibited removal or modification of company data or equipment – respondent's On-Call Procedure specifically for work with Tier 3 clients did not address retention of records – applicant employed by respondent since 2016 and at time of dismissal was Specialist Intervention Services Manager (Acting) – respondent required to have specialised caseworker available to Tier 3 clients between 5pm and 9am for emergencies and provided applicant with a secondary mobile telephone (on-call phone) for this purpose – respondent dismissed applicant for serious misconduct on 3 February 2022 because in December 2021 applicant deleted contents of on-call phone before giving it to a colleague and commencing Christmas leave – applicant

submitted she was unfairly dismissed and sought reinstatement – applicant submitted her dismissal was unfair because there was no evidence client correspondence had been deleted, asserting Tier 3 clients called her primary work mobile after 5pm – respondent failed to investigate claims that information allegedly deleted was available on applicant's primary work mobile and client database – respondent never directed applicant not to delete telephone data or provided training, policy documents or contracts that specified obligation – respondent submitted dismissal was valid because applicant's misconduct was serious given she deleted the contents of the on-call phone without authority and contrary to respondent's Procedure Manual and Sub-Contractor Agreement – Commission considered *Sydney Trains* v *Gary Hilder*, *Westpac Banking Corporation* v *Wittenberg*, *Blackadder* v *Ramsey Butchering*, *Slonim* v *Fellows*, *Perkins* v *Grace Worldwide Australia P/L* and *Humphries* v *Buslink Vivo P/L* – Commission accepted possibility that at least some clients had called the on-call phone and potential damage of applicant's conduct to respondent – Commission found erasing contents of employer-issued device without authorisation was a valid reason for dismissal and applicant had breach respondent's Procedure Manual – Commission found policy terms too complex and legalistic for its context, which included second language English speakers, and did not clearly put applicant on notice of rules – respondent did not ensure its employees read and understood its Procedure Manual – respondent's policy bore little connection to the procedures initiated and/or tolerated by managers – respondent's mobile phones and IT procedures were haphazard – applicant gave rational and plausible explanation for claiming no Tier 3 client records were on on-call phone – consequences of applicant's conduct were not serious because likelihood on-call phone contained client records very low – respondent had access to materials capable of proving (or disproving) applicant's claims but did not investigate – SSI Contract not reasonably accessible to applicant – Commission satisfied dismissal was harsh, unjust and unreasonable – Commission considered gravity of conduct weighed against dismissal and supported reinstating applicant to former position – considered applicant's conduct prior to dismissal and efforts to find new job favoured a 25% reduction lost pay ordered – Commission ordered applicant be reinstated with continuity of employment maintained and respondent pay applicant lost remuneration in accordance with instructions – parties ordered to make further submissions to the Commission on lost pay if amount not agreed to by 17 March 2023.

U2022/2111 [2023] FWC 557
Easton DP Sydney 7 March 2023

Applications by E and Anor

ANTI-BULLYING – bullied at work – unreasonable behaviour – s.789FC Fair Work Act 2009 – two applications were initially lodged by the applicants – one of the applications was resolved following a consensus agreement being reached at a private conference – series of preventative actions agreed to address issues raised in first conference – one action included appointment of intermediary contact person to liaise between applicants and first respondent – preventative actions not implemented in the form agreed – for example contact person acted more as post office who did not foster respectful working relationship – further issues arose – did the respondents' conduct create an unreasonable risk to the health and safety of the applicants – applicants alleged that the respondents behaved unreasonably in the manner in which they dealt with them in respect of their obligations with each other – conduct alleged by the applicants was committed by the first respondent – first respondent denied allegations and claimed that the issues raised by the applicants resulted from decisions made by the third respondent – Commission held that the conduct of the first respondent amounted to bullying – Commission also held that given the first respondent's role as Treasurer and acting Chairman, the conduct of the first respondent flows to the third respondent – interim orders to ensure proactive steps are taken to ensure a safe place of work for the applicants issued.

SO2023/31 and Anor [2023] FWC 364
Dobson DP Brisbane 14 February 2023

Application by Australian Education Union (284V) and Anor

TRANSFER OF BUSINESS – enterprise agreement – public sector – s.768BG Fair Work Act 2009 – applications by Australian Education Union (AEU) and United Workers' Union (UWU) for consolidation orders that copied State instruments for transferring employees are extended to apply to non-transferring employees – employer opposed applications – employer raised jurisdictional objections – Commission rejected employer's argument that applicants bear onus of proof of satisfying Commission that order should be made – no onus to establish facts to any particular standard beyond that of persuasive evidentiary case – Commission rejected employer's argument that both sides of coin should be considered in relation to provisions of s.768BG(4) – weight given to mandatory considerations in s.768BG(4) to be determined by decision maker – applications considered separately – AEU application considered first – views of employees for purposes of s.768BG(4)(a)(i) not limited to views of non-transferring employees – views of transferring employees to be considered if shown to be affected – views of non-transferring employees not clear – transferring employees concerned about there being two sets of conditions and effect on future bargaining – views of transferring employees weighed in favour of consolidation order – employer vigorously opposed order sought – views of employer weighed against consolidation order – that no employees would be disadvantaged weighed in favour of consolidation order – one copied State instrument remained within nominal expiry date and one only recently expired – not a case where instruments no longer relevant to workforce – factor weighed in favour of consolidation order – negative impact on productivity to be considered in relation to instruments applying to non-transferring employees – 'productivity' directed at conventional economic concept of quantity of output relative to quantity of inputs [*Schweppes* in *Penalty Rates Case*] – if order made non-transferring employees to maintain higher salary via contractual entitlement and gain more beneficial terms of instruments – non-transferring employees available for additional hours without penalty in absence of order – hours cap in instruments imposed rostering difficulties – instruments involved more restrictive leave arrangements – negative impact on productivity weighed against consolidation order – no evidence that employer would incur significant economic disadvantage if order not made – neutral consideration – lack of business synergy between instruments and award weighed in favour of consolidation order – public interest something distinct from views of parties though considerations may overlap [*Parks Victoria*] – Commission rejected employer's argument that public interest not to be determined by Commission as this had been done by elected State Parliament – views of State Parliament relevant but in context of application determination is for Commission – relevant recommendation to Parliament was for respondent to employ employees under FW Act – objective still achieved if order made – making of order would not prevent offering competitive salaries – objects of FW Act relevant to consideration of public interest – achieving productivity and fairness through bargaining an object of FW Act – making order likely to lead to emphasis on bargaining – productivity improvements can be achieved through bargaining – public interest weighed in favour of consolidation order – on balance Commission satisfied orders sought by AEU should be made – consolidation order issued – application by UWU considered second – views of non-transferring employees a neutral consideration – views of transferring employees in favour of orders – weighed in favour of consolidation order – employer opposed to order –weighed against consolidation order – consideration of whether employees advantaged not relevant – relevant that employees clearly not disadvantaged – weighed in favour of consolidation order – one instrument remained within nominal expiry date and other only recently expired – not a case where instruments no longer relevant to workforce – factor weighed in favour of consolidation order – Commission not satisfied instruments would have negative effect on productivity if order made – weighed in favour of consolidation order – no evidence that employer would incur significant economic disadvantage if order not made – neutral consideration – lack of business synergy weighed in favour of consolidation order – consolidation order likely to lead to emphasis on bargaining – consistent with objects of FW Act and a public interest consideration – weighed in favour of consolidation order – on balance Commission

satisfied appropriate to make order sought by UWU – order issued.

AG2022/1809 and Anor		[2023] FWC 391
Lee C	Melbourne	24 March 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 Building and Construction Commission – www.abcc.gov.au/ - regulates workplace relations laws in the building and construction industry through education, advice and compliance activities.

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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