FWC Bulletin

13 January 2022 Volume 1/22 with selected Decision Summaries for the week ending Friday, 7 January 2022.

Contents

Consultation: The future of online proceedings

As a result of the COVID-19 pandemic the Fair Work Commission moved to holding conferences and hearings online. As the world gradually returns to a 'new normal', the Commission is considering what approach we should take to online proceedings into the future.

The President has published a discussion paper on the future of online proceedings at the Commission.

We are seeking feedback on:

- any issues with how online hearings and conferences are currently used
- any benefits of how online hearings and conference are currently used
- users' experiences with, and perceptions of, online hearings and conferences at the Commission.

Learn more: The future of online proceedings

Any comments or feedback on the discussion paper should be emailed to consultation@fwc.gov.au by close of business on **Friday, 11 February 2022**.

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 week ending Friday, 7 January 2022.

1 ENTERPRISE BARGAINING – scope order – s.238 Fair Work Act 2009 – 2 applications for scope orders – Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) and the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) both applied for scope orders relating to 2 employers: OS MCAP P/L and OS ACPM P/L – both employers are companies within an asset of BHP known as Operations Services (OS) – OS is a production and maintenance services provider to any BHP Minerals Australia business group (BHP) operations – OS ACPM (OS Maintenance) provides maintenance services and OS MCAP P/L (OS Production) provides production services – the principal operations in which OS Maintenance and OS Production undertake work are BHP's black coal mining and iron ore mining operations (metalliferous mining) – bargaining initiated by OS Maintenance and OS Production has been proceeding for 2 agreements: an OS Maintenance agreement covering all maintenance employees across the black coal and metalliferous mining industries; and an OS Production agreement to cover all production employees across the black coal and metalliferous mining industries – the CFMMEU scope application, filed on 9 April 2021, proposed an agreement to cover all employees of OS Production and OS Maintenance performing work covered by Schedule A of the **Black Coal Mining Industry Award 2010** (Black Coal Award) undertaking production and maintenance activities in the black coal mining industry – CFMMEU application stated the Union was not a bargaining representative of employees working on 'non-coal operations' and that the scope of an enterprise agreement covering those employees is a matter for the relevant bargaining representatives – the CFMMEU also observed that a single enterprise agreement covering non-coal employees undertaking maintenance and production work would seem to be logical – the AMWU proposed 3 agreements covering OS Maintenance employees as follows: Queensland employees performing maintenance in the black coal industry; Western Australian employees performing maintenance work in the metalliferous mining industry, excluding rail; and New South Wales employees performing maintenance work in the black coal industry in the unlikely event that OS Maintenance employs persons at the Mt Arthur Mine in that State although this claim was not pressed – the AMWU did not express a view about the scope of agreements covering production employees of OS Production, in the areas it seeks to establish maintenance agreements – the Australian Workers Union (AWU) supports the CFMMEU's application – the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) supports the AMWU's application and in the alternative, supports the scope proposed by the CFMMEU – OS Production and OS Maintenance opposed both applications and each sought to continue bargaining for separate

production and maintenance agreements, with both agreements covering black coal mining and metalliferous mining operations – there is some history to the bargaining – OS Production and OS Maintenance respectively issued notices of employee representational rights in August 2018 and commenced bargaining with employees for an OS Maintenance agreement and an OS Production agreement – each employer invited employees to vote on a proposed agreement and in October 2018, applications were made to the Commission for approval of the agreements – the applications were determined together and the agreements were approved [[2019] FWCA 8595; [2019] FWCA 8601] – in each case, on appeal to a Full Bench of the Commission, the approval decisions were quashed [[2020] FWCFB 2434] – on rehearing, the applications for approval of the agreements were refused by the majority of the Full Bench, which found that the agreements were not genuinely agreed [[2020] FWCFB 6089] – bargaining for those proposed agreements continued and the present applications were made after 9 meetings were conducted, 5 in relation to the proposed production agreement and 4 in relation to the proposed maintenance agreement – at the time the applications were heard 7 meetings had been conducted for the proposed OS Maintenance agreement and 6 for the proposed OS Production Agreement – s.238 of the FW Act is directed to the fair and efficient conduct of bargaining and is not a generalised power in the Commission to determine the scope of proposed agreements – fairness and reasonableness are relevant in the exercise of the discretion under s.238 but it remains the case that the purpose of the order is to promote the fair and efficient conduct of bargaining – the scope of an agreement is a matter that can of itself, be the subject of bargaining – present case concerns 2 separate and competing scope applications – arguing that a scope order will remove the source of an impasse between the parties and allow bargaining to recommence is not of itself, a persuasive reason for the Commission to exercise the discretion to make a scope order – underpinning the competing positions about the scope of the agreements is a question about whether scope should be occupational in that it is based on the work performed by employees or the industry in which it is to be performed – Commission found the AMWU and the CFMMEU were meeting the good faith bargaining requirements – found it indisputable that bargaining was taking place for both the proposed OS Production agreement and OS Maintenance agreement – there are regular meetings, exchanges, concessions, claims and responses to those claims as would be expected in the ordinary course of bargaining – logs of claims and draft agreements have been exchanged – regular bargaining meetings were, and are being held – Commission held it was apparent that the structure of the proposed agreements was an issue of greater significance than their scope – the fundamental issue was that the OS entities and BHP were seeking what they describe as a minimal safety net agreement – all Unions involved in the bargaining for the agreements were opposed to the current drafts and were seeking what they describe as comprehensive agreements based on the **BMA Enterprise Agreement 2018** which applies to direct employees of BHP – Commission found that the evidence established that: OS Maintenance and OS Production will maintain their respective positions in relation to seeking minimal safety net agreements, regardless of any scope order the Commission may make; the Union bargaining representatives will maintain their positions in relation to seeking comprehensive agreements, regardless of any scope order the Commission may make; to the

extent that there is an impasse in bargaining, it is an impasse about whether the agreements will be minimal or comprehensive, described by the parties as a structural issue; this structural impasse is not caused by scope and would exist regardless of the industry sector in which the agreement will operate or where the relevant employees are working or the award which applies to them; and the primary purpose of the CFMMEU and the AMWU seeking scope orders is to break the impasse in relation to the structure of the agreements rather than to deal with any issue in relation to scope – Commission determined that these matters weigh against granting either of the competing scope applications and support a finding that neither of the orders sought will promote fairness or efficiency – Commission not satisfied that it was reasonable in all of the circumstances to make the orders sought by either the CFMMEU or the AMWU – both applications dismissed – Commission available to assist parties to resolve impasses in bargaining through conciliation.

Construction, Forestry, Maritime, Mining and Energy Union v OS MCAP P/L t/a Operations Services; "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v OS ACPM P/L

B2021/246; B2021/269 [2021] FWC 6706
Asbury DP Brisbane 31 December 2021

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2 TERMINATION OF EMPLOYMENT – misconduct – s.394 Fair Work Act 2009 – application for unfair dismissal – applicant was employed as a bus driver – dismissed for serious misconduct following an incident on 26 September 2021 in which a 16 year old girl who had sought to board the applicant's bus in a remote area at dusk was told that she had the wrong ticket and that he was unable to issue her with a new one – applicant contended he did nothing wrong because he simply told the girl about the ticketing problem, and she decided of her own accord not to board the bus and instead to be collected by her mother – the respondent submitted that the applicant discouraged the girl from boarding the bus and left her in a remote area to be collected by her mother, who had to drive over an hour and a half from Hobart to do so – the respondent further submitted that the applicant placed the girl at risk by failing to follow its policy that no child ever be left behind, and that this constituted serious misconduct warranting immediate dismissal – Commission found the respondent had a valid reason for dismissing the applicant because he failed to abide by the policy that no child should ever be left behind – the policy constituted a lawful and reasonable direction in relation to a serious matter – Commission considered that the decision to dismiss the applicant without notice, whilst not unjust or unreasonable, was harsh, because the company's own ticketing system played a role in the incident – dismissal was unfair – had the booking system accounted for the fact that 2 passengers had not boarded in Perth, the applicant would have been able to sell the girl a new ticket, and the girl would not have been left behind – reinstatement inappropriate – ordered compensation equivalent to what would have been the relevant notice period, namely 3 weeks' pay, less taxation as required by law.

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3 TERMINATION OF EMPLOYMENT – misconduct – COVID-19 – s.394 Fair Work Act 2009 – application for unfair dismissal – the applicant's employment as a mobile crane operator with the respondent was terminated with immediate effect on 21 September 2021 after he attended a protest the previous day outside the office of the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) in Melbourne – the respondent considered that the applicant had engaged in serious misconduct by attending the rally, which occurred in contravention of government stay-at-home orders, because his attendance brought the company into disrepute – it also considered that the applicant had failed to comply with a lawful and reasonable direction that he go home following the closure of his worksite on the morning of the protest – the applicant submitted that he did not commit misconduct, because he was within his rights to attend the protest and did not participate in the violence that occurred that day, and because he had in fact been encouraged to attend the protest by the respondent's general manager – he denied that the respondent directed him to go home and submitted that any contravention of the stay-at-home orders was not work-related but a matter between him and the authorities – Commission rejected the applicant's evidence that the respondent's general manager encouraged him to attend the protest – found that the applicant went to the protest because on some level he supported it – Commission did not accept the applicant's evidence that he went to the protest in order to 'find out what was going on' – Commission accepted the general manager's evidence that he considered the applicant's actions 'compromised the reputations of the company' – among the respondent's clients is the Victorian government, whose stay-at-home orders the applicant and his colleagues contravened by their presence at the protest – although the applicant was not wearing clothing that bore the name of the company, he was nevertheless identifiable by some people as an employee of the company for the simple reason that they knew who he was – Commission found the applicant did not simply attend a protest in contravention of the stay-at-home orders, he attended a protest that was related to his work and did so on the company's time – it put his employer's reputation at risk – for an employee to create a risk to the reputation of the employer is a serious matter – this gave the respondent a valid reason to dismiss him – important to consider whether the respondent's decision to dismiss the applicant, and to do so summarily, was proportionate to the reasons for dismissal – Commission found the incident that occurred on 21 September 2021 was a serious matter, however the applicant's conduct did not constitute serious misconduct – dismissal was a proportionate response but the applicant should have been dismissed on notice – Commission found the decision to dismissal him summarily was harsh – appropriate amount of compensation would reflect the period for which the applicant would have remained employed if he had been terminated on notice – Commission ordered compensation equivalent to 4 weeks' pay less taxation as required by law.

U2021/9000 [2021] FWC 6693
Colman DP Melbourne 24 December 2021

4 GENERAL PROTECTIONS – contractor or employee – ss.365, 386 Fair Work Act 2009 – application to deal with a general protections contravention involving a dismissal – applicant contended he was employed by the respondent (MTS) and MTS contravened one or more of the general protections provisions in dismissing him from his employment – MTS raised a jurisdictional objection to the application – MTS contended that it neither employed nor dismissed the applicant – MTS has operated a taxi network in the Maitland area for over 68 years – the applicant has driven taxis in the MTS network for in excess of 22 years – during that period, he has driven taxis owned by MTS as well as taxis owned by individuals who are both taxi licence plate holders and shareholders in MTS – until recently, the applicant did not question that he was engaged as a bailee when he drove taxis on the MTS network – however, the applicant alleged he was employed by MTS when he drove a taxi owned by MTS in the period from August 2019 until his alleged dismissal on 2 September 2021 – Commission found that the fundamental elements of an employment relationship did not exist between the applicant and MTS – found the arrangement between the parties was truly one of a joint venture for their common profit on agreed terms – Commission found MTS terminated its bailment agreement with the applicant with effect on 2 September 2021; it did not dismiss him under a contract of employment – found applicant was not employed by MTS, he therefore could not have been dismissed within the meaning of s.386 of the FW Act – it followed that he was not eligible to make a general protections application involving a dismissal and as a result his application must be dismissed for want of jurisdiction.

McMahon v Red and White Star Cabs Co-Operative Limited t/a Maitland Taxi Service

C2021/6512 [2021] FWC 6652
Saunders DP Newcastle 21 December 2021

5 TERMINATION OF EMPLOYMENT – genuine redundancy – ss.389, 394 Fair Work Act 2009 – 24 applications for unfair dismissal – matter has a lengthy history – Commission first heard the matters jointly, with consent of the parties, in October 2020 – the respondent objected to the applications on jurisdictional grounds, stating that each of the terminations were genuine redundancies within the meaning of s.389 of the FW Act – the Commission's decision on the jurisdictional objection was issued on 24 December 2020 (the December 2020 Decision) [[2020] FWC 5756] – the respondent appealed that decision – in a decision issued on 19 May 2021 (the Appeal Decision) [[2021] FWCFB 2871] a Full Bench of the Commission quashed the December 2020 Decision and remitted the matters back for determination, consistent with the reasons of the Full Bench in the appeal – employees were employed extracting coking coal at respondent's mine operation – 90 employees, including the applicants, were made redundant as a result of reduced production – respondent subsequently employed contractors (Mentser) to undertake conveyor belt cleaning and improvement work at the mine, and a

company (Nexus) for project work – the respondent's position was that the dismissals of the applicants were cases of genuine redundancy for the purpose of s.389(1) – 22 applicants are claiming that their terminations were not cases of genuine redundancy and that they were unfairly dismissed – the respondent submitted there had been no finding of breach of a consultation obligation, and therefore the only remaining issue on remitter from the Full Bench was whether there was a reasonable redeployment opportunity in the respondent's enterprise – the respondent further submitted that there were no reasonable redeployment opportunities to which the applicants could be redeployed – the respondent made submissions that the applicants misunderstood or underestimated the contention as to why redeploying the redundant cohort to the work of Nexus and Mentser was not reasonable – the applicants submitted that even on the evidence of the respondent in the first instance, it was evident, 'at the very least', that the applicants could perform the work done by the Mentser and Nexus contractors with a period of retraining – the applicants submitted in summary that on the facts before the Commission, it would have been reasonable in all of the circumstances to have redeployed the applicants into a job or work that is performed by contractors at the Mine, especially Nexus and Mentser, and for these reasons the Commission should find that s.389(2) has not been satisfied and the jurisdictional objection be dismissed – Commission held that Nexus provides a wide range of services based on a wide range of skills and competencies of its employees – it was not in dispute that the respondent did not consult or ask any of its employees whether they held any of those skills or competencies or could have gained any of those competencies with some additional training – based on the self-assessment task undertaken by the applicants, 9 applicants identified themselves as having 100% of the suite of competencies required, whilst a further 5 applicants held more than 90% of the competencies and a further 4 held more than 75% of the competencies – Commission found no impediment to the respondent if it were to insource sufficient work to allow for the applicants to be redeployed – the Union was not seeking the total removal of all contractors for the Mine, they accept that some of the work is specialist but, more importantly, the Union only wanted the 22 applicants redeployed into the work where 60 contractor employees are currently working – Commission of the view that it was feasible for the respondent to insource some of the work of the contractors – there is sufficient basic black coal work to gainfully employ all of the applicants in this work – Commission also satisfied that it is feasible that the work of the 4 2-man Mentser crews could be insourced – in relation to Nexus, Commission held certain elements of the 'project work' could be performed by the applicants under the supervision – Commission found the applicants' termination was not a case of genuine redundancy – Directions Conference will be convened in February 2022 to program the substantive applications.

Bartley and Ors v Helensburgh Coal P/L

U2020/9414 and Ors [2021] FWC 6414
Riordan C Sydney 24 December 2021

Other Fair Work Commission decisions of note

Stark v Charter Mercantile Agency P/L

TERMINATION OF EMPLOYMENT – misconduct – s.394 Fair Work Act 2009 – application for unfair dismissal – applicant was employed by the respondent at their call centre at Redcliffe as a debt collection agent – applicant's employment was terminated because the respondent had reason to believe that she had hung up on already connected callers in favour of taking incoming calls, misrepresented the reason for the early termination of calls in her records and inaccurately completed her time sheets – Commission found that in the context of a call centre operating within the financial services regulations the first 2 allegations were concerning – found the premature termination of a phone call in this context was a very serious issue – the respondent's business relies upon the making or taking of calls and the accurate reporting of each – fundamental to the conduct of their business and a failure to do so is likely to cause them significant reputational damage, particularly given the clients for which they work and the fact that their calls are regularly audited to monitor compliance – Commission satisfied that non-compliance with the standard practices and procedures in respect of taking calls by an employee was a valid reason for dismissal – the inaccurate completion of timesheets would too be a valid reason for the respondent to have issued a show cause notice – particularly so in a workplace that relies so heavily on trust given the highly sensitive and confidential nature of the information involved – Commission found the respondent failed to afford the applicant natural justice in allowing her an opportunity to respond to the allegations – however, the gravity of her conduct meant that her dismissal was not harsh, unjust or unreasonable – application dismissed.

U2021/6932		[2021] FWC 6682
Lake DP	Brisbane	23 December 2021

Ruddell v Windermere Child and Family Services

TERMINATION OF EMPLOYMENT – extension of time – s.394 Fair Work Act 2009 – application for unfair dismissal made 12 days outside the 21-day time limit – applicant dismissed from his client facing role by the respondent for refusing to take an 'experimental vaccine' that he believes was not lawful – applicant was aware that there was a requirement for staff involved in direct client service delivery work to be fully vaccinated – he understood he could be subject to disciplinary action if he was not vaccinated but that he was waiting for the respondent to provide him with information on the experimental drugs, safety assessment and related matters – applicant made an unfair dismissal application on 11 November 2021 (the first application) – Commission staff attempted to contact the applicant on the phone number he provided for the purpose of securing payment of the filing fee that must be paid or to seek a fee waiver form from him – contact by telephone was attempted on 12 and 25 November 2021 – Commission staff also sent written correspondence to the applicant's nominated email address on 12 November 2021 in relation to payment of the filing fee – he was advised in that letter that a failure to pay the fee or to complete a fee waiver form may result in his application being dismissed – attempts by Commission staff to contact the applicant were not successful – the applicant did not respond and did not pay the filing fee or seek a waiver – on 7 December 2021 the Commission dismissed the first application on the grounds that it had not been made in accordance with the FW Act in that the required fee, or a fee waiver application, had not been received by the Commission [[2021] FWC 6531] – the applicant made the application currently before the Commission on 8 December 2021 (the second application) – *McNicol v 4lifeskills Inc* considered – applicant not precluded from making the second application – the applicant agreed in his evidence that on 12 November 2021, after filing his first application, he received correspondence from the Commission and that correspondence was in relation to the payment of the filing fee – he said however that he thought he had then paid the filing fee by telephone – applicant said that, following his dismissal from the respondent, he had to replace both his phone number and computer as these had previously been provided by the respondent – when he made the first application on 11 November 2021, he indicated his new phone number (as advised to him by his provider) was not, at that time, operational – he said in his evidence that he had trouble with the provider associated with the new telephone number and was eventually told by that provider that the phone number given to him was wrong – applicant submitted that he made the first application on time and thought that he had paid the filing fee – on finding out that he had not done so he took swift action to remedy the situation – Commission accepted the applicant's evidence that the failure to provide a functioning telephone number was caused by problems with his service provider and that he thought he had paid the filing fee – the delay in the applicant making the second application was caused by him believing that he had made a complete (first) application to the Commission and only becoming aware of his error on day 32 after his dismissal – Commission considered that the applicant provided an acceptable explanation of the reason for the delay in making the second application – Commission satisfied there were exceptional circumstances – extension of time granted – matter referred to a staff conciliator for conciliation.

U2021/11376		[2022] FWC 6
Bissett C	Melbourne	6 January 2022

Dube v Energy Australia P/L t/a Energy Australia

TERMINATION OF EMPLOYMENT – performance – s.394 Fair Work Act 2009 – application for unfair dismissal – applicant was employed as an Asset Management Leader in the Central Engineering Department from 1 February 2018 – in around June 2020 the respondent appointed a new Engineering Leader and also conducted a restructure – because of the restructure the applicant was appointed as Principal Engineer: Boilers in around July 2020 and he was dismissed on 9 February 2021 after the introduction of performance improvement plans and performance reviews – the respondent is a retailer and generator of electrical power, it has 6 power stations and one coal mine – the respondent contended that the dismissal was not unfair and further gave evidence that following his dismissal, a review of the IT account discovered the applicant had, during his employment, performed engineering consulting services as the Managing Director of SUBSAH Resources Investment P/L (SUBSAH) and also copied numerous commercially sensitive and confidential documents belonging to the respondent to his personal email address – the respondent submitted that had the applicant not been dismissed for poor performance, and had it known of his work for SUBSAH including the copying of the respondent's documents, he would have been dismissed for breaches of his contract of employment, the Code of Conduct, Workplace Behaviour Policy and Conflicts of Interest Policy and *Corporations Act 2001* (Cth) – having considered the evidence of the witnesses together with the materials concerning behaviour and conduct, and the performance improvement plans, the Commission found that the applicant was dismissed for poor performance which was a valid reason for dismissal which was sound and defensible – Commission did not consider that the applicant's conduct that came to light post-employment, would have justified dismissal had the respondent known of the conduct prior to dismissal – Commission satisfied that while the respondent had a valid reason based on performance, the procedure of using a performance improvement plan, without affording the applicant a procedure meeting the requirements of a fair disciplinary/termination process, rendered the dismissal unfair – also evident that the respondent determined that the applicant could not address the performance issues and the decision to terminate his employment was made well before the dismissal – Commission found that the dismissal occurred without a warning, and having regard for the circumstances of this matter, providing an opportunity to the applicant to show cause why he ought not be dismissed would have been reasonable – found dismissal was procedurally unfair – reinstatement inappropriate – Commission calculated compensation of 3 months wages, less the 2 months' notice already paid in lieu, leaving a balance of one month – this is a gross sum of $14,431.1266 – from this the Commission deducted for mitigation 20% leaving a figure of $11,544.9013 gross, with a further deduction of 10% contingency for any income from work associated with SUBSAH leaving a balance of $10,390.41 gross.

U2021/1715		[2021] FWC 6634
Yilmaz C	Melbourne	21 December 2021

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Attorney-General's Department - www.ag.gov.au/industrial-relations - 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 Court of Australia - www.federalcircuitcourt.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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