**FWC Bulletin**

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.

20 March 2014 Volume 11/14 with the Decision Summaries for the week ending Friday, 14 March 2014.

**Contents**

New website......................................................................................................................2

Good Faith Bargaining and Advanced Negotiation Skills Course.................................2

Decisions of the Fair Work Commission........................................................................3

Websites of Interest ......................................................................................................18

Fair Work Commission Addresses...............................................................................20
New website

The Fair Work Commission’s exciting new website will officially ‘go live’ on Monday 31 March 2014.

While our web address will remain the same - www.fwc.gov.au - the upgraded site will have a new look and navigation from 8.00 am on 31 March.

The new site uses fully responsive technology, which means you will be able to access and view the full site from any PC, smart phone, tablet or other device.

To support the transition to the new site, no new material will be published from 5.00 pm on Friday, 28 March until 8.00 am on 31 March. The site will be off-line for a short period over the weekend.

The Commission will work to minimise any potential inconvenience caused during this time. Please note however, this transition will mean that any submissions or other materials received by the Commission after approximately 4.30 pm (AEDST) on Friday, 28 March will not appear on the website until after 8.00 am on Monday, 31 March.

Many of the current links on the website will also change as of 31 March. Instructions and further information will be provided on the new site to ensure that regular users are able to find all the information you require as quickly and efficiently as possible.

If you wish to view a sample of the new site before 31 March, please visit our beta site at beta.fwc.gov.au.

Good Faith Bargaining and Advanced Negotiation Skills Course

IRIQ in conjunction with Cornell University is presenting a 3 day Good Faith Bargaining and Advanced Negotiation Skills course on the Gold Coast from the 16th to 18th of July 2014.

More information regarding this course is available at the following link: http://www.iriq.com.au/training/iriq-cornell-university-ilr-school-program/.
Decisions of the Fair Work Commission
Summaries of selected decisions signed and filed during the week ending Friday, 14 March 2014.

1 CASE PROCEDURES – representation – ss.596, 604 Fair Work Act 2009 – appeal – Full Bench – Commissioner refused permission for party in unfair dismissal proceeding to be represented by counsel – appellant submitted it was a 'person who is aggrieved by a decision' for purposes of s.604 of FW Act – Full Bench considered Warrell – Full Bench identified two respects in which they consider decision attended by error however permission to appeal refused.

Appeal by New South Wales Bar Association against decision in transcript of Riordan C of 5 December 2013 in matter number U2013/12597 Re: McAuliffe

C2013/7046
Ross J
Hatcher VP
Cargill C

[2014] FWCFB 1663
Melbourne 13 March 2014

2 CASE PROCEDURES – appeals – ss.372, 604 Fair Work Act 2009 – Full Bench – alleged adverse action against applicant by dismissing or threatening to dismiss applicant due to applicant exercising a workplace right – Commissioner dismissed matter pursuant to s.587 of FW Act – application characterised as s.372 application – application should have been under s.365 of FW Act as applicant dismissed – Full Bench held in public interest to grant permission to appeal – appeal allowed – directed file be amended to record application made under s.365 of FW Act – matter remitted to Commissioner to deal with under s.365.

Appeal by Abu-Izneid against order of Steel C of 18 November 2013 [PR544658] Re: Abu-Izneid

C2013/7370
Watson VP
Hamberger SDP
Cambridge C

[2014] FWCFB 1553
Sydney 13 March 2014

3 MODERN AWARDS – review – apprentices – Sch.5, Item 6 Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 – Full Bench – decision regarding proposal to vary competency based wage progression (CBWP) provisions in Manufacturing and Associated Industries and Occupations Award 2010 (Manufacturing Award) – evidence did not support conclusion that there was an existing model which mandates three-way signoff prior to any CBWP under Manufacturing Award – accepted evidence presented concerning assessment responsibilities in National Training System – RTO is responsible for assessment including that the requirement for ‘consistent application of knowledge and skill to the standard of performance required in the workplace’ is met – evidence did not show three-way signoff is mandated in practice by any State system – existing provision which requires employer agreement prevents
RTO funding pressures from leading to inappropriate early completion – evidence sufficient to demonstrate level of take up of CBWP is less than optimal – accepted failure of award provisions to clearly specify mechanism for making necessary decisions and for resolving disputes hampering effective implementation – satisfied variation to include additional provisions, as previously introduced in five other awards, is consistent with and necessary to achieve modern awards objective – noted general desirability of having broadly consistent set of processes in major awards in all States – satisfied additional provisions strike appropriate balance – appropriate that provision be made for circumstances where agreement in relation to achievement of competency is not able to be reached within reasonable timeframe – award varied to insert provisions similar to those inserted into five other awards.

Modern Awards Review 2012—Apprentices, Trainees and Juniors

AM2012/76
Boulton J
Harrison SDP
Roe C

CASE PROCEDURES – costs – ss.400A, 611 Fair Work Act 2009 – appeal – Full Bench – application by respondent employee for costs incurred in appeal against unfair dismissal decision and cost of costs application – consideration of s.400A FW Act – phrase ‘unreasonable act or omission’ used in s.170CJ(3) WR Act – referred to various authorities considering this phrase – considered settlement offers made by parties – Full Bench did not have regard to events which occurred before appeal was instituted as separate proceedings concerning those events are underway – Full Bench had found there was ‘no consultation at all’ in relation to restructuring and redundancy – no appeal grounds substantiated – no basis upon which permission to appeal could be granted – appellant entitled to engage in hard bargaining – conduct went beyond hard bargaining into realm of refusal to reasonably assess and respond to clear statement from Commission in stay decision that prospects on appeal were weak and barely arguable – appellant knew or should have known there was no evidence put during proceedings to support its contention that requirements of ss.389(1)(a) and (b) FW Act were satisfied – no tenable relationship between offer made by appellant and strength, or lack thereof, of its case – no basis on which appellant could submit its arguments were ‘worthy of consideration’ in the circumstances – given poor prospects of appeal, appellant’s course of conduct was unreasonable conduct which led respondent to incur substantial costs – appropriate to order appellant to pay costs incurred by respondent after stay was issued, and cost of costs proceedings – no evidentiary basis on which a decision could be made favourable to appellant in relation to its contentions with respect to s.389 FW Act – institution and continuation of appeal were unreasonable acts in connection with conduct or continuation of s.394 application and caused respondent to incur costs – requirements of s.400A satisfied – given finding in relation to s.400A unnecessary to consider s.611 application – in the alternative made findings – considered Church – found there cannot be reasonable prospects of success in the circumstances, or in fact any prospects of success in the absence of error – appeal made without any reasonable prospects of success – requirements of s.611 FW Act satisfied – order of costs against
apellant warranted – Full Bench to make order requiring appellant pay costs incurred in respect of appeal and costs application – parties to confer as to quantum – if no agreement reached Hamilton DP to settle order.


C2013/6194 Melbourne 14 March 2014
Watson SDP 2014] FWCFB 1175
Hamilton DP
Lee C

MODERN AWARDS – review – Sch.5, Item 6 Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 – s.604 Fair Work Act 2009 – appeal – Full Bench – appeal against decision in relation to review of Road Transport and Distribution Award 2010 (Award) and related determination – issue on appeal concerned rate of pay for meal breaks after ordinary hours and before overtime is worked – review under TPCA Act narrower than 4 yearly review under s.156 FW Act – first instance decision noted that parties' competing wording of proposed clause was discussed at length during conferences – notion of public interest in relation to grant of permission to appeal described in GlaxoSmithKline – given first instance decision was in context of discrete 'one-off' review of Award, Full Bench not satisfied public interest is enlivened – appeal did not raise matters of importance or general application to Award Modernisation jurisdiction – no misapplication of relevant legal principles – not persuaded any ground of appeal made out such as to demonstrate any error in first instance decision – modern approach to award construction envisages taking into account wider context underpinning making of clause in contention – no error in consideration of meaning of clause and principles of award construction – at the very least, there was ambiguity or uncertainty within meaning of clause – principle of stare decisis does not apply – Linfox clearly distinguishable from circumstances of this case – care should be taken when reliance is sought to be had on decision arising from private arbitration – Duncans Holdings did not support claim that rest breaks during overtime should be paid at overtime rates in this award – first instance findings made in entirely conventional way, based on parties' submissions and Her Honour’s knowledge of history of making of Award and Part 10A process – first instance decision and determination met modern awards objective to provide fair and relevant safety net of terms and conditions – finding that omission of offending words was an 'oversight' not a subjective view – agreed that omission was an oversight – viewed in context, Commission obliged to correct technical problem or anomaly – at no stage was appellant denied opportunity to respond to submissions of other parties or comment on various drafts – for grounds of denial of procedural fairness to be made out, appellant must demonstrate that once having reserved her decision, Her Honour introduced an entirely new issue parties were not aware of, to which they had no opportunity to respond – the very opposite is the case – permission to appeal refused – appeal dismissed – stay order discharged – order issued.
TERMINATION OF EMPLOYMENT – misconduct – s.394 Fair Work Act 2009 – applicant summarily dismissed for serious misconduct – applicant refused direction to leave meeting and continued to behave in aggressive and intimidating manner – applicant not notified of reason for dismissal before it occurred however little weight given due to nature of misconduct – applicant received two previous warnings about conduct – applicant continued to receive worker's compensation benefits after dismissal – no financial loss suffered – dismissal not harsh, unjust or unreasonable – applicant engaged in serious misconduct – no mitigating factors – application dismissed.

Kongor v Red Lea Chickens P/L t/a Red Lea

TERMINATION OF EMPLOYMENT – Small Business Fair Dismissal Code – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – Commission satisfied Code applied to respondent – respondent gave six verbal warnings and one written warning to applicant regarding refusal to follow direction – Commission found refusal to follow direction combined with other matters constituted valid reason for termination – satisfied applicant given chance to rectify problem and knew he risked dismissal if there was no improvement – applicant did not rectify problem – sufficient evidence provided by respondent of compliance with Code – not necessary to consider merits or whether dismissal was harsh, unjust or unreasonable – application dismissed.

Ciabattoni v Glen Rochester t/a Matraville TAB
9 ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – s.739 Fair Work Act 2009 – dispute about whether camping allowance due under agreement – employees fly in to different regions for each rostered period and are provided with accommodation – meaning of words ‘camp out overnight’ considered – City of Waneroo considered in relation to interpretation – accommodation improved since agreement negotiated – ‘camp out overnight’ must refer to accommodation of a standard lower than sites specified in agreement – insufficient evidence to apply this interpretation to applicant’s circumstances – parties directed to engage in further discussions.

Construction, Forestry, Mining and Energy Union v Transfield Services (Australia) P/L
C2013/5936
O’Callaghan SDP
Adelaide
[2014] FWC 1713
12 March 2014

10 ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – s.739 Fair Work Act 2009 – dispute concerning reclassification – agreement provides power of arbitration – employee requested reclassification from Grade 2 psychologist to Grade 3 psychologist – key issues whether employee ‘engaged on psychological work requiring advanced knowledge and skills’ and whether employee has a main role as a case worker in a multi-disciplinary team rather than as a clinical psychologist – employee gave evidence that she did meet these criteria – witnesses for respondent gave evidence that employee did not meet these criteria and that work performed is of nature expected of Grade 2 psychologist – decision made by Manager of Psychology Services Alfred Health, the Head of Psychology not to reclassify employee – Commission not satisfied that employee meets the criteria – employee does not fall within classification definition of Grade 3 Psychologist – application dismissed.

Health Services Union v Alfred Health
C2013/3870
Hamilton DP
Melbourne
[2014] FWC 1144
11 March 2014


Jack v Goulburn Ovens Institute of TAFE
U2013/14916
Hamilton DP
Melbourne
[2014] FWC 1462
14 March 2014
ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – s.739 Fair Work Act 2009 – dispute about inclement weather provisions in three enterprise agreements affecting employees working on a joint venture at Royal Adelaide Hospital worksite – importance of context for interpreting meaning [Kucks] – context of particular provisions within agreement as a whole and any statutory and historical context of when agreement was made to be considered [Watson] – whether employees were entitled to leave worksite with pay or whether they were to remain at site for four hours when temperature reached 37 degrees – evidence that contentious sub-clause was specifically included to capture group of employees relocated to amenities building in circumstances where they were unable to work in air-conditioned or cooler area persuasive – contentious sub-clause had affect of clarifying that workers could leave site at 37 degrees and not introduced to restrict workers who could leave – Commission cannot determine what is just and fair in all circumstances – Commission cannot create a right that does not exist under terms of the agreements – merit in exploring issue of start time for afternoon shift – Deputy President intends to convene conference to discuss these matters – agreements do not provide that workers can leave site when temperature is 37 degrees on commencement or that they can leave when temperature is 35 degrees on commencement – only circumstance enabling workers to leave site when it is 37 degrees is when they have relocated to amenities building at 35 degrees – parties at liberty to apply for orders to be issued if necessary.

Construction, Forestry, Mining and Energy Union v Form 700 P/L; Hansen Yuncken P/L v Construction, Forestry, Mining and Energy Union; Leighton Contractors P/L v Construction, Forestry, Mining and Energy Union

C2014/2669; C2014/2907; C2014/2908 [2014] FWC 1720
Bartel DP Adelaide 12 March 2014

ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – s.739 Fair Work Act 2009 – Alcohol and Other Drugs Policy in enterprise agreements – TWU applied to intervene in matter – application granted – dispute about whether sufficient consultation occurred – whether jurisdiction for orders sought – whether policy unjust or unreasonable – role of intervener – numerous orders issued by Commission – ongoing implementation of policy to be agreed between parties.

The Maritime Union of Australia v DP World Brisbane P/L; DP World (Fremantle) Limited; DP World Melbourne Limited; DP World Sydney Limited

C2012/1405 [2014] FWC 1523
Booth DP Sydney 10 March 2014

CASE PROCEDURES – application dismissed on FWC's own initiative – ss.394, 587 Fair Work Act 2009 – application for unfair dismissal remedy – application lodged outside 21 day time period – conciliation unsuccessful – matter referred to hear jurisdictional objection – matter listed for mention/directions conference – applicant requested extension of time – Commission granted request – Commission contacted applicant and advised applicant if no response received matter may be dismissed – no correspondence received by applicant – application dismissed.
pursuant to s.587 FW Act – order issued.

**Fry v Just Better Care Brisbane South**

U2013/13248  
Asbury DP  
Brisbane  
14 March 2014

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15 CASE PROCEDURES – application dismissed on FWC’s own initiative – ss.394, 587 Fair Work Act 2009 – application for unfair dismissal remedy – respondent objected on basis minimum employment period not met – conciliation cancelled – matter referred to hear jurisdictional objection – listed for mention/directions conference – applicant requested adjournment – Commission granted request – Commission contacted applicant and advised if no response received matter may be dismissed – no correspondence received from the applicant – application dismissed pursuant to s.587 FW Act – order issued.

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**Tuiala v Logan Legal Centre**

U2013/11668  
Asbury DP  
Brisbane  
14 March 2014

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16 TERMINATION OF EMPLOYMENT – genuine redundancy – remedy – s.394 Fair Work Act 2009 – application for relief from unfair dismissal – applicant employed since 2000 – since 2006 applicant had been performing two roles – respondent is not-for-profit organisation – applicant called to a meeting and advised that both roles had become redundant as a result of a review/restructure and that she was not qualified for new roles – applicant given option of working through five week notice period to try and secure alternative role or take redundancy package either immediately or at any time during notice period – applicant was unaccompanied at meeting – applicant elected next day to take redundancy package – applicant made unfair dismissal application one week later alleging termination of her employment was harsh, unjust or unreasonable – respondent raised two jurisdictional objections, genuine redundancy and no termination at initiative of respondent – applicant submits termination was not a genuine redundancy as ‘there was a complete absence of consultation’ and that it would have been reasonable to redeploy her – applicant also submitted there was no resignation as respondent informed her that it was her choice whether she worked out notice period or paid in lieu of notice – respondent submitted applicant had been consulted over approximately six month period in relation to restructure and at time of termination there were no roles to which applicant could be reasonably redeployed – respondent also submitted termination not at their initiative as applicant had chosen to not work out notice period – Commission found jurisdictional objection regarding no termination at initiative of respondent simply not sustainable on any basis – regarding jurisdictional objection for genuine redundancy Commission found respondent had not followed consultation obligations under agreement and was therefore not a genuine redundancy as defined in FW Act and application cannot be dismissed on that basis – Commission not satisfied there was a job, a position or other work to which applicant could have been redeployed – Commission found termination of applicant to be harsh, unjust and unreasonable – given lack of redeployment opportunities reinstatement not considered appropriate – payment of
compensation of $5632.56 less applicable tax (equivalent to 4 weeks’ salary), plus 9.25% superannuation ordered.

Barbakh v Jewish Care (Victoria) Inc
U2013/11603 Kovacic DP Melbourne 14 March 2014

17 TERMINATION OF EMPLOYMENT – valid reason – s.394 Fair Work Act 2009 – applicant suffered shoulder injuries at work – applicant returned to work after eight months without clearly communicating any details of his injury or return date – respondent only had general certificates stating applicant had ‘medical condition’ – respondent directed applicant to attend specialist in workplace medicine to ensure applicant fit for duties – coal mines are inherently dangerous workplaces – respondent had duty under Coal Act and Regulations to ensure no one on work site exposed to unacceptable level of risk – applicant did not attend medical appointment on two occasions as directed by respondent – applicant sought legal explanation for direction to attend – sought to record (with consent) various conversations and messages in evidence – having regard to the Coal Act and Regulations, Commission determined direction to attend specialist was lawful – direction also reasonable given medical evidence supplied by applicant was insufficient to determine it was safe for him to return to work – it did not focus on occupational assessment – evidence established that applicant was suspicious about respondent’s request however, respondent’s position that it sought to have applicant’s clearance for duty checked against his actual duties at mine could have been explained – Commission found applicant’s failure to attend both medical appointments respondent arranged was unreasonable – respondent should have told applicant what to bring to appointments – applicant unreasonably refused to cooperate and participate in investigation process into how his workplace injury occurred – these reasons formed part of a valid reason for dismissal – applicant notified of reasons for decision and provided opportunity to respond – no refusal to have support person – matter not related to unsatisfactory performance – size of respondent and access to dedicated human resource management not raised – Commission considered other factors – applicant’s return to work without properly confirming return – difficulty created in matter by conduct of both parties – applicant’s WorkCover statement of claim claiming a 20% degree of permanent impairment – on balance, dismissal not harsh, unjust or unreasonable – application dismissed.

Grant v BHP Coal P/L
U2013/10299 Spencer C Brisbane 14 March 2014

19 TRANSFER OF BUSINESS – enterprise agreement – s.319 Fair Work Act 2009 – application for order relating to instruments covering new employer and non-transferring employees – Electricity Corporations Amendment Act 2013 (the EC Act) merged Verve Energy and Synergy Energy – traditionally Electricity Generation Corporation (Verve Energy) & Salaried Employees’ Enterprise Agreement 2012 (Verve agreement) covered generation work and Synergy Enterprise Agreement 2012 (Synergy agreement) retail functions – agreements for each company covered duties specific to each entity – EC Act transferred the assets and liabilities of Synergy to Verve – Verve became the new employer – EC Act guaranteed Synergy employees continue on current terms and conditions – ASU covered by both agreements – applicant seeking order for future employees performing transferring work not covered by Verve agreement to be covered by the Synergy agreement – submissions of applicant addressed provisions of s.319 – ASU submissions indicated broad support albeit advocating some new retail employees could be covered by the Verve agreement – Commissioner concluded ASU approach will result in significant ongoing uncertainty – applicant made compelling case – order issued.

Electricity Generation Corporation t/a Verve Energy

AG2013/12148

[2014] FWC 1460

Williams C

Perth

12 March 2014

20 TERMINATION OF EMPLOYMENT – minimum employment period – application dismissed on FWC's own initiative – ss.394, 587 Fair Work Act 2009 – application for unfair dismissal remedy – applicant did not respond to Commission requests to advise whether he wished to proceed or discontinue application – s.587 FW Act empowers Commission to dismiss application on its own initiative – Commission satisfied applicant had not served minimum employment period due to lengthy and numerous periods of unpaid personal leave – respondent entitled to fair go including having claim determined within reasonable time – applicant given fair go – application dismissed.

Lonergan v Mammoet Australia P/L

U2013/17051

[2014] FWC 1657

Williams C

Perth

12 March 2014

21 TERMINATION OF EMPLOYMENT – high income threshold – covered by modern award – ss.382, 394 Fair Work Act 2009 – application for unfair dismissal remedy – respondent objected on grounds applicant not covered by award or agreement and applicant’s rate of earnings exceeded high income threshold – terms and conditions of applicant's employment set out in common law contract – base salary $140,000 per annum – applicant employed to coordinate and deliver high quality
workplace training – respondent submitted Building and Construction General On-site Award 2010 (Building Award) as only relevant modern award – applicant argued employment covered by either Building Award or Educational Services (Post-Secondary Education) Award 2010 (Educational Award) – Commission found substantial character of respondent’s industrial enterprise within construction industry not post-secondary educational services industry – based on responsibilities and duties, evident to Commission applicant’s position different from classifications in Building Award and Educational Award – examination must be made of nature of work and circumstances in which employee is employed to do work with view to ascertaining ‘principal purpose’ [Carpenter] – found applicant’s principal purpose was managing delivery of workplace training and assessment in scaffolding, rigging and safety – highly sophisticated and skilled involvement in training not assisting with on the job training – Commission did not accept applicant’s employment covered by Building Award or Educational Award – applicant’s submission he did not receive income greater than high income threshold involved misunderstanding of legislative provision – s.382 of FW Act concerned with annual rate a person was earning at time of dismissal – satisfied applicant’s annual rate of earning exceeded high income threshold at time of dismissal – applicant not able to make application – application dismissed.

Emery v Cape Australia Holdings P/L

U2013/15552 [2014] FWC 1659
Williams C Perth 12 March 2014

TRANSFER OF BUSINESS – enterprise agreement – s.318 Fair Work Act 2009 – applicant sought order that transferrable instruments not cover employees of the applicant and its subsidiaries – the Fortescue Team Member Agreement 2013 cover transferring employees – transferring employees in favour of order being made – consideration of the information provided in the application and additional submissions addressing the provisions of s.318(3) – satisfied appropriate to make order – order issued.

FMG Personnel Services P/L

AG2014/3771 [2014] FWC 1702
Williams C Perth 13 March 2014

TERMINATION OF EMPLOYMENT – termination at initiative of employer – ss.386, 394 Fair Work Act 2009 – application for relief from unfair dismissal – respondent objected on grounds of resignation in response form – respondent failed to attend hearing and was unable to be contacted – applicant submitted he was forced to resign due to non-payment of approximately 15 weeks’ wages – accepted applicant forced to resign by respondent’s conduct or course of conduct – distinguished from Fingal Glen – no valid reason for dismissal – satisfied applicant unfairly dismissed – reinstatement inappropriate – applicant made efforts to mitigate loss – compensation of 12 weeks wages at a gross rate of $2,019.24 a week to be paid – order issued.
TERMINATION OF EMPLOYMENT – termination at initiative of employer – remedy – ss.386, 394 Fair Work Act 2009 – application for relief from unfair dismissal – respondent failed to lodge submissions or attend hearing and was unable to be contacted – applicant submitted he was forced to resign due to respondent's failure to pay any remuneration for approximately nine weeks – Commission accepted applicant forced to resign by respondent's conduct or course of conduct – no valid reason for dismissal – distinguished from Fingal Glen – satisfied applicant unfairly dismissed – reinstatement inappropriate – applicant made efforts to mitigate loss – applicant forced to sell his property due to non-payment of wages – applicant contractually constrained from working for another entity during employment – applicant to be compensated in the amount of $10,000 – order issued.

TERMINATION OF EMPLOYMENT – application to dismiss by employer – ss.394, 399A Fair Work Act 2009 – application for unfair dismissal remedy – application not made within 21 day statutory time limit – matter listed for conciliation – respondent sought jurisdictional objection regarding late lodgement be dealt with first – matter listed for jurisdiction hearing – applicant did not attend hearing – respondent made application pursuant to s.399A FW Act to dismiss application – respondent’s application accepted – applicant did not provide any material in opposition – application dismissed.

TRANSFER OF BUSINESS – enterprise agreement – s.318 Fair Work Act 2009 – application for order relating to instruments covering new employer and transferring employees in agreements – application related to one employee commencing employment with applicant – there is an association between previous and current employers – transfer of business will occur when employee commencing employment with new employer as anticipated – conditions of employment with new employer more beneficial than under previous agreement – considered application and accompanying materials taking into account provisions of s.318(3) – satisfied appropriate to make order – order issued.
27 TRANSFER OF BUSINESS – enterprise agreement – s.318 Fair Work Act 2009 – application for order relating to instruments covering new employer and transferring employees in agreements – application related to one employee commencing employment with Jetstar – there is an association between previous and current employers – transfer of business will occur when employee commencing employment with new employer as anticipated – conditions of employment with new employer more beneficial than under previous agreement – considered application and accompanying materials taking into account provisions of s.318(3) – satisfied appropriate to make order – order issued.

Qantas Airways Limited; Jetstar Airways P/L; Wing

AG2014/3917 [2014] FWC 1669
Cambridge C Sydney 13 March 2014

28 TERMINATION OF EMPLOYMENT – contractor or employee – ss.382, 394 Fair Work Act 2009 – applicant was chauffeured car driver employed by respondent – respondent claims applicant was independent contractor instead of employee – followed required approach summarised in Abdalla following Hollis – found applicant could control his hours and decline work – could use his vehicle to work for others – paid commission and various fees to respondent – applicant could delegate or sub-contract work – respondent did not deduct income tax from applicant – no paid leave for applicant – satisfied applicant conducted his own business within meaning of Hollis and was not an employee within the meaning of FW Act – application dismissed.

Bertok v Halsan P/L t/a Hughes Chauffeured Cars-Limousines-Coaches, Citicar, SmartCar and Skylink

U2013/13382 [2014] FWC 1252
Hampton C Adelaide 11 March 2014

29 CASE PROCEDURES – application dismissed on FWC's own initiative – anti-bullying – ss.587, 789FC Fair Work Act 2009 – application for order to stop bullying – application not accompanied by filling fee – application must be accompanied by fee pursuant to s.789FC(3) FW Act – Commission contacted applicant again – no further received – satisfied application not made in accordance with FW Act – application dismissed.

C.D.

AB2014/1051 [2014] FWC 1741
Hampton C Adelaide 14 March 2014

30 ENTERPRISE BARGAINING – protected action ballot – s.437 Fair Work Act 2009 – proposed protected action ballot by employees of respondent – whether application properly made – whether
Transport Workers’ Union of Australia v Linfox Armaguard P/L

B2014/584
Hampton C
Adelaide
17 March 2014

31  RIGHT OF ENTRY – dispute over right of entry – s.505 Fair Work Act 2009 – Coles imposed restrictions on NUW permit holders including that officials must remain at particular table in lunch room, must not roam around lunchroom or approach workers to initiate discussions – NUW sought order refraining Coles from imposing these conditions – Commission considered relevant provisions of legislation including changes to s.493 that commenced 1 January 2014 – referred to Australasian Meat Industry Employees’ Union decision – Commission considered that right of entry for purposes of discussions not restricted to discussions initiated by employees – act does not suggest who must approach who – employers have no general right to restrict organiser approaching employees to identify if they wish to participate in discussions – there may be circumstances where employer may reasonably restrict manner in which the meal room is accessed – an order preventing Coles from imposing restriction on the permit holder to prevent them approaching employees would not be contrary to FW Act – many employees NUW sought to have discussions with already members of SDA (the predominant union on site) – Commission decided not appropriate to make order to resolve dispute in circumstances – Commission made following recommendations – Coles should not impose conditions that prevent permit holders from approaching employees in delegated meeting location for purpose of holding discussions – reasonable for Coles to restrict permit holders to a particular area of a meal room to reduce likelihood of workplace conflict – parties should attempt to reach agreement and trial arrangements for at least one month.

National Union of Workers v Coles Group Supply Chain P/L

RE2014/547
Roe C
Melbourne
12 March 2014

32  ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – s.739 Fair Work Act 2009 – dispute involved applicant’s belief that he was entitled to an endorsement loading in respect of an endorsement he held for the Gulfstream V aircraft – parties agreed that Commission was to determine whether transition to new classification structure was intended to broaden access to endorsement loadings; whether the Gulfstream 550 qualifies applicant for endorsement loading and whether applicant was eligible for the loading – applicant submitted agreement clear that employees who satisfied criteria at Level 2 was entitled to endorsement loading regardless of stream – respondent submitted that during negotiations for agreement union sought broadened access of endorsement loadings but this was rejected by respondent – respondent submitted further that Commission
was to consider the context of the words in the agreement [Short] and the evidence of prior negotiations in considering objective framework of facts [BP Australia] – Commission found that the new classification structure allowed for broadened access to the endorsement loading and that an endorsement on the Gulfstream G550 is an endorsement which qualifies for the payment of a Level 2 endorsement loading – Commission found that applicant satisfies the minimum criteria to be eligible to be paid the Level 2 endorsement loading.

Lacy v Civil Aviation Safety Authority

C2013/5238  
Bissett C  
Melbourne  
13 March 2014  

33 GENERAL PROTECTIONS – extension of time – ss.365, 366 Fair Work Act 2009 – application made four days late – applicant did not provide any reason for delay in lodging application – no exceptional circumstances found – application dismissed.

McLean v Stawell Medical Centre t/a C/- Stawell Regional Health

C2013/7714  
Bissett C  
Melbourne  
13 March 2014  

34 CASE PROCEDURES – evidence – production of documents – s.394 Fair Work Act 2009 – Commission issued order for production of documents directed to applicant at request of respondent – applicant’s representative questioned why documents should be produced – directions issued regarding objection to order – applicant failed to file submissions as required – respondent provided submissions as required – order as issued will stand.

Reimers v Safari Automotive P/L t/a Safari Automotive P/L

U2013/15371  
Bissett C  
Melbourne  
13 March 2014  

35 TERMINATION OF EMPLOYMENT – contract for specified term – s.386 Fair Work Act 2009 – applicant entered into competency based apprentice contract on 6 April 2010 with nominal expiry date of 4 April 2014 but could finish earlier through competency progression – apprenticeship formally completed 1 October 2013 – satisfied that a training arrangement applied and employment contract was limited to the duration of the training contract – no jurisdiction to consider dismissal application – application dismissed.

Graham v Comgroup Supplies P/L t/a Comgroup

U2013/15133  
Simpson C  
Brisbane  
10 March 2014
TERMINATION OF EMPLOYMENT – Small Business Fair Dismissal Code – s.394 Fair Work Act 2009 – application for relief from unfair dismissal – respondent was small business who employed applicant to remove rubbish from worksites – applicant lost trailer wheel whilst driving and aggressively confronted respondent by telephone and in person – examination required of whether dismissal was consistent with small business fair dismissal code – test within code is two-fold; whether dismissal meets test of summary dismissal or, if not, it meets test of an ‘other dismissal’ – whether it satisfies summary dismissal dependent upon whether conduct sufficiently serious to justify immediate dismissal and whether such belief was based on reasonable grounds [Pinawin] – Commission found that applicant was provocateur in argument and that the applicant’s collectively comprised conduct was sufficiently serious to justify immediate dismissal – Commission satisfied it was reasonable for respondent to form belief that conduct was sufficiently serious to justify immediate dismissal – applicant’s dismissal found to be consistent with small business fair dismissal code – application dismissed.

Paerau v Rainshield Roofing P/L t/a Rainshield Roofing

U2013/13670 [2014] FWC 1524
Wilson C Melbourne 11 March 2014

TERMINATION OF EMPLOYMENT – extension of time – s.394 Fair Work Act 2009 – three days out of time – applicant’s absence from Darwin to attend family funeral together with lack of knowledge about rights and entitlements accepted as reason for delay – satisfied applicant took steps to dispute dismissal – application has some arguable element – satisfied of exceptional circumstances – order extending time issued.

Ormond v Pilbara Logistics WA P/L

U2013/16437 [2014] FWC 1673
Wilson C Melbourne 11 March 2014
Websites of Interest

**AUSTLII** - [www.austlii.edu.au](http://www.austlii.edu.au) - a legal site including legislation, treaties and decisions of courts and tribunals.


**Fair Work Ombudsman** - [www.fairwork.gov.au](http://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.


Industrial Relations Commission of New South Wales -

- 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 -

Road Safety Remuneration Tribunal—www.rsrt.gov.au

South Australian Industrial Relations Court and Commission -


Western Australian Industrial Relations Commission -

Workplace Relations Act 2009 -
### Australian Capital Territory
- **Sydney**
  - Level 8, Terrace Tower
  - 80 William Street
  - East Sydney 2011
  - Tel: (02) 8374 6666
  - Fax: (02) 9380 6990
  - Out of hrs emergency: 0419 318 011
  - Email: sydney@fwc.gov.au

- **Newcastle**
  - Level 3, 237 Wharf Road,
  - Newcastle, 2300
  - PO Box 805, Newcastle, 2300

- **Wollongong**
  - Level 6, 90 Crown Street,
  - Wollongong, 2500

### New South Wales
- **Sydney**
  - Level 8, Terrace Tower
  - 80 William Street
  - East Sydney 2011
  - Tel: (02) 8374 6666
  - Fax: (02) 9380 6990
  - Out of hrs emergency: 0419 318 011
  - Email: sydney@fwc.gov.au

### Northern Territory
- **Darwin**
  - 10th Floor, Northern Territory House
  - 22 Mitchell Street
  - Darwin 0800
  - GPO Box 969
  - Darwin 0801
  - Tel: (08) 8936 2800
  - Fax: (08) 8936 2820
  - Out of hrs emergency: 0419 335 202
  - Email: darwin@fwc.gov.au

### Queensland
- **Brisbane**
  - Level 14, Central Plaza
  - Two
  - 66 Eagle Street
  - Brisbane 4000
  - PO Box 5713 Central Plaza
  - Brisbane 4001
  - Tel: (07) 3000 0399
  - Fax: (07) 3000 0388
  - Out of hrs emergency: 0419 335 202
  - Email: brisbane@fwc.gov.au

### South Australia
- **Adelaide**
  - Level 6, Riverside Centre
  - North Terrace
  - Adelaide 5000
  - PO Box 8072 Station Arcade 5000
  - Tel: (08) 8308 9863
  - Fax: (08) 8308 9864
  - Out of hrs emergency: 0419 563 601
  - Email: adelaide@fwc.gov.au

### Tasmania
- **Hobart**
  - 1st Floor, Commonwealth Law Courts
  - 39-41 Davey Street
  - Hobart 7000
  - GPO Box 1232M
  - Hobart 7001
  - Tel: (03) 6214 0200
  - Fax: (03) 6214 0202
  - Out of hrs emergency: 0418 124 021
  - Email: hobart@fwc.gov.au

### Victoria
- **Melbourne**
  - Level 4, 11 Exhibition Street
  - Melbourne 3000
  - GPO Box 1994 Melbourne 3001
  - Tel: (03) 8661 7777
  - Fax: (03) 9655 0401
  - Out of hrs emergency: 0419 960 157
  - Email: melbourne@fwc.gov.au

### Western Australia
- **Perth**
  - Floor 16, 111 St Georges Terrace
  - Perth 6000
  - GPO Box X2206
  - Perth 6001
  - Tel: (08) 9464 5172
  - Fax: (08) 9464 5171
  - Out of hrs emergency: 0448 275 936
  - Email: perth@fwc.gov.au
The address of the Fair Work Commission home page is: www.fwc.gov.au/

The FWC Bulletin is a weekly publication that includes information on the following topics:

• information concerning notice of matters before the Fair Work Commission;
• Practice Directions concerning the practice and procedure of the Fair Work Commission;
• weekly decisions summaries;
• details of procedural changes and developments within the Fair Work Commission; and
• advice regarding the rights and obligations of organisations registered under the Fair Work (Registered Organisations) Act 2009.

For inquiries regarding publication of the FWC Bulletin please contact the Fair Work Commission by email: FWCsubscriptions@fwc.gov.au.

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