



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Mr Bradley Drake

v

BHP Coal Pty Ltd

(U2019/1403)

Mr Andrew Bird

v

BHP Coal Pty Ltd

(U2019/1397)

DEPUTY PRESIDENT ASBURY

BRISBANE, 30 OCTOBER 2019

Application for an unfair dismissal remedy – Whether conduct related to employment so as to provide valid reason for dismissal – Fighting at work related Christmas event – Found to be valid reason for dismissal – Standard of proof – Finding on balance of probabilities in relation to conduct of two dismissed employees – Finding that one employee did engage in conduct and other employee did not – Applicant in U2019/1403 not unfairly dismissed – Applicant in U2019/1397 unfairly dismissed – Application in U2019/1403 dismissed – Application in U2019/1397 granted – Applicant in U2019/1397 reinstated and order for backpay discounted for failing to take reasonable steps to find alternative employment and for inappropriate conduct at work related Christmas event.

INTRODUCTION

[1] Mr Bradley Drake and Mr Andrew Bird respectively apply under s. 394 of the *Fair Work Act 2009* (the Act) for an unfair dismissal remedy in respect of the termination of their employment by BHP Coal Pty Ltd (BHP). Mr Drake and Mr Bird were employed as Operators in the Mine's Pre-strip Department. Mr Drake was employed from December 2011 and Mr Bird from 23 April 2012. Both were dismissed with effect from 24 January 2019. The reasons for dismissal were that following an internal investigation Mr Drake and Mr Bird were found to have engaged in a verbal and physical altercation with a Coal Mining Supervisor, Mr Rod Maunder. The altercation was found to have occurred at a work related Christmas event held at the Moranbah Bowls Club on 6 December 2018, and it was also found that both Mr Drake and Mr Bird punched Mr Maunder several times during that altercation. Mr Drake was also found to have made an offensive comment to a female colleague during the event.

[2] The applications of Mr Drake and Mr Bird were heard together with the consent of all parties and this Decision deals with both applications. Given the complexity of the matter

including the serious nature of the allegations and to facilitate the efficient conduct of the hearing, permission was granted under s. 596 of the Act for all parties to be legally represented. Given that their positions were not aligned, Mr Drake and Mr Bird had separate representation. Mr Drake was represented by Mr Tiley of Hall Payne Lawyers and Mr Bird was represented by Mr Rich of Slater and Gordon Lawyers. BHP was represented by Mr Mahendra of Counsel, instructed by Ms Fairbairn of Herbert Smith Freehills. It was agreed by the parties that the evidence in one application would constitute evidence in the other application. Legal representatives for both Applicants had the opportunity to cross-examine all witnesses called by the other Applicant and the witnesses for BHP. The legal representatives for each of the Applicants elected to cross-examine some but not all witnesses. The hearing was initially listed for five days in Mackay. It was able to be conducted in three days due to the professionalism and efforts of the legal representatives for all parties.

[3] Mr Drake gave evidence on his own behalf.¹ Evidence for Mr Drake was also given by:

- Leon Joseph Malone, Operator²;
- Steven Thomas Johnston, Operator³;
- Wayne Thomas Goulevitch, Operator and CFMMEU Delegate⁴; and
- Nat Redgrave, Operator⁵; and

[4] Mr Bird gave evidence on his own behalf.⁶ Evidence for Mr Bird was also given by the following persons:

- Wayne Thomas Goulevitch, Operator and CFMMEU Delegate⁷;
- Leon Joseph Malone, Operator⁸;
- Geoffrey Andrew Richards, Operator⁹; and
- Ms Sarah Christina Monique Builder, Operator employed by WorkPac and fiancée of Mr Bird¹⁰.

[5] Mr Drake's legal representative cross-examined Ms Builder in respect of her evidence given on behalf of Mr Bird. Other witnesses in support of Mr Bird's case were not required for cross-examination by Mr Drake's legal representative. Mr Bird's legal representative cross-examined Mr Drake. Other witnesses called by Mr Drake were not required for cross-examination by Mr Bird's legal representative. All witnesses for both Mr Drake and Mr Bird were cross-examined by Counsel for BHP.

[6] Evidence for BHP was given by:

- Michael Ian Schafferius, Superintendent Pre-strip¹¹;
- Roderick Maunder, formerly Supervisor – Coal Mining at Goonyella Riverside until his resignation on 25 January 2019¹²;
- Clayton Gregory Gardner, Supervisor – Mine Services at Goonyella Riverside employed by WorkPac¹³; and
- Trudi Anne Lewis, Bar Manager, Moranbah Bowls Club¹⁴.

[7] All witnesses for BHP were cross-examined by the legal representatives of both Mr Drake and Mr Bird with the exception of Ms Lewis who was not cross-examined by Mr Drake's legal representative.

REASONS FOR DISMISSAL AND ISSUES FOR DETERMINATION

[8] The reasons for the dismissal of both Mr Drake and Mr Bird (set out in Show Cause and termination letters) are that an investigation conducted by BHP established that:

- During the evening on 6 December 2018 Mr Drake and Mr Bird attended the Goonyella Riverside Mine Prestrip Department “C Crew” Christmas Party at the Moranbah Bowls Club.
- At approximately 11.00pm Mr Drake was standing at the bar next to Mr Bird and Mr Maunder, Supervisor Coal Mining. Mr Drake had a conversation as follows:

Mr Drake: [To Rod Maunder] “*What are you Coalies doing here, is your Christmas Party over?*”

Mr Bird: “*You’re not a Prestrip Supervisor, fuck off*”

Mr Maunder: “*Don’t fucking start*”

- Mr Bird and Mr Maunder continued to argue.
- Mr Maunder then pushed Mr Drake and Mr Bird before attempting to grab Mr Bird.
- Mr Bird punched Mr Maunder in the face at least once.
- Mr Drake subsequently jumped over the top of Mr Bird and punched Mr Maunder at least once.
- The fight ended after Mr Clayton Gardner and Mr Robert Bigham intervened to break Mr Drake, Mr Maunder and Mr Bird apart.
- As a result of the fight, Mr Maunder suffered injuries to his forehead and nose.

[9] It was also found that during the same function, Mr Drake introduced himself to Ms H, a Mine Employee in the Prestrip Department, who was standing outside the bar and had the following conversation with her, causing offence to Ms H:

Mr Drake: “*Do you have fake tits?*”

Ms H: “*What? That’s none of your business*”

Mr Drake: “*All the girls have them, you can’t come to [excavator] strip 44 unless you have fake boobs*”

[10] These were said by BHP in the letters advising Mr Drake and Mr Bird of the termination of their employment, to be serious findings constituting misconduct and breaches of BHP policies and procedures in relation to:

- Charter Values: Specifically *Respect*;
- BHP Code of Conduct – *Part 2 Our People: Harassment and Bullying*.¹⁵

[11] Both Mr Drake and Mr Bird contend that at the time they attended the event on 6 December 2019 they did not know that it was a BHP event or that the Company had made any contribution to, or had any involvement in, the event. Both Mr Drake and Mr Bird assert that their belief at the time they attended the event was that it was a regular social event arranged between employees working a particular shift roster at a point in the roster where employees change from day shift to night shift (thereby having a longer than usual break) colloquially known as a “*pyjama night*” or “*PJ night*”. Mr Drake and Mr Bird further assert that their belief was that there were more than the usual number of persons present because the event on 6 December coincided with the last PJ night before Christmas.

[12] Mr Drake admits that he made an inappropriate comment to Ms H and that he punched Mr Maunder. Notwithstanding these admissions, Mr Drake contends that his dismissal was unfair. In relation to the comment made to Ms H, Mr Drake states that he immediately apologised to Ms H. Mr Drake further states that at all times he has admitted and taken responsibility for the comment he made to Ms H, apologised to BHP and has offered to again apologise to Ms H. In relation to punching Mr Maunder, Mr Drake contends that he did so in the context of intervening in a heated verbal and physical confrontation between Mr Maunder and Mr Bird and was defending Mr Bird. Mr Drake further asserts that because he did not know that the event on 6 December 2018 was organised by BHP, it did not have the requisite connection to his employment so that his conduct at the function constituted a valid reason for his dismissal.

[13] Mr Bird contends that he did not engage in misconduct and did not punch Mr Maunder. Mr Bird also contends that his language was appropriate to the environment and the circumstances. Further Mr Bird contends that: Mr Maunder was the aggressor; he acted in defence of Mr Maunder’s aggression by grabbing him by the shirt front so that he would not punch Mr Bird; and that he did not know at the time that Mr Maunder was an employee of BHP. Mr Bird also states that he was not aware that BHP had any involvement in the function and submits that it lacks the requisite connection to his employment and as such he did not breach BHP Charter Value – Respect or the BHP Code of Business Conduct. Mr Bird also raises issues of procedural fairness and asserts that the investigation process into his conduct on 6 December 2018 was unfair. In particular, Mr Bird takes issue with a direction he was given by BHP not to discuss the incident or the investigation with anyone other than his support person. Mr Bird contends that this prevented him from properly defending himself because he was unable to gather information from persons who may have witnessed the incident.

LEGISLATIVE PROVISIONS

[14] In deciding whether a dismissal was unfair on the grounds that it was harsh, unjust or unreasonable, the Commission is required to consider the criteria in s.387 of the Act, as follows:

- “(a) whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- (e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and

- (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that the FWC considers relevant."

[15] The employer bears the onus of establishing that there was a valid reason for a dismissal.¹⁶ A valid reason for dismissal is one that is "*sound, defensible or well founded*" and not "*capricious, fanciful, spiteful or prejudiced*."¹⁷ The reason for dismissal must also be defensible or justifiable on an objective analysis of the relevant facts,¹⁸ and validity is judged by reference to an assessment of the factual circumstances as to what the employee is capable of doing or has done.¹⁹

[16] To determine whether there was a valid reason for a dismissal relating to conduct, the Commission must determine whether, on the balance of probabilities, the conduct allegedly engaged in by the employee actually occurred, on the basis of the evidence before the Commission. The test is not whether the employer believed on reasonable grounds, after sufficient inquiry that the employee was guilty of the conduct.

[17] Further, to constitute a valid reason for dismissal, the Commission must assess whether the conduct was of sufficient gravity or seriousness such as to justify dismissal as a sound, defensible or well-founded response to the conduct.²⁰ In finding that there was a valid reason for dismissal, the Commission is not limited to the reason relied on by the employer.

[18] In the context of earlier award and legislative provisions to the effect that termination of employment should not be harsh, unjust or unreasonable, it has been observed that employers are not required to have the investigative skills of police or legal investigators but are expected to take reasonable steps to investigate allegations and give employees an opportunity to respond.²¹ While these observations remain apposite, under the present legislative provisions, in considering whether there is a valid reason for dismissal on the grounds of conduct, the Commission is required to be satisfied that the conduct occurred rather than that the employer had a reasonable belief that this was the case. Thus the standard of the investigation conducted by an employer is not determinative of whether there was a valid reason for dismissal. However the standard of the employer's investigation may be relevant to other s.387 considerations including whether the dismissed employee had a reasonable opportunity to respond to allegations.

[19] In *AWU-FIME v Queensland Alumina Limited*²² Moore J considered a number of decisions of industrial tribunals concerning employees who had been dismissed for fighting in the workplace and observed:

"What emerges from these decisions is that whether a dismissal or termination arising from a fight in the workplace is harsh, unjust or unreasonable will depend very much on the circumstances. However, generally the attitude of industrial tribunals tends to be that the absence of extenuating circumstances, a dismissal for fighting will not be viewed as harsh, unjust or unreasonable. The extenuating circumstances may, and often do, concern the circumstances in which the fight occurred as well as other considerations such as the length of service of the employee, including their work record, and whether he or she was in a supervisory position. As to the circumstances of the fight, relevant considerations

include whether the dismissed employee was provoked and whether he or she was acting in self defence.”²³

[20] A relevant consideration in cases involving fighting is whether the conduct occurred outside working hours and the effect that such conduct has on the employment of the persons involved. The cases considering these issues were considered by Vice President Ross (as he then was) in *Rose v Telstra Corporation Limited*²⁴ where his Honour observed:

“There is some support for the proposition that the existence of an implied term of trust and confidence in contracts of employment has been accepted in Australia.

The words ‘trust and confidence’ in this context are used in a contractual sense rather than as an ingredient of a personal relationship. As McCarry notes:

‘...the words ‘trust and confidence’, just like the employee’s reciprocal duties of ‘fidelity and good faith’ do not now refer to the ingredients of a personal relationship, even if they once did. The words now represent, in shorthand form, a bundle of legal rights which have more to do with modes of behaviour which allow work to proceed in a commercially and legally correct manner than with ingredients in an interpersonal relationship.’

The above statement is consistent with the shift in the nature of the employment relationship, from status to contract, referred to earlier.

It is clear that in certain circumstances an employee’s employment may be validly terminated because of out of hours conduct but such circumstances are limited:

- The conduct must be such that viewed objectively, it is likely to cause serious damage to the relationship between the employer and the employee; or
- The conduct damages the employer’s interests; or
- The conduct is incompatible with the employee’s duty as an employee.

In essence the conduct complained of must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee.

Absent such considerations an employer has no right to control or regulate an employee’s out of hours conduct.” (citations omitted)

[21] Mr Drake and Mr Bird were dismissed as a result of BHP finding that they had engaged in misconduct that would also amount to assault. Generally, such an allegation, if proven, will be a valid reason for dismissal subject to the requisite connection to employment. In determining whether Mr Drake did engage in the conduct alleged and whether there was a valid reason for his dismissal, the standard of proof is the balance of probabilities. Given the seriousness of the allegations, the principle in *Briginshaw v Briginshaw* is relevant.²⁵ This principle means that whilst the standard of proof remains the balance of probabilities, the seriousness of the allegation affects the process of reaching a level of satisfaction that the conduct occurred and “*should not be produced by inexact proofs, indefinite testimony, or indirect inferences’ or ‘by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion.’*”²⁶

[22] A more recent consideration of the principle in *Briginshaw* is found in the High Court Decision in *Neat Holdings v Karajan*²⁷ where it was held that statements to the effect that clear or cogent or strict proof is necessary where a question of whether a person in civil proceedings has engaged in theft or fraud is to be determined, should not be understood as directed to the standard of proof. Rather such statements should be understood as: “...*merely*

reflecting a conventional perception that members of our society do not ordinarily engage in criminal or fraudulent conduct.”²⁸ The Court went on to observe that:

“When an issue falls for determination on the balance of probabilities and the determination depends on the choice between competing and mutually inconsistent allegations of fraudulent conduct, generalisations about the need for clear and cogent proof are likely to be at best unhelpful and at worst misleading. If such generalisations were to affect the proof required of the party bearing the onus of proving the issue, the issue would be determined not on the balance of probabilities but on an unbalanced standard. The most that can validly be said in such a case is that the trial judge should be conscious of the gravity of the allegations made on both sides when reaching his or her conclusion. Ultimately however it remains incumbent upon the trial judge to determine the issue by reference to the balance of probabilities.”²⁹

[23] The matters in s.387 go to both substantive and procedural fairness and it is necessary to weigh each of those matters in any given case, and decide whether on balance, a dismissal is harsh, unjust or unreasonable. A dismissal may be:

Harsh - because of its consequences for the personal and economic situation of the employee, or because it is disproportionate to the gravity of the misconduct;

Unjust - because the employee was not guilty of the misconduct on which the employer acted; and/or

Unreasonable - because it was decided on inferences that could not reasonably have been drawn from the material before the employer.³⁰

EVIDENCE

Background

[24] Mr Drake and Mr Bird were employed by BHP on C Crew, which consists of about 150 people split into approximately eight sub-groups known as digging units. Mr Drake said in his witness statement³¹ that he did not have a lot to do with persons in C Crew other than those he worked with on a regular basis. Mr Drake also stated that everyone on the C Crew worked the same “lifestyle roster”. Mr Drake lives in Mirani outside Mackay and stayed at a Camp at the Mine known as Eureka when he was rostered on shift.

[25] According to Mr Drake, because all employees on C Crew work the same roster and live in the Eureka Camp while at work, there is a close relationship between many on the Crew because they eat and work together and sometimes have drinks after work. During the second week of the roster where the roster changes from day to night shift, there are two day shifts followed by three night shifts. The free night in this period is a PJ night. Members of C Crew have a tradition of getting together at the Bar at Eureka Camp for a few drinks on PJ nights. Mr Drake is close to some members of the Crew. Mr Drake stated that he knew Mr Maunder, but not well. Mr Drake also said that he has known Mr Bird since he started at the Mine but they have very little to do with each other because Mr Bird is a local based in Moranbah and Mr Drake lives in Eureka Camp when he is rostered on. Mr Drake stated that he had no issues with either Mr Bird or Mr Maunder.

[26] Mr Bird also gave evidence that it was usual for members of his dig team to go out and socialise together every PJ night and that it is standard for about 30 to 40 people across different dig teams to go for drinks on PJ night either at the Pub or the Bowls Club or some

other location in the Town. According to Mr Bird these social occasions were arranged on an *ad hoc* basis by word of mouth – using the UHF channel or during crib breaks or after pre-start meetings. On 6 December 2018 Mr Bird worked a day shift and was told in response to a question directed to a co-worker about where PJ drinks were to be held that: “*there are a few of us going up to the Bowls Club.*”

The function on 6 December 2018

[27] It is not in dispute that the evening of 6 December 2018 was the last PJ night before Christmas and that there was a drinks function at the Moranbah Bowls Club on that night. There was some disagreement between various witnesses about whether BHP was involved in the event at the Bowls Club and the level of the Company’s involvement. Both Mr Drake and Mr Bird maintained that when they attended the event they did not know that the Company had any involvement in the event.

[28] Evidence (in support of Mr Drake’s case) in relation to the involvement of BHP in the event was given by Mr Redgrave, an employee of BHP who also works in C Crew. Mr Redgrave stated that approximately three weeks prior to the function, he heard that the BHP would not be organising a Christmas party that year and therefore he and another colleague, Mr Johnston, decided to organise a party.³² Mr Redgrave stated that while BHP has organised Christmas parties in previous years, in recent years Christmas parties have been organised by supervisors.³³

[29] On 19 November 2018, Mr Redgrave send a text message to Mr Schafferius, asking how Mr Redgrave could go about organising a Christmas party and querying the budget per person that would be provided by the Company. Mr Redgrave was advised that his supervisor would need to organise with an administration officer of BHP for appropriate documentation to be generated for BHP to contribute to the event.³⁴ Upon realising that a colleague had booked the Moranbah Bowls Club for a Christmas party Mr Redgrave agreed with that colleague that the all members of C Crew would join the party.³⁵ Mr Redgrave contacted the Moranbah Bowls Club to request a quote for food and bare foot bowls.³⁶ In the email requesting the quote Mr Redgrave stated that the function was for 95 people with a budget of \$20 per person to cover 25 kg of roast pork, gravy, fresh bread rolls and platters and for the use of facilities for attendees to play bowls.³⁷

[30] Mr Redgrave also received quotes regarding transport to the event.³⁸ The BHP contribution to the party for food and bowling totalled \$1900. In addition, BHP paid for the hire of two 48 seat buses at the cost of \$676.50 per bus, to transport employees from Eureka Camp to and from the function. This expenditure was approved by Mr Schafferius. A flyer was generated and distributed around lunch rooms and work buses to advise employees about the function.³⁹ Mr Johnston who was also involved in the organisation of the event generated the flyer referred to by Mr Redgrave. The flyer stated the event was the C Crew Christmas Party and that it was to be held on 6 December 2018, the next PJ night and that “*All Welcome*”. The flyer also stated that 2 buses would be transporting employees from the Eureka Camp leaving at 7.50 pm and returning at midnight and that the food provided would be “*Roast pork & gravy rolls & deep fried nibbles*”.⁴⁰

[31] Mr Drake said that he had not previously attended a C Crew Christmas party but decided to attend the party on the evening of 6 December at the urging of his partner who had recently commenced work at the Mine and thought it would be a good idea to get to know

everybody. Mr Drake said in November 2018 he had heard “*chatter*” that the Company was not going to hold a Christmas party for employees and a fellow member of C Crew told him that Mr Redgrave and Mr Johnson were organising a Christmas party because the Company was not putting one on. Mr Drake also said that at all times prior to 7 December 2018, he believed that the party was a private one and that BMA had not organised it.

[32] Under cross-examination by Mr Mahendra on behalf of BHP, Mr Drake maintained that he heard that Mr Johnston and Mr Redgrave were arranging a Christmas function for C Crew because BHP was not going to hold such a function. Mr Drake also maintained that he did not know that there were buses to transport employees from the Eureka Camp but stated that he was aware that there was a flyer put out about the event and that when he arrived he noted that there were a large number of members of C Crew at the event.⁴¹ Mr Bird maintained that he was not aware that the event at the Bowls Club on 6 December 2018 was the C Crew Christmas party and maintained that he thought that there were a lot more people than usually attended PJ night drinks because 6 December was the last PJ night before Christmas.

[33] Mr Schafferius stated that he considers it was clear that the function was organised by BHP.⁴² Mr Schafferius stated that BHP organised similar Christmas parties in previous years and tendered invoices evidencing payment for Christmas parties in 2018 and 2017.⁴³ Mr Schafferius also provided an invoice for the catering and bowling at the function and for the charter of buses with evidence of payment, consistent Mr Redgrave’s evidence.⁴⁴

The incidents at the function on 6 December 2018

[34] Mr Drake attended the party from approximately 7.45 pm until shortly after last drinks were called at around 11.00 pm. The party was attended by around 60 members from the pre-strip part of C Crew as well as spouses and family members. Mr Drake got a lift to the party from a colleague who was driving and consumed a packet of potato chips in the car. Mr Drake drank approximately ten mid-strength beers at the party and did not eat anything. Mr Drake said that at the end of the evening he felt quite drunk. Mr Drake also said that for most of the evening he was in a conversation with Mr Leon Malone and Mr Aaron Page.

[35] Later in the evening, Mr Drake was introduced to Ms H who joined the conversation. A colleague stated to Mr Drake and the group that Ms H was interested in joining their work group,⁴⁵ and that she could not do so unless she had Mr Drake’s permission.⁴⁶ Mr Drake believes that his colleague said this because Mr Drake had been with the work group for a long time and was regarded as the “*elder statesman*.”⁴⁷ Mr Drake accepts that he said to Ms H words to the effect of: “*You can’t come to 44 strip unless you’ve got fake tits. All the girls have got them.*”⁴⁸ Ms H responded stating: “*What have my boobs got to do with me working at 44 strip.*”⁴⁹ Mr Drake then stated that: “*It was just a joke because the other girls in the crew have all got them. I was talking about the crew. I was not talking about your boobs. I’m sorry if I offended you, that is not how I meant it.*”⁵⁰

[36] Mr Drake states that he made the remarks to Ms H as a joke because several of his female colleagues on the 44 strip had breast implants and they would regularly make jokes about that.⁵¹ It is Mr Drake’s understanding that Ms H did not make a complaint about his comments. Mr Drake stated that he intends to make a personal and sincere apology to Ms H at the earliest opportunity and accepts that he should not have made the comments.⁵² In his statement in support of Mr Drake’s application, Mr Malone recalls Mr Drake asking Ms H

whether she had fake boobs in the context of her working on 44 strip and said that it is common knowledge that three of the five girls who work on that strip have had breast implants and that those girls joke about the 44 strip being the “*fake boobs strip*” for that reason.⁵³

[37] Mr Drake’s evidence about the altercation with Mr Maunder can be summarised as follows. At approximately 11:00 pm the bar staff called “*last drinks*” and Mr Drake went to the bar to buy a round of drinks. According to Mr Drake, the bar area was very crowded with people wanting to purchase last drinks and there was a wait. Mr Drake said that while he was standing at the bar he noticed Mr Maunder who was also standing at the bar. Mr Drake said that he was aware that the Coal Mining department was having a party that night and that Mr Maunder should have been at that party and “*had no reason to be at our party as he was not part of our work group*”. Accordingly, Mr Drake states that he said to Mr Maunder words to the effect of: “*What are you doing here? Have you coalies finished your party?*”⁵⁴ Mr Drake states that Mr Maunder responded by stating: “*Mind your fucking business. You are a wanker.*” Mr Drake states that he was shocked at this response and turned away from Mr Maunder.

[38] A short time afterwards, Mr Drake observed Mr Maunder and Mr Bird having what appeared to be a heated exchange and that Mr Maunder grabbed Mr Bird by the throat.⁵⁵ According to Mr Drake people started to gather around and were watching the altercation. Mr Drake stated that he reacted by going to Mr Bird’s defence and trying to push Mr Maunder away. Mr Drake also stated that while he does not have any recollection of punching Mr Maunder and that was not his intention, he has been informed by numerous people that he punched Mr Maunder and accepts that this did occur.⁵⁶ Mr Drake further stated that he was quickly pulled away from the fracas by someone – he does not know who – and was ushered onto a bus back to camp which was the end of the evening.

[39] Under cross-examination by Mr Mahendra for BHP, Mr Drake agreed that he had quite a bit to drink on the night of 6 December 2018. In relation to the interaction of Mr Bird and Mr Drake with Mr Maunder while they were all at the bar, Mr Drake said that Mr Maunder was beside him at the bar and agreed that he asked Mr Maunder what he was doing there and whether Mr Maunder’s Christmas party was over. Mr Drake said that he could not recall any discussion between Mr Bird and Mr Maunder and did not remember Mr Bird telling Mr Maunder that he was not a Pre-strip supervisor and that he should fuck off. In response to a proposition that he got involved in an altercation between Mr Bird and Mr Maunder, Mr Drake said that this was the case but maintained that he could not hear a word that Mr Maunder and Mr Bird were saying.⁵⁷

[40] Mr Drake also said he did not remember Mr Bird throwing a punch and did not see Mr Bird throw a punch. In response to the proposition that he threw punches Mr Drake agreed that this was so but said that he did not remember doing so and only accepted that he punched Mr Maunder because of what he was told by others who witnessed the incident. Mr Drake maintained that he went in to break up Mr Maunder and Mr Bird and had no intention of throwing any punches but: “*If the witnesses say I punched him I will take the medicine.*”⁵⁸ Mr Drake also stated that he had no reason to lie about punching Mr Maunder because there were people everywhere who had seen the incident. In response to a question about what he actually saw happening, Mr Drake said that he turned around and saw Mr Maunder and Mr Bird “*having words*” in a heated manner.

[41] Mr Drake agreed that he had not challenged Ms Builder's statement in these proceedings but denied that he had been stirring Mr Bird up. Mr Drake stated that he does not recall Ms Builder coming over and grabbing Mr Bird by the chin or that Ms Bird walked Mr Maunder away from the incident. Mr Drake also agreed that he had not challenged the statements of Mr Gardner or Ms Lewis and said that he could not challenge any statement because he did not remember what happened.

[42] Mr Bird said in his evidence that he arrived at the Bowls Club at around 8.00 pm. Mr Bird consumed approximately seven schooners of beer over a three hour period and did not feel particularly intoxicated. Mr Bird's version of events was that he went to the bar at around 11.00 pm to buy himself a last beer. At the bar, Mr Bird noticed that Mr Drake – who Mr Bird described as an “*Operator who also worked on C Crew in a different team*” – was also at the bar. Mr Bird said that another person he did not know at the time, but now knows was Mr Maunder, was standing behind Mr Bird on his left. Mr Bird stated that he assumed when he saw Mr Maunder at the bar that he was not employed by BHP. According to Mr Bird there were a few people also waiting for a drink, but not many. As Mr Bird was leaning on the bar he was aware that Mr Drake was talking to someone behind Mr Bird although as he was not specifically listening, Mr Bird was unaware what they were talking about. Mr Bird did hear Mr Drake say: “*you're from coal mining, they had drinks at the footy club tonight, why aren't you there?*” and a person Mr Bird was not able to identify said: “*what are you doing?*”.

[43] Mr Bird said that he then became aware that Mr Maunder had stepped closer to him and Mr Maunder then said in a loud and aggressive voice: “*What did you say?*” Mr Bird turned towards Mr Maunder and Mr Maunder – who is taller than Mr Bird – stepped in closer so that his face was 20 to 30 cm from Mr Bird's face and had his hand up pointing at Mr Bird's chest. Mr Bird stated that Mr Maunder then called Mr Bird a “*fuckwit*” and said to Mr Bird: “*who do you think you are?*” Mr Bird also stated that:

“Rod [Maunder] appeared to be very drunk. He was slurring his words and wasn't making any sense to me, in terms of what he was saying. I thought that if I told him to go away and ignored him that that was the best way of closing down, rather than escalating things. I said to Rod words to the effect of ‘piss off’ or ‘fuck off’ (I do not remember precisely). I then turned away from him and looked back to the bar. I was aware that Rod briefly walked away from me and from the bar. I said nothing to him after I turned away from him and he walked away. Shortly afterward, however, he was back.

Rod must have only walked a few paces and turned around and walked back, because I became aware again that someone was approaching me. I turned to my left and Rod was there again. Rod stepped up to me and grabbed me aggressively by the collar of my t-shirt and put his face in my face.

I instinctively grabbed him quickly with my right arm by his shirt to hold him so that he couldn't hit me, which I feared that he might because he was behaving unpredictably. I said to him words to the effect, ‘fuck off’ or ‘piss off’ (again, I do not remember which) and ‘Pull your head in mate’. By the time I had grabbed hold of Rod's shirt, some people behind me had started to pull me back.

I was conscious of the fact that, as I have said, Rod seemed extremely drunk. Although I had thought that Rod might hit me, I would never have hit him, because he was so drunk. I also will not hit someone unless a punch has been thrown at me. Grabbing Rod by the shirt seemed to stop him. In addition, I was quickly pulled back from Rod by some people behind me. I turned away from the bar and toward them and let go of Rod at the same time, which was all happening in the same moment. As I was being pulled back and as I was turning around I was aware of a hand coming over my right shoulder from behind me to my right, toward Rod. I didn't see whose hand it was or whether it grabbed or made contact with Rod. I ended up being pulled back and then pushed back to the bar and then to the wall opposite the bar, where the windows were. All of this, from the moment that Rod stepped into me and I grabbed his shirt, to the time that I was pulled away and things broke up, happened very quickly.”⁵⁹

[44] Under cross-examination by Mr Mahendra for BHP, Mr Bird said that he did not hear a conversation between Ms Builder and Mr Drake or Mr Drake saying “*he’s right*” to Ms Builder. Mr Bird said that Mr Drake is a bit of character and likes a laugh and whatever he was saying would not have been meant in a serious way. Mr Bird denied that he said to Mr Maunder that he was not a Pre-strip supervisor and should fuck off and that Mr Maunder said “*don’t fucking start*”. Mr Bird agreed that he “*had words*” with Mr Maunder and said that Mr Maunder called him a “*fuckwit*”. It was Mr Bird’s view that Mr Maunder had him mixed up with someone else. Mr Bird heard some discussion between Mr Maunder and Mr Drake but did not see Mr Maunder push Mr Drake. Mr Bird denied that he punched Mr Maunder in the face and said that he did not see Mr Maunder being punched at all as he was being pulled away. Mr Bird also said that while he was focused on Mr Maunder he saw an arm come over his shoulder, but did not see it hit Mr Maunder as Mr Bird was being dragged away.

[45] In relation to Ms Builder’s evidence, Mr Bird said that he recalls Ms Builder telling him: “*I don’t want you to get involved in this*” but was not aware of the gravity of what she was saying because he was not aware that there was a situation about to happen. Mr Bird also said he did not remember Ms Builder holding him by the chin or pushing Mr Maunder away. In response to a question about what Ms Builder had told him about the night of 6 December, Mr Bird said Ms Builder stated to him that she had seen everything and he had not punched Mr Maunder and that this clarified it for Mr Bird. Further, Mr Bird said he did not recall Ms Builder having an argument with Mr Drake and he did not know what “*past matters*” Ms Builder was referring to in her evidence and said that he knew of no past matters involving Mr Drake. Mr Bird said that when he was standing at the bar he did not see Mr Goulevitch. In response to the proposition that the women working behind the bar would have had a clear view of what occurred, Mr Bird said that they were pretty busy that night and there were 80 to 90 people buying last drinks.

[46] Mr Goulevitch gave evidence on behalf of both Mr Drake and Mr Bird. In his witness statement on behalf of Mr Drake⁶⁰, Mr Goulevitch said that he was at the bar purchasing a drink when the incident occurred. Mr Drake and Mr Bird were behind Mr Goulevitch and off to one side. Mr Goulevitch heard raised voices and when he turned around, observed Mr Maunder and Mr Bird having what appeared to be a disagreement.⁶¹ The disagreement appeared to end momentarily and Mr Maunder turned to leave. When Mr Goulevitch turned around again he saw that the disagreement had started again and Mr Maunder and Mr Bird were grabbing each other by their shirts. In the same witness statement Mr Goulevitch also said:

“At this point other party attendees attempted to intervene. Rod [Maunder] and Andrew [Bird] were screaming at each other and then I saw Brad [Drake] come from behind Andrew [Bird] and attempt to punch Rod [Maunder]. I did not see Brad [Drake] actually make contact with Rod [Maunder]. The altercation was quickly broken up by other party attendees who I didn’t know and it was at this point I noticed blood on Rod’s [Maunder’s] face.”⁶²

[47] Mr Goulevitch in his witness statement on behalf of Mr Bird⁶³ said:

“Later in the night, at around 11 pm I heard last drinks being called and went to the bar. Rod Maunder (who I had known as a Coal Mining Supervisor from a previous encounter as a Delegate) and Andrew [Bird] had just gotten their drinks at the bar and had turned around from the bar. I went to the bar and rested with my elbows on the bar, waiting to order a drink.

I heard someone speaking in an angry tone right behind me. I turned around immediately. Andrew was a meter to my left and Rod was several meters to my right. Moments after I turned around Rod took a step or two closer to Andrew who didn't move. After 1 or 2 more verbal exchanges Rod turned to walk away. At that stage even though there were still some words being exchanged I thought it was over and turned back to the bar. When it got loud again shortly after, I turned a second time and Rod was walking back towards Andrew who still hadn't moved. When Rod physically met Andrew I was directly to the side of Andrew and Rod, though slightly closer to Rod. Rod and Andrew grabbed each other by the shirts. Their faces were about 30cm apart. They held each other still and exchanged some words. I cannot now remember exactly what was said. They were both pretty worked up, but neither of them threw a punch.

Pretty quickly after this happened, people rushed in around Andrew and Rod to try to break them apart and attempted to pull them away from each other. Because people were squashing into what was a very small space between the bar and the wall next to the bar to break things apart, everyone was being jostled and moved about. As this happened I was aware of a fist coming over the top, from behind Andrew's left shoulder, and hitting Rod 3 times. I had a clear view of Andrew. He did not hit Rod.⁶⁴

[48] In his reply statement in support of Mr Bird's case⁶⁵ Mr Goulevitch maintained that he saw only one person – Mr Drake – hit Mr Maunder and said that this was consistent with his first statement in support of Mr Bird's case. Under cross-examination by Mr Mahandra for BHP, Mr Goulevitch said that there was an initial verbal altercation that seemed like it had died down and Mr Maunder turned to walk away. Mr Goulevitch turned to the bar to order a drink when the altercation started blowing up again. Mr Goulevitch again turned around to see Mr Maunder walking back towards Mr Bird. Mr Goulevitch was shown Annexure "MS-38" to the statement of Mr Schafferius, which was a record of a discussion between Mr Schafferius and Mr Goulevitch on 22 January 2019 during the investigation of the incident. Mr Goulevitch agreed that in the statement he said that Mr Bird and Mr Maunder were shouting and yelling at each other and continued to do so as last drinks were called.

[49] According to the record of discussion on 22 January 2019, Mr Goulevitch told Mr Schafferius that Mr Maunder walked towards Mr Bird and someone tried to stop him. Mr Bird and Mr Maunder got within three to four metres of each other and then Mr Maunder turned to walk away. Mr Maunder then turned around and walked towards Mr Bird and each grabbed the shirt of the other. The record of discussion also states that Mr Goulevitch saw a punch thrown and said it was not Mr Bird who threw the punch and that he saw Mr Drake hit Mr Maunder two or three times. After that there was a lot of "niggling" going on between them for another 30 or 40 seconds.

[50] In response to the proposition that his witness statement in these proceedings was inconsistent with his January 2019 statement provided to Mr Schafferius, Mr Goulevitch said that the statement made in these proceedings lacked some detail. Mr Goulevitch had the following exchange with Counsel for BHP:

"How do you reconcile that you did not see Brad [Drake] actually make contact with any part of Rod's face or body with seeing Brad hit Rod [Maunder] three times?---So I was standing - If I'm Rod, in this chair, I'm standing just ever so slightly behind Rod. I saw Mr Drake throw punches and I saw his hand towards Mr Maunder's face but because of where I was standing, the contact was made to his face at an angle that I didn't see him actually connect.

So you didn't see him hit him?---Well, it was pretty obvious from what I saw that the punches landed.

Well, Mr Goulevitch, these two statements are inconsistent. You accept that, don't you?--- No, I don't.

On the one hand you say you saw him hit him three times?---Yes.

On the other hand you say you didn't see him make contact?---That's right.

You understand that's inconsistent?---I don't think it is.⁶⁶

[51] Mr Goulevitch maintained that he was at the bar at the relevant time. In response to the proposition that he was the only witness in the entire case who said that Mr Drake and Mr Bird must have gotten drinks and had turned around from the bar, Mr Goulevitch said that he based this statement on his belief that as neither were at the bar they had ordered drinks and had started having a stoush. In response to a question from me as to what Mr Drake and Mr Bird did with their drinks, Mr Goulevitch said: *"It's a good question. I don't know."* Mr Goulevitch also said that when he first turned around to observe the situation, Mr Maunder's back was side on to the bar and he was facing Mr Bird. Mr Goulevitch stated that he was closer to Mr Bird and on Mr Bird's right and saw the punches come over Mr Bird's shoulder but did not see them land because of where he was standing as Mr Maunder's face was out of his vision.

[52] Mr Goulevitch also maintained that Mr Bird did not throw a punch and that he did not believe that Mr Bird punched Mr Maunder. Mr Goulevitch also said that it is possible that Mr Bird punched Mr Maunder but he did not think that this was the case unless there were two altercations and he had seen only one.⁶⁷ In response to a question from me about how Mr Drake's arm came over Mr Bird's shoulder so that he punched Mr Maunder, Mr Goulevitch said that Mr Drake was slightly more to Mr Bird's left rather than directly behind him.

[53] In re-examination Mr Goulevitch said that he assisted Mr Drake and Mr Bird in meetings during the investigation process but did not give a statement about what he had witnessed on 6 December 2018 because he was not asked to do so. Mr Goulevitch also said that he saw Mr Drake punch Mr Maunder and that was evidence he would rather have not given. Further, Mr Goulevitch said that his supervisor knew he was at the function and did not ask for a statement, and that Mr Goulevitch did not understand why he was not asked.

[54] Ms Builder said that at the time the event on 6 December was held, she was recovering from breast surgery and was still a bit sore. Accordingly, Ms Builder was taking care not to bump into people and was planning not to have a big night out or to drink too much. At around 11.15 or 11.30 pm Ms Builder states that she observed Mr Bird and Mr Drake at the bar ordering their last drinks and that Mr Drake was on Mr Bird's right. A person who Ms Builder now knows is Mr Maunder was behind Mr Bird and to his left as though he was waiting in line. Ms Builder stated that not everyone at the Club that evening was an employee of BMA. Ms Builder further stated:

"I went to say g'day to Andrew [Bird], but as I approached I immediately sensed some tension, so I hung back against the wall to watch what was going on. [Mr Drake] was standing at the bar, tall and big chested, and looking over his left shoulder toward Rod [Maunder], and saying something, speaking to the men standing near to him. As [Mr Drake] spoke he was turning back toward Rod and those behind him. He also looked toward Andrew from time to time, as though he was trying to catch Andrew's attention. He seemed to be speaking loudly enough that Rod could hear him. The focus of the people standing near to [Mr Drake] had started to turn to [Mr Drake] and Rod. Through [Mr Drake's] body language and behaviour and that of the people around him it seemed to me that [Mr Drake] was stirring Rod, though I could not hear what [Mr Drake] was saying. Andrew was facing the bar and I could see that his attention had started to be grabbed by [Mr Drake] as well. The noise levels went up. Because of the noise I did not hear what was said, but Rod appeared annoyed.

I immediately went in to Andrew's side because I was concerned that something might happen. I took Andrew by his chin to get his attention and said to him, "You're not being involved in all this". He

nodded. Nevertheless, I have worked in bars since I was 15 years old and so have some experience of dealing with patrons who had been drinking, and experience avoiding confrontation. I turned to Rod and said, "Walk away mate." Rod didn't listen to me, so I turned him around, walked him one step and then continued to give him a push him in that direction, away from the bar. He didn't resist me and he walked 4 to 5 steps in the direction I had pushed him. I stepped back and walked to the wall where I had been watching from before and continued to observe what was going on.

However, Rod turned around and quickly walked back towards Andrew and the group as the commotion from the group seemed to grab his attention and annoy him. I had a very clear view of both Andrew and Rod from about 1 to 1.5 metres to their side. Rod walked right up to Andrew, barged into him and said something, and grabbed him by the shirt, Andrew then grabbed Rod at the shirt as well. Both men had their chests puffed out but no punches were being thrown. Both men were standing with their sides to the bar. One or two people were near me also to their side, but most people in the bar area were to my right, behind Andrew. About 20 people then all seemed to converge on Andrew and Rod and started pulling them apart and pushing them back.

I was keeping my eye on Andrew as much as I could. Andrew was pulled back toward the bar, and Rod seemed to have been pushed towards me and pulled down slightly, toward the wall in front of the bar.

Rod ended up directly in front of me. He was being caught up in the group of people holding him and as a result, seemed to have been pushed down a bit from all the weight of people. Andrew had been pulled back and had turned around toward the bar. [Mr Drake]'s arm then came over the top and punched Rod four times in the face. I was then pulled back around toward the bar by my friend Danielle who said to me, "You need to get yourself out of there. You've got to be careful. You don't want to hurt yourself after the operation". I said to her, "I don't want Andrew getting pulled into it". As I was having this conversation I observed the group calming down and people leaving the area, going on their own way almost immediately. Andrew and I then both made our way out of the Bowls Club."⁶⁸

[55] In her reply statement Ms Builder emphasised that she saw only one person throw a punch – Mr Drake – who threw four quick punches so close to her that it was lucky she did not get hit. Ms Builder also maintained that she repeatedly asked Maunder to walk away and actually pushed him so that he walked several steps and that he had not been punched before she did this. Ms Builder also gave evidence that outside the Bowls Club after the altercation she had words with Mr Drake and accused him of stirring the pot to create a fight. Ms Builder said that Mr Drake responded by saying that she had only been with Mr Bird for a short time, which caused her to become upset and repeat something that Mr Bird had told her in confidence about "*past matters*" involving Mr Drake and Mr Bird. Mr Bird then asked Ms Builder why she had said that and they had a conversation about the matter. This may have been interpreted as Mr Bird and Ms Builder arguing when this was not the case.

[56] In a statement tendered by Mr Schafferius made by Ms Builder on 10 December 2018,⁶⁹ it is variously asserted that Ms Builder was watching the group at the bar "*because something didn't feel right*" and that she could see from the body language that "*there was trouble to be had*" and "*that something was about to happen.*" Ms Builder also said in that statement that when it began to "*erupt*" among the crowd, she grabbed Mr Bird's chin for focus and told him he was not going to be part of "*this*". Further, Ms Builder said that it seemed that by doing so she was "*mucking up a plan of removing [Mr Bird] from this situation*".

[57] In her oral evidence Ms Builder said that she told Mr Maunder to walk away on multiple occasions and not just once as indicated in her statement. Under cross-examination from Mr Tiley on behalf of Mr Drake, Ms Builder said that she did not know whether Mr Drake was attempting to defend Mr Bird when he got into the altercation with Mr Maunder.

Ms Builder maintained that she saw Mr Drake throw four punches at Mr Maunder and that while it happened quickly it was right in front of her face.

[58] Under cross-examination by Mr Mahendra for BMA, Ms Builder said that she did not know Mr Maunder but was aware that he had previously been good friends with Mr Bird and that their relationship had changed. In relation to her evidence about what she saw when Mr Drake was standing at the bar to the right of Mr Bird, Ms Builder said that Mr Drake was looking at Mr Maunder over his shoulder while looking at Mr Bird to the side. Ms Builder said that the body language of Mr Drake was that he was standing “*big chested*” and looking smug. Ms Builder’s impression was that something did not feel right and this caused her to walk over to Mr Bird at the bar and to tell Mr Bird not to get involved. In response to a question as to whether this action on her part was entirely based on body language, Ms Builder said that it was not only body language but also words after the body language and she could see that there was some talking between Mr Drake and Mr Maunder.

[59] Ms Builder also said that in her view, Mr Bird was being caught in the middle of an altercation between Mr Drake and Mr Maunder and Mr Drake was talking loudly so that it seemed he was trying to attract Mr Bird’s attention so that Mr Bird would be a part of whatever Mr Drake was trying to start.⁷⁰ Ms Builder agreed that this was speculative but maintained that she had an idea of what was going on from the body language of the participants. In relation to her attempts to remove Mr Bird from what was occurring, Ms Builder agreed that she was getting pushed towards the back wall and Mr Bird was being pushed towards that bar but maintained that there were no punches thrown at Mr Maunder besides the four that she saw and that Mr Bird did not throw a punch at Mr Maunder. Ms Builder had the following exchange with Counsel for BMA in relation to this point:

“Let’s just be clear about this. You’re saying this purely to defend your fiancé, correct? --- No, I’m not.

The truth is you could not have seen if Mr Bird had thrown a punch. He was being pulled towards the bar, you were being pulled towards the wall? --- I understand where you’re going with this, but I could see what was going on in that short space of two/three metres in between the bar. It happened very quickly. Andrew was pulled apart, away from Rod, where Rod was pulled towards the wall a bit more too; he’s getting pushed out a bit by other people; at the same time [Mr Drake] has come around, and four punches over the top.

I don’t doubt you saw Mr Drake punch him, but if Mr Bird had punched Mr Maunder before that, there’s a possibility that you didn’t see it? --- There are no possibilities, because I know what I saw, and within that distance and how quick it was, Andrew was pulled away immediately.”⁷¹

[60] Ms Builder said that she did not see Mr Goulevitch at the bar with Mr Bird and Mr Drake but maintained that there were a lot of people there. Ms Builder disputed the proposition that her vision may have been impeded by taller people. Ms Builder also said that her attention was on what was happening and she was watching her partner and “*trying to defuse the situation before it exploded.*”⁷² Ms Builder was also questioned about the comment she made to Mr Drake outside the Bowls Club after the 6 December event ended and her evidence about the comment was made the subject of a confidentiality order with the agreement of BHP. The content of those matters is not relevant and other than it evidences that Mr Drake and Mr Bird were friends in the past, and that the relationship was more than that of work colleagues who knew each other only in that capacity.

[61] Mr Richards gave evidence on behalf of Mr Bird, which was in response to the evidence of Mr Gardner given on behalf of BHP.⁷³ Mr Richards stated that he witnessed the

altercation from outside the glass doors at the entrance to the bar, said that he was standing with Mr Gardner, 6 – 7 metres from where the “*scuffle*” started. Mr Richards said that he turned around when he heard a glass smash to see what was going on. Mr Richards stated that he saw that Mr Maunder and Mr Bird had each other by the fronts of their shirts and that he had a clear view of Mr Bird when he saw three punches come from behind Mr Bird’s right shoulder, making contact with Mr Maunder.

[62] Mr Richards further stated that by this time people were pulling Mr Maunder and Mr Bird apart and that he is certain that the punches did not come from Mr Bird but rather, came from behind him and over the top, with the punches going downwards. Mr Richards did not see who threw the punches because they were obscured by other people running in to pull Mr Bird and Mr Maunder apart. Under cross examination from Mr Mahendra for BHP, Mr Richards maintained that he did not see Mr Bird throwing any punches. Mr Richards also said that he heard a glass smash and turned around and saw that Mr Bird and Mr Maunder had each other “*by the scruff of the shirts*”. In response to the proposition that he may not have seen Mr Bird hit Mr Maunder before grabbing him by the shirt, Mr Richards said that his belief is that the glass smashing was the start of the scuffle.

[63] Mr Richards maintained under cross-examination that he did hear a glass smash before the altercation notwithstanding that he was the only witness who had mentioned this. Mr Richards also maintained that he saw no evidence at all of Mr Bird punching Mr Maunder. Mr Richards further maintained that when he heard the glass smash he turned around immediately and saw Mr Bird and Mr Maunder holding onto each other by their shirts. According to Mr Richards, he would have seen if Mr Bird hit Mr Maunder before grabbing his shirt based on Mr Richards’ belief that the breaking glass could be the start of the scuffle. Mr Richards later conceded that he was not 100% sure he heard a glass smash.

[64] In re-examination Mr Richards said in response to a question about why he did not accept that Mr Bird punched Mr Maunder, that the punches were coming over Mr Bird’s shoulder as he and Mr Maunder were holding each other by the shirt front. This meant that there was no way that Mr Bird could have thrown those punches because of the way that he was holding Mr Maunder. According to Mr Richards, the punches were coming over Mr Bird’s right shoulder in a downwards direction and if you have got a person in a hold you cannot possibly throw punches downwards.⁷⁴

[65] Mr Malone was outside the Bowls Club when Mr Maunder arrived. According to Mr Malone, Mr Maunder appeared to be pretty drunk. Mr Page, who was standing with Mr Malone, said to Mr Maunder words to the effect of: “*you’ve had your do, what are you doing at ours?*” According to Mr Malone, Mr Maunder seemed annoyed at this and muttered something that Mr Malone could not hear before entering the Club. Mr Malone did not witness the altercation having left the club before it occurred.

[66] Mr Maunder gave evidence on behalf of BHP. Mr Maunder’s evidence was that he arrived at the Bowls Club around 10.30 pm and went to line up at the bar for a drink at approximately 11.00 pm. Mr Maunder states that as he waited in line, two employees from Pre-strip, who Mr Maunder now knows to be Mr Bird and Mr Drake, started giving Mr Maunder a hard time about being at their Christmas party. Mr Maunder states that at the time he did not know either person but knew that they were from Pre-strip rather than just locals from the Club. Mr Maunder also states that Mr Bird and Mr Drake had a conversation with him during which words to the following effect were said:

“Mr Drake [to Mr Maunder] “*What are you coalies doing here, is your Christmas party over?*”

Mr Bird: “*You are not a Pre-strip Supervisor, fuck off.*”

Mr Maunder: “*Don’t fucking start.*”

[67] Mr Maunder said that he felt threatened by Mr Drake due to his raised voice and general demeanour and that he appeared to be moving towards Mr Maunder. This caused Mr Maunder to push Mr Drake. Mr Bird responded to this by punching Mr Maunder in the face at least once and Mr Maunder stated that he did not see the punch coming. Mr Maunder states that after he was punched, a woman who he was later told was Ms Builder, came up to him and told him to walk away. Mr Maunder also stated that he cannot remember Mr Drake punching him but it all happened so quickly it is possible that Mr Drake also threw a punch. Mr Maunder further stated that he distinctly remembers the comment about him being a supervisor and not welcome and that when you are supervisor at a mine most people know who you are. Mr Maunder was pulled away from the fight by Mr Gardner. When he returned to his home Mr Maunder photographed his face and tendered the photograph as an appendix to his witness statement. Mr Maunder stated that while he did not feel multiple punches at the time, when he looked at himself in the mirror he noted injuries to different parts of his face and based on those injuries, believed that he may have been punched multiple times.

[68] Under cross-examination by Mr Tiley on behalf of Mr Drake, Mr Maunder maintained that he did not tell Mr Drake to “*mind your own fucking business*” and did not call Mr Drake a “*wanker*”. Mr Maunder agreed that Mr Drake had not sworn at him. Mr Maunder did not accept that his comment was an over-reaction or escalated the situation. Mr Maunder was shown Annexure MS-24 to Mr Schafferius’ statement which is a record of an interview conducted with Mr Maunder by Mr Schafferius on 27 December 2018 in which Mr Maunder is recorded as admitting that he pushed Mr Bird but denying that he held Mr Bird by the throat. Mr Maunder is also recorded as stating that he pushed Mr Drake when he was punched by Mr Bird and that Mr Drake did not punch him. Further, Mr Maunder is recorded as stating that he thinks that he was punched once.

[69] Mr Maunder agreed that the record of interview appended to Mr Schafferius’ statement indicates that he said he pushed Mr Drake before being punched by Mr Bird. Mr Maunder was asked how he got from stating on 27 December 2018 that he was punched once to stating on 30 May 2019 in his witness statement that he was punched more than once. Mr Maunder maintained that his injuries were consistent with being punched more than once but conceded that he did not have any positive recollection of a second punch. Mr Maunder said that he was stood down on 7 December 2018 and then came back to work a short time later before being stood down again and being asked to show cause why his employment should not be terminated. Mr Maunder also said that during the show cause process he asked to be given the option to resign and took that option when he was informed by Mr McNamara that his employment was to be terminated. Mr McNamara initially told Mr Maunder to let the investigation play out but later accepted Mr Maunder’s resignation.

[70] Under cross-examination by Mr Rich for Mr Bird, Mr Maunder was shown Mr Schafferius’ statement and agreed that he telephoned Mr Schafferius at 10.30 am on 7 December and reported that he had been bashed by two operators at the event on 6 December and was unable to identify those operators. Mr Maunder also agreed that he did not see who punched him and that he had relied on what he was told by other persons as to the identity of

his attackers. Mr Maunder agreed that he was drunk and that he had stated in interviews about the incident that he was “*quite drunk*” but maintained that this had not affected his memory. Mr Maunder also agreed that the only reason he said that he was punched by Mr Bird was because he was told this by Mr Gardner. In response to a question from the Commission, Mr Maunder said that he did not remember having hold of Mr Bird’s shirt collar or that Mr Bird was holding his shirt collar and maintained that it was Mr Drake that he actually pushed. In response to a question from me about why he was so certain that he was punched by Mr Bird, Mr Maunder said:

“So why are you so certain it was Mr Bird? --- There was only two other people involved in the altercation, in the verbal altercation at that stage. Mr Bird also says in his statement that was standing to the left of me, which is correct, okay? He was standing to the left of me, and that's right of me. I'm looking at Mr Drake in front of me, the punch come over from this side which is from my right-hand side, which is Mr Bird's left-hand side. So it's come from that direction, the direction he was standing in and then I had to ask the question to Mr Gardner, "Did you see what happened? Did you see who punched me?" So I didn't see it, because I wasn't even looking that way. I was looking straight in front of me.”⁷⁵

[71] Mr Maunder further stated in response to a question from me, that he did not go to a doctor about his injuries because they were not severe enough. In re-examination Mr Maunder denied that Mr Drake threw the first punch and did not recall Mr Drake throwing a punch at all.

[72] Mr Gardner also gave evidence in support of BHP. Mr Gardner attended the Production Coal Christmas party at the Leagues Club on the night of 6 December 2018 and at 10.00 pm, when that party was winding up, Mr Gardner went to the Bowls Club where he knew that the Pre-strip department was having its Christmas party. Mr Gardner was accompanied by a number of people including Mr Maunder. At approximately 11.00 pm Mr Gardner was standing outside the bar with Mr Richards and another employee when he heard a commotion at the bar and people yelling. Mr Gardner stated that he turned around and saw Mr Bird hit Mr Maunder in the head three times. Mr Gardner rushed to the bar to pull Mr Bird and Mr Maunder apart and said that he pulled Mr Maunder away and saw Mr Bigham, an Operator in Pre-strip, pull Mr Bird away. Mr Gardner does not recall seeing Mr Drake but stated that this may be because he is not as familiar with Mr Drake and there were twenty or thirty people around the bar. Mr Gardner also stated that as he pulled Mr Maunder away he saw that his face was bleeding and that he appeared obviously intoxicated.

[73] Under cross-examination by Mr Rich for Mr Bird, Mr Gardner said that he works for WorkPac and wishes to have a permanent role with BHP at some point but denied that this played any part in his evidence in this case. Mr Gardner had not met Mr Drake or Mr Bird before the event on 6 December 2018. Mr Gardner said that Mr Maunder was drunk when he arrived at the event and agreed that he was slurring his words, but did not see Mr Maunder attempt to get a rise out of anyone as he entered the Bowls Club and did not hear Mr Maunder say anything he should not have said. When the incident occurred, Mr Gardner was two metres from the bar standing at a door but accepted that he may have been six or seven metres from where the scuffle occurred.

[74] Mr Gardner maintained that he heard a commotion and turned around and saw Mr Bird reach over Mr Rob Bigham and hit Mr Maunder. Mr Gardner does not recall seeing Mr Drake. In response to the proposition that what he saw was an arm reaching over Mr Bird’s shoulder, Mr Gardner said that this was possible but he recalled that Mr Bird punched Mr

Maunder. Mr Gardner does not remember seeing Mr Bird and Mr Maunder holding each other by the shirt but agreed it was possible that this happened. In relation to Mr Richards' statement that he saw three punches come from behind Mr Bird and over his shoulder, Mr Gardner said that he did not see that and had the following exchange with Mr Rich (for Mr Bird):

"You didn't see that. So what did you see? Where were Mr Bird's hands? --- I just seen punches thrown which - and the only person that I seen in direct line was Mr Bird and Rob, which was beside him.

Yes, and how sure - what I want to suggest to you is that the punches you saw coming were not coming from him but from someone else who was behind him. Is that possible? Based on what you can recall seeing, that that's a possible explanation for what you saw? --- Yes, that's right. Yes, that's probably possible, yes, but that's what I - I recall seeing Bird, but, yes, I mean, anything's possible, I suppose.

Well, I - - -?--- Yes, all right.

I want to be clear. What I'm suggesting to you - - -?--- Yes.

- - - is that you saw someone punching Mr Maunder. I'm suggesting that one explanation for what you saw was it wasn't Mr Bird's hand, it was someone else's hand who was standing beside or behind Mr Bird. That's a possible explanation for what you saw. Do you accept that's possible?--- Yes, I guess so. Yes."⁷⁶

[75] Mr Gardner also said that Mr Bigham was holding Mr Bird back and was between Mr Bird and Mr Maunder. In re-examination, Mr Gardner said in response to a question from Mr Mahendra for BHP:

"In answer to a few questions about a fist coming over the top of Mr Bird's shoulder, you said, "That's a possibility." What do you mean by, "It's a possibility", as opposed to what you recall? --- Well, I guess, I mean, like he said, like, maybe when I was running in there I didn't see it correctly or, you know what I mean, by having someone standing there, watch the whole scene. But, yes, as I said, I'll stick by my statement and - that's what I saw. I can't really answer any other question."⁷⁷

[76] BHP also tendered a witness statement made by Ms Trudi Lewis, an employee at the Moranbah Bowls Club. Ms Lewis stated that she recalls seeing a fight break out between three men at approximately 11:00pm on 6 December 2018.⁷⁸ Ms Lewis does not know the names of any of the men but recalls seeing two men punching another man.⁷⁹ Ms Lewis stated that, as a consequence of the incident, the Bowls Club may consider decreasing the number of patrons permitted at similar functions.⁸⁰ She also stated that, if similar incidents occurred frequently at BHP's events, then she would make a comment to the Bowls Club Committee that they should reconsider allowing the Company to host events at the Bowls Club.⁸¹

[77] Under cross-examination by Mr Rich for Mr Bird, Ms Lewis said that she was first approached to make a statement at the beginning of May 2019. Ms Lewis agreed that this was the first time since the incident occurred on 6 December 2018 that she had turned her mind to the detail of the incident but also said that it stuck in her mind as there had not been a fight at the Bowls Club since she had been employed there. Ms Lewis agreed that when the incident occurred there were 30 people standing three deep at the bar but maintained that the fight occurred at the bar and there was no-one in front of the persons engaged in it and that she had a clear view.

[78] Ms Lewis also maintained that she saw two persons – designated by her as A and B – hit a third person, C. In response to the proposition that the bar was busy and events had

occurred quickly and that what she had seen was A grabbing C instinctively as a response to being grabbed by C and then B coming over the top to hit C, Ms Lewis said:

“- - - coming over the top as you described? --- No, I never seen C grab anyone. I seen A hit first, broke skin which therefore blood came out, and then once A was held aside B has come over with, excuse the term, a cheap shot and gave him one hit as well and then he was grabbed and pulled aside as well.

Isn't it also possible that you really didn't have time or opportunity to see blood on C's face, but between the initial, what you say was the initial hit and the subsequent one, isn't it possible, I suggest to you, that you saw the blood at the end and you made some assumptions? --- No, because I pretty much, well, seen C split open at the first punch.

Did you see - you didn't see them holding onto each other's collars at all? --- No.

Hold each other's shirts? --- No.⁸²

[79] In response to a question from me Ms Lewis said that she could not see drinks in the hands of A, B or C. Ms Lewis maintained that the three persons were facing each other with C being in the middle. A came up and hit C and then when other people pulled A aside B came in over the top and punched C once. C did not retaliate. Ms Lewis also said in response to a question from me that she could not identify A, B or C in the hearing room despite being invited by me to stand close to the public gallery of the hearing room and observe the persons sitting in the hearing room. At that time, Mr Drake, Mr Bird and Mr Maunder were all present in the hearing room. Ms Lewis also said that no-one from BHP had spoken to her in the days following the incident and that the first contact she had in relation to the matter was in May 2019.

The investigation and show cause process

[80] Mr Schafferius became aware of the incident on the morning of 7 December 2018 when he was informed by a supervisor that Mr Drake and Mr Bird were involved in an altercation with Mr Maunder on the previous evening. Mr Schafferius telephoned Mr Maunder who informed Mr Schafferius that he had been bashed by two Pre-strip Operators at the Pre-strip Christmas Department Crew Christmas party. Mr Maunder took a photograph of his injuries and sent it to Mr Schafferius. The photograph – Attachment MS-2 to Mr Schafferius' witness statement – evidences abrasions on Mr Maunder's forehead and nose. Mr Schafferius instructed Mr Bradford, Supervisor – Pre-strip – who was at the party, to investigate the incident. Mr Drake and Mr Bird were stood aside during the investigation.

[81] Between 7 December 2018 and 14 December 2018, various supervisors conducted interviews and obtained statements in relation to the incident.⁸³ Statements taken at those interviews were appended to Mr Schafferius's witness statement.⁸⁴ Objection was taken to a number of those statements being received into evidence on the basis that the persons who made the statements were not available for cross-examination. Counsel for BHP asserted that they were business records to which the hearsay rules do not apply, but accepted that as a matter of procedural fairness they would be given less weight than statements by witnesses who were called at the hearing and cross-examined. I accepted the statements into evidence on the basis that it would be a matter for the Commission as to the weight if any to be put on those statements. In summary the initial statements relevant to the investigation in relation to events at the Christmas function were as follows:

- Mr Maunder stated that Mr Bird and Mr Drake verbally abused him and that Mr Bird threw the punches.
- Mr Drake said that he was not sure who punched who and that he just went to push Mr Maunder because he had Mr Bird by the throat.
- Mr Drake said that he did not wish to provide a written statement.
- Mr Bird stated that Mr Maunder was mouthing off about stuff and grabbed him on the shirt or throat and that he did not see anyone throw any punches.
- Mr Bird said that he did not wish to provide a written statement “*at this stage*”.
- Mr Rob Bigham stated that he did not see Mr Bird throw any punches and that in response to a question about whether he saw Mr Drake throw any punches, stated that he saw Mr Drake come over the top but was not sure if he threw any punches.
- Mr Levi Maunder said that he was not there for the incident but saw his uncle Mr Maunder after the incident and he was bleeding from the face.⁸⁵
- Mr Troy Hahn said that he saw Mr Maunder set upon by at least 2 individuals but was unable to hear what was said.⁸⁶
- Ms Hughes stated that Maunder was mouthing off at people and he did not see anyone throw any punches.⁸⁷
- Ms Builder stated that Mr Maunder was drunk and Mr Drake was stirring him up and Mr Drake threw 4 punches over the top. Ms Builder also stated that Mr Bird did not throw any punches.⁸⁸
- Ms Kylie Butler made a statement that she did not see who was involved in the incident.⁸⁹
- Mr Gardner stated that Mr Bird was punching Mr Maunder in the head and that he saw Mr Bird lay into Mr Maunder hitting him at least 3 times. Mr Gardner also stated that he ran in to split them apart and felt he needed to do this as he saw an old guy getting punched in the head.⁹⁰
- Ms H provided a statement about the comment Mr Drake made to her with reference to “*fake tits*” in which Ms H said that when she took issue with Mr Drake’s comment he was not apologetic but justified his question by stating “*that all the girls on 44 strip have fake tits*”.⁹¹
- Ms Tracey Tanner stated that she approached the bar to meet with Mr Drake and felt a push from behind and ended up against bar. Ms Tanner also stated that she did not see any physical violence.⁹²
- Mr Joshua Brown stated that he did not see the incident but saw Mr Bird walking away from the bar looking angry and heard Mr Drake say: “*Fuck I shouldn’t of punched him.*”⁹³
- Mr Mark Connolly said that he ‘noticed that Mr Bird and Mr Maunder were holding onto each other by their collars but did not realise that there had been any punches thrown until he walked through the clubhouse on his way home and noticed blood on Mr Maunder’s face.’⁹⁴

[82] On 18 December 2018, Mr Schafferius met with Mr Drake, with Mr Goulevitch attending as an employee representative and support person for Mr Drake. The record of interview was set out in Mr Schafferius’ witness statement. According to Mr Schafferius, Mr Drake admitted to making inappropriate comments to Ms Henry and said that it was meant as a joke. Mr Drake also admitted that he had a verbal exchange with Mr Maunder in which he asked: “*Have you coalies finished your party?*” and Mr Maunder responded by telling Mr Drake to: “*Mind your fucking business*”. Mr Drake denied that he stated to Mr Maunder that he was not a supervisor in Pre-strip and should fuck off. Mr Drake is also recorded as stating that Mr Maunder grabbed Mr Bird by the throat and that Mr Bird responded by grabbing Mr

Maunder by the throat or the shirt and that Mr Drake pushed Mr Maunder away when he grabbed Mr Bird. Further, Mr Drake is recorded as stating that he was having difficulty remembering whether he threw a punch and could not remember saying “*fuck I shouldn’t have punched him*” but could not argue. In response to a question about whether it was possible that he punched Mr Maunder, Mr Drake is recorded as answering: “*Yes but I don’t really remember*” and that he had a fair amount to drink that night and did not recall much of it.⁹⁵

[83] Mr Schafferius also met with Mr Bird on 18 December 2018 and included the record of this interview in his witness statement. According to that record, Mr Bird stated that he could not remember asking Mr Maunder what he was doing at the Pre-strip Christmas party or stating that Mr Maunder should fuck off because he was not a Pre-strip supervisor. Later in the interview Mr Bird is recorded as stating that Mr Maunder: “*...properly fired up when I asked him what he was doing there...*”. Mr Bird is also recorded as stating that: “*I remember grabbing Rod [Maunder] but I can’t remember if I punched him or not.*” When asked whether he remembered Mr Maunder grabbing him by the throat, Mr Bird is recorded as stating that: “*Rod [Maunder] went to grab me but I stopped him from doing that by grabbing him.*” In response to questions about how many punches he threw or where those punches landed, Mr Bird is recorded as stating that he could not remember and that he could not recall Mr Drake punching Mr Maunder. Mr Bird is also recorded as stating that he didn’t realise it was a BHP event and that: “*I probably wouldn’t have acted the way I did, from what I recall, if I knew it was a work function.*”⁹⁶

[84] On 27 December 2018, Mr Schafferius met with Mr Maunder. Mr Maunder’s conduct was being separately investigated by the Coal Operations Superintendent, Mr McNamara.⁹⁷ During the meeting with Mr Schafferius, Mr Maunder said that he was told by Mr Drake and Mr Bird that as a mining supervisor he was not part of Pre-strip and should “*fuck off*” and that Mr Maunder said the same thing back. Mr Maunder also said that both Mr Drake and Mr Bird asked him what he was doing at the party and whether his party was over. The record of interview in Mr Schafferius’ statement indicates that Mr Maunder denied holding Mr Bird by the throat and stated that he pushed Mr Drake as he felt threatened. Mr Maunder also asserted in that discussion that while he was looking at Mr Drake after pushing him he was punched by Mr Bird. When asked whether Mr Drake threw any punches, Mr Maunder stated “*I can’t remember. I think it was only Andrew [Bird] but I have since been told that Brad [Drake] was also involved.*” Mr Maunder also stated that he could only remember the first punch but was told that other punches were thrown.⁹⁸

[85] Mr Schafferius stated that on the basis of the information before him, he decided that:

- Mr Drake made the comments alleged by Ms H;
- Mr Drake and Mr Bird both made comments to Mr Maunder about being at the Pre-strip Christmas party and Mr Bird told Mr Maunder that as he was not a Pre-strip supervisor he should “*fuck off*” and Mr Maunder responded by saying “*don’t fucking start*”
- Mr Bird and Mr Maunder continued to argue;
- Mr Maunder pushed Mr Drake and Mr Bird before attempting to grab Mr Bird;
- Mr Bird punched Mr Maunder in the face at least once;
- Mr Drake jumped over the top of Mr Bird and punched Mr Maunder at least once;
- The fight ended after Mr Bigham and Mr Gardner intervened; and

- As a result of the fight Mr Maunder suffered injuries to his forehead and nose.

[86] Mr Schafferius applied BHP’s Just Culture process to the facts and completed two Just Culture Decision Tree Forms (one for Mr Drake and one for Mr Bird) to guide him to the appropriate response. Mr Schafferius characterised the conduct of both Mr Drake and Mr Bird as intentional violations and deviant rather than cultural. For the purposes of the Just Culture Process, a cultural violation is defined as an intentional error by a person because it is deemed that it is the expected action in their work group while a deviant violation is an intentional error by a person even though they know it is not the approved/tolerated action.

[87] On 4 January 2019, Mr Schafferius met with Mr Drake and advised him that his conduct on 6 December 2018 was in breach of the BHP Charter Values, specifically “*Respect*” and the BHP Code of Business Conduct, specifically “*Part 2 Our People: Harassment and Bullying.*”⁹⁹ Mr Drake was provided with a letter setting out the findings of the investigation and requiring him to show cause as to why his employment should not be terminated.¹⁰⁰ The letter also stated that the investigation and its findings were confidential and that Mr Drake must not discuss it with any other employee except one acting as a support person for him. According to Mr Schafferius, Mr Drake verbally advised that: there were details in the letter which were not true; he only hit Mr Maunder because Mr Bird was being choked by Mr Maunder; and he was not aware that it was a Company event.¹⁰¹

[88] Mr Drake provided a four page written response¹⁰² to the show cause letter in which he accepted that he made the comments to Ms H and that he “*likely punched Mr Maunder*”. Mr Drake’s response raised a number of matters in explanation of his conduct which can be summarised as follows:

- Mr Drake believed that the function was an informal arrangement made by the employees in the crew and was not sanctioned or organised by BHP;
- One third of persons present were members of the public and BHP had not issued a communication in relation to behavioural expectations or outlining contributions made by the Company to the event;
- The Company should not investigate or take disciplinary action given that events were outside the workplace;
- Mr Drake regrets the comments he made to Ms H and should not have made those comments either inside or outside the workplace and intends to apologise to her at the first opportunity and had not done so to date because of the direction from BHP not to discuss matters subject of the investigation;
- Mr Drake will not make such comments in the future and is embarrassed by them and would attend mediation or take any other reasonable step that may be recommended;
- The question directed to Mr Maunder – “*what are you doing here? Have you coalies finished your party?*” – was asked in a genuine and friendly manner and to make small talk while Mr Drake waited to get a drink;
- Mr Maunder’s response – “*Mind your fucking business. You’re a wanker*” – was aggressive and Mr Drake did not seek to engage with him further;
- Mr Drake heard a heated exchange behind him and turned to see Mr Maunder grabbing Mr Bird by the throat and Mr Drake intervened to defend Mr Bird;
- Mr Drake’s reaction was to an assault that he perceived to be occurring and was reasonable and proportionate;

- The incident did not relate to a work issue and Mr Drake had no involvement with Mr Maunder before the incident and did not envisage having involvement with Mr Maunder in the future;
- Mr Drake did not consider that his actions in respect of Mr Maunder were a breach of any policy or procedure or intentional and requested that these allegations be withdrawn; and
- Mr Drake's personal circumstances are such that termination of his employment would have a significant impact.

[89] Mr Bird was also given a show cause letter on 4 January during a meeting with Mr Schafferius. Mr Schafferius informed Mr Bird in that meeting that his conduct on 6 December 2018 was in breach of the BHP Charter Values, specifically "*Respect*" and the BHP Code of Business Conduct, specifically "*Part 2 Our People: Harassment and Bullying.*"¹⁰³ According to Mr Schafferius, Mr Bird became upset and stated that he did not know it was a BHP function and that he did not recall punching Mr Maunder. Mr Schafferius advised Mr Bird that the Company had statements from witnesses saying that they saw Mr Bird punch Mr Maunder.¹⁰⁴ Mr Bird's response to the show cause letter issued on 4 January 2019, was provided on 6 January 2019. In that response, Mr Bird asserted that he was not aware that it was a Company Christmas party but after the investigation Mr Bird is aware that BHP may have "*contributed a couple of food platters*".

[90] Mr Bird stated in his show cause response that he heard talk from behind him between Mr Maunder and Mr Drake about the fact that Mr Maunder was from Coal Mining and they were having drinks at the "*footy*" club so why was Mr Maunder at the Bowls Club. Mr Bird stated that Mr Maunder aggressively asked him what he had said even though Mr Bird was not in the conversation. Mr Bird also stated that he told Mr Maunder to piss off or fuck off and Mr Maunder turned and walked away before coming back to grab Mr Bird. Mr Bird reacted to being grabbed by Mr Maunder by grabbing Mr Maunder by the front of his collar and telling him to piss off or pull his head in. According to Mr Bird, while he had hold of Mr Maunder's collar someone came from behind him and lunged towards Mr Maunder. Mr Bird stated that he did not see what happened as people came from everywhere to break up a fight and that he did hit or attempt to hit Mr Maunder.

[91] Mr Bird also stated in his response to the show cause letter that Mr Maunder was hostile to him for no reason causing Mr Bird to hold him away by grabbing Mr Maunder's collar. Mr Bird agreed that he told Mr Maunder to "*piss off*" or "*fuck off*" but maintained he did not hit Mr Maunder or anybody. Mr Bird reiterated that the events of 6 December were not his fault and he was a bystander at a bar when Mr Maunder was hostile to him for no reason other than Mr Maunder thought that Mr Bird said something when this was not the case. Mr Bird also raised a number of issues with the investigation stating that:

- he did not believe that it was a Company Christmas party because it was organised by word of mouth and there were no emails, pre-starts, tool boxes or any other Company communication;
- he was disappointed that there was no CCTV footage;
- the crew who were there are now being forced to take sides or say nothing at all so their mates don't lose their jobs;
- the show cause letter states that he cannot speak to other people at work about the incident and this is suppressing his only opportunity to put evidence to the contrary; and

- he has not seen the evidence against him or had an opportunity to respond to it.¹⁰⁵

[92] Mr Schafferius responded to the letter from Mr Bird by issuing a second show cause letter dated 17 January 2019. In the second show cause letter, Mr Schafferius stated that the Company maintained its position that the event on 6 December 2018 was work related and that while Mr Bird was not provided with copies of witness statements, the Company conducted a thorough investigation and interviewed BHP employees and employees of labour hire companies before putting the allegations to Mr Bird and asking him to respond. It is noted that Mr Bird was asked to provide the names of persons he thought should be interviewed and that he had not done so. The letter went on to state that Mr Bird had not denied punching Mr Maunder and instead had stated that he did not remember doing so. Further the letter states that that Mr Bird admitted to telling Mr Maunder to “*fuck off*” at least once before grabbing him by the shirt and telling him to “*pull his head in*”. It is also asserted in the letter that a number of attendees at the Christmas party stated that they had seen Mr Bird punch Mr Maunder at least once. The letter concludes by inviting Mr Bird to provide a further response to the matters raised.

[93] In a response to the second show cause letter dated 19 January 2019, Mr Bird maintained that he did not know that the event on 6 December 2018 was a Company Christmas party and denied that he said during the investigation that he would have acted differently if he had known this. Mr Bird also stated that:

“If a stranger at a bar approaches you aggressively and grabs you, you are going to defend yourself, and that’s what I did by grabbing him and telling him to “piss off/fuck off” before potentially being hit.”

[94] Mr Bird maintained that in his experience when an incident occurs people are asked to provide a written statement immediately in their own words and he had been denied the opportunity to see the relevant witness statements. Mr Bird also asserted his understanding that there were some statements which supported his version of events and some which did not and that if Ms Builder, Ms Hughes and Mr Goulevitch had not been interviewed, then the investigation was not thorough. Mr Bird asserted that he had been denied a copy of a Company policy used to justify terminating his employment and had access to the policy for a limited period before being asked to respond to the show cause letter. Mr Bird concluded by asserting that he did not hit Mr Maunder and that statements supporting his version of events had not been referenced or considered in the investigation and that: “*There seems to be no reasoning on the matter that a person who turned out to be a Supervisor at BMA attacked me in my own time and I’m the one trying to save my job.*”

[95] Upon being informed by Mr Bird that Mr Goulevitch had witnessed the incident, Mr Schafferius interviewed Mr Goulevitch on 22 January 2018. The record of interview with Mr Goulevitch, tendered by Mr Schafferius indicates that Mr Goulevitch stated that he heard lot of shouting and yelling between Mr Bird and Mr Maunder before Mr Maunder turned and walked away and then swung around and walked back to Mr Bird. It was at that point that they both grabbed each other by the top of the shirt at the same time. Mr Goulevitch confirmed that Mr Maunder and Mr Bird did not throw any punches and that Mr Drake hit Mr Maunder two or maybe three times. Under cross-examination, Mr Goulevitch generally accepted that this version of his statement was correct.

[96] Mr Schafferius said that he did not place much weight on Mr Goulevitch’s evidence as he was present during the interviews with Mr Drake and Mr Bird and heard their versions of

events and did not mention that he had witnessed the incident.¹⁰⁶ Mr Schafferius also stated that had he been aware that Mr Goulevitch was a witness, he would have told Mr Drake and Mr Bird to nominate an alternative support person.¹⁰⁷ Mr Schafferius placed little weight on Ms Builder's version of events given her relationship with Mr Bird. On the basis of the information before him Mr Schafferius determined that Mr Bird was involved in an argument with Mr Maunder when Mr Maunder attempted to grab Mr Bird. Mr Bird responded by grabbing Mr Maunder by the shirt and punched Mr Maunder in the face at least once.¹⁰⁸ Mr Schafferius did not accept Mr Bird's version of events or Mr Bird's lack of understanding about BHP's involvement in the event.¹⁰⁹

[97] Mr Schafferius also determined that Mr Drake made inappropriate comments to Ms H. Further, Mr Schafferius determined that Mr Drake was involved in a conversation with Mr Bird and Mr Maunder and that after seeing Mr Maunder and Mr Bird grabbing each other, Mr Drake punched Mr Maunder at least once.¹¹⁰ Mr Schafferius did not accept Mr Drake's explanation for his conduct or that Mr Drake's assertion that he did not understand that BHP was involved with the event.¹¹¹ Mr Schafferius said that he was not satisfied that Mr Drake's remorse demonstrated that dismissal was not the appropriate action or that he understood the gravity of his actions.¹¹² On 24 January 2019 Mr Schafferius advised Mr Drake of the termination of his employment. Mr Bird was also advised of the termination of his employment on the same day.

[98] Under cross-examination, Mr Schafferius agreed that Mr Drake stated that he was not aware that the Company had contributed to the event on 6 December 2019 but maintained that he did not accept this on the basis that there were flyers about the event in every crib room. Mr Schafferius was also asked about Mr Maunder and said that Mr Maunder was stood down around 9 December but came back to work a few days later before being stood down again on 21 December 2018. Mr Schafferius said that Mr Maunder was stood down for the second time because Mr Schafferius escalated the issue of Mr Maunder being back at work while Mr Drake and Mr Bird were stood down and in his view Mr Maunder should have been stood down with Mr Drake and Mr Bird. Mr Schafferius said that Mr Lachlan McNamara was responsible for dealing with Mr Maunder and conducting an investigation into his conduct.

[99] Mr Schafferius accepted that it would probably have made more sense for him to have run the entire investigation but considering that Mr Maunder was not a supervisor in Mr Schafferius' area he did not get involved in the investigation of Mr Maunder's conduct and played no part in any decision in relation to Mr Maunder's employment. Mr Schafferius said that Mr McNamara who was charged with investigating the conduct of Mr Maunder had access to the material obtained in the investigation into the conduct of Mr Drake and Mr Bird.

[100] Mr Schafferius also accepted that there was a difference between Mr Drake's version of the comments made to Ms H set out in his witness statement and the version set out in Mr Drake's witness statement. Mr Schafferius agreed that Mr Drake told him that he said to Ms H "*you can't come to 44 strip unless you've got fake tits, all the girls have got them*" and that he preferred Ms H's version which was that Mr Drake said "*Do you have fake tits*". Mr Schafferius also agreed that if he had accepted Mr Drake's version of the comments it would have had a different character in his decision making process.

[101] Further, Mr Schafferius agreed that the decision to terminate Mr Drake's employment was a difficult one because Mr Drake was a good worker; had an unblemished work record and that at the termination meeting he stated to Mr Drake: "*I'm sorry to have to do this to*

you...we are losing a good man today. Thanks for telling the truth throughout this process.” Mr Schafferius said he had no reason to doubt that Mr Drake’s apology to Ms H would have been given in a personal and sincere way. Mr Schafferius had regard for the fact that alcohol was involved in the incident. However, Mr Schafferius maintained that in his view dismissal was an appropriate outcome because he could not guarantee in his mind or satisfy himself that Mr Drake’s conduct would not happen again. In response to a question from the Commission, Mr Schafferius said that he did not accept Mr Drake’s explanation for hitting Mr Maunder and formed the view that if he was assisting Mr Bird his conduct was disproportionate.

[102] Under cross-examination from Mr Rich for Mr Bird, Mr Schafferius said that he heard about the incident on the evening of 6 December from B Crew supervisors who had not attended the event but told him they had heard about it “*on the Goonyella Grapevine*”. Mr Schafferius said that his understanding of what the B Crew supervisors told him was that both Mr Drake and Mr Bird punched Mr Maunder. Mr Schafferius agreed that all of the information that he had available to him at the point he first interviewed Mr Bird was appended to his witness statement. Later Mr Schafferius said that he relied on some additional information he obtained from Mr McNamara’s investigation into Mr Maunder’s conduct to formulate the questions he asked Mr Bird.

[103] Mr Schafferius was taken to notes of the meeting with Mr Bird on 18 December 2018 set out in his witness statement in which Mr Bird is recorded as stating that he remembers grabbing Mr Maunder but does not remember punching him. Mr Schafferius was also shown notes taken by Mr Goulevitch of the same meeting in which Mr Goulevitch records that Mr Bird said that he remembers holding Mr Maunder’s collar but not punching. Mr Schafferius said that Mr Goulevitch’s notes reflect the answer that was given by Mr Bird and that the two records reflect a different characterisation of the same answer. Mr Schafferius agreed that Mr Bird’s answer to a question about whether he remembered punching Mr Maunder was – as recorded by Mr Goulevitch – that Mr Bird denied punching Mr Maunder. Mr Schafferius also agreed that Mr Goulevitch’s notes were generally accurate and contained references to some statements made by Mr Bird that were not recorded in Mr Schafferius’ notes including that Mr Maunder started going off at Mr Bird even though Mr Bird had not spoken to Mr Maunder. Mr Schafferius further agreed that notwithstanding that Mr Maunder’s statement contained less detail he preferred Mr Maunder’s version of events over the version given by Mr Bird.

[104] Mr Schafferius was also asked about the basis of his conclusion that Mr Bird explicitly said to Mr Maunder: “*you are not a [pre-strip] supervisor, fuck off*” and said that at the point he reached that conclusion the only evidence he had was Mr Maunder’s statement that both Mr Drake and Mr Bird asked him what he was doing at the Bowls Club event and whether Mr Maunder’s Christmas party was over. Mr Schafferius agreed that there was no specific evidence that Mr Bird made this comment. Mr Schafferius also agreed that he left an important matter out of his findings, that Mr Bird and Mr Maunder were holding each other by the shirt and that he had four witnesses who said that this was the case. Further Mr Schafferius agreed that this finding would not have been consistent with Mr Maunder’s version of events. In relation to his finding that both Mr Drake and Mr Bird punched Mr Maunder, Mr Schafferius said that this was based on what Mr Maunder said to Mr McNamara.

[105] Mr Schafferius accepted that the conduct on the part of Mr Bird that he took issue with was the punch, and if Mr Bird had not punched Mr Maunder, termination of his employment

would not have been appropriate. Further, Mr Schafferius accepted that it would also have been a different issue if the incident had occurred at the Bowls Club but the persons involved were not at a work function. Mr Schafferius also accepted that Mr Maunder was quite drunk when the incident occurred and that his findings indicated that the punch was in response to Mr Maunder pushing Mr Bird and Mr Drake. In relation to his comments that Mr Bird was aggressive in a meeting at which he was given a show cause letter, Mr Schafferius agreed that Mr Bird was upset rather than aggressive.

[106] In relation to the investigation of the incident, Mr Schafferius accepted that Mr Bird had complained about the direction that he not speak to anyone else about the incident or the investigation and that Mr Bird would have no way of speaking to persons who may have witnessed the investigation in light of that direction. Mr Schafferius agreed that Mr Bird was relying entirely on the Company to do a full investigation of the incident and to interview everyone who might have seen the incident and could support Mr Bird's version of events. In response to the proposition that BHP could have done more to obtain statements, Mr Schafferius said that the Company had information from people who would come forward. Information was gathered by supervisors who spoke to people who told them that they had witnessed the incident. Mr Schafferius later agreed that there was more that BHP could have done to gather information. Mr Schafferius also agreed that Mr Bird had complained that he had not been given an opportunity to see the evidence both for and against his version of events.

[107] It emerged during the cross-examination of Mr Schafferius that on 7 December 2018 Mr Maunder was shown photographs of Mr Drake and Mr Bird by Mr McNamara and that Mr McNamara reported that Mr Maunder had identified Mr Bird as the person who punched him on the basis of those photographs. Mr Schafferius accepted that he did not know what photographs were shown to Mr Maunder and the process that was followed in the request for him to identify persons in those photographs. Mr McNamara was not called to give evidence and there was no indication that he was not available. Mr Maunder did not give evidence about this matter and the photographs that were shown to Mr Maunder were not tendered.

CONSIDERATION

[108] Before turning to consider whether Mr Drake and Mr Bird were unfairly dismissed I make the following findings in relation to their conduct and the issues in dispute in this case.

The event on 6 December 2018 was a BHP Christmas party

[109] I am satisfied that the event on 6 December 2018 was a BHP Christmas party sanctioned by the Company and to which it made a significant contribution for food and transportation. I also conclude that it is more probable than not that Mr Drake and Mr Bird knew that the function on 6 December 2019 was a BHP Christmas party.

[110] It is improbable that Mr Drake and Mr Bird would have failed to note flyers which were distributed in every crib room used by C Crew. It is also improbable that Mr Drake – who lives in the Eureka Camp – would not have been aware of buses arranged to transport employees from the Camp to the event even if he travelled there in a private vehicle. I do not accept that Mr Drake and Mr Bird would not have noticed the food provided at the event – 25 kg of pork, gravy, bread rolls and deep fried nibbles. The fact that they were not asked about these matters in cross-examination does not reduce the improbability of their evidence that

they did not notice the provision of catering which was free for attendees or that there were employees of BHP on the bowling green participating in bowling.

[111] Upon arrival at the event, it is improbable that Mr Drake and Mr Bird would not have noted that instead of the usual 30 – 40 attendees at PJ night drinks, some 90 persons were present comprising 60 employees and their family members. It is also improbable that they would not have considered that notwithstanding that 6 December was the last PJ night before Christmas the presence of some 60 of their colleagues and an additional 30 persons signified that the event was more than an *ad hoc* gathering for PJ night drinks. The combination of these factors makes it improbable that Mr Drake and Mr Bird did not know that the event was a Company Christmas party.

[112] The evidence about what Mr Drake and Mr Bird said to Mr Maunder at the bar also supports this finding. On Mr Drake's evidence, his initial comment to Mr Maunder was to ask what he was doing at the Bowling Club and: "*Have you coalies finished your party*". It is implicit from this question that there were several Christmas events on that evening and that Mr Maunder was at the Pre-strip Christmas party.

[113] Further, in an interview on 7 December Mr Bird is reported as stating that: "*Rod was having a carry on about the coal xmas party not even sure what he was going on about.*"¹¹³ If the event at the Bowls Club was as Mr Drake and Mr Bird assert – a casual get together of a group of employees in a public place at which members of the public were also present – it would not have been necessary to question the presence of Mr Maunder in the terms used by Mr Drake and Mr Bird. Furthermore, a casual *ad hoc* gathering of employees of the kind described by Mr Drake and Mr Bird as being usual PJ night drinks, is not generally referred to as a "party."

[114] I am also of the view that Mr Bird's first response to the show cause letter¹¹⁴ appended to his witness statement and dated 6 January 2019, that he now knows that BHP may have contributed "*a few food platters*" is disingenuous given that at the meeting with Mr Schafferius on 18 December, he was informed that Mr Schafferius had contributed \$25 per head for 90 people to attend the event. That Mr Schafferius made this comment is also confirmed by Mr Goulevitch whose notes of the same meeting indicate that Mr Schafferius stated: "*I paid \$25 a head for 90 people for food.*"¹¹⁵ As I have previously noted, I do not accept that Mr Bird or Mr Drake would not have noted the presence of 25 kg of roast pork, gravy, bread rolls and deep fried nibbles provided at the event at no cost to attendees even if they did not partake in eating that food.

[115] If I am wrong about whether Mr Bird and Mr Drake knew that the event was a Company supported Christmas party, I am also of the view that the fact that 90 people including 60 employees of BHP and their families were gathered in one venue with a common purpose of celebrating Christmas, is sufficient to establish that the event was work related. It is arguable that this would be so even if the event was simply the usual PJ night drinks described by Mr Bird, which he states are usually attended by 30 – 40 persons. If 30 – 40 employees of BHP were gathered in a venue for drinks, united by the fact that they work in accordance with the same roster for the same company, and some of those employees had an altercation with another employee of BHP or a member of the public, those employees should not assume that their conduct will be considered out of hours conduct that is not related to work and to which BHP policies do not apply.

[116] Where an employee physically assaults a work colleague in a public place in the presence of other work colleagues, the assault may be conduct that is likely to cause serious damage to the relationship between the employer and the employee. It may also breach company policies or procedures such as the BHP Charter Values and Code of Conduct. Other employees of BHP should not be put in a position where they witness an assault or are caught in the middle of it. Ms Builder's description of punches that were so close to her face that they nearly hit her evidences the danger to bystanders when they are in the vicinity of a physical altercation. It is also the case that BHP is a large employer in Moranbah and other regional areas and it is likely that where a large group of its employees gather in a public venue and consume alcohol and some of that group have a physical altercation, that BHP's interests will be damaged. The likelihood of such damage increases where there are members of the public who are not employed by BHP who are present at the relevant time.

[117] On their own evidence, Mr Drake and Mr Bird arrived at an event where almost double the numbers of their workmates who usually participate in PJ night drinks were present along with a significant number of their family members. That fact alone should have put them on notice that their conduct in such an environment could impact on their employment relationship with BHP. The assertions that they were not told by managers of BHP about behavioural expectations for the event do Mr Drake and Mr Bird no credit. Employees who gather with their work colleagues in public places outside working hours, particularly in large numbers, should not have to be told by their employer that they should not get into a physical altercation with a work colleague or a member of the public and that such an altercation may damage their employment relationship.

[118] It is also apparent from the evidence that both Mr Drake and Mr Bird knew that Mr Maunder was an employee of BHP. On his own evidence, Mr Drake asked Mr Maunder whether the "coalies" party had finished and Mr Maunder told him not to start anything. Mr Bird confirmed in his statement that he recalls Mr Drake stating to Mr Maunder: "*You're from coal mining. They had drinks at the footy club tonight. Why are you here?*" This discussion occurred before the altercation became physical and before Mr Bird and Mr Maunder took hold of the others' shirt.

Both Mr Drake and Mr Bird were involved in a verbal altercation with Mr Maunder

[119] I am satisfied that both Mr Drake and Mr Bird engaged in a verbal altercation with Mr Maunder. Mr Drake started the altercation and Mr Bird joined in. I do not accept that it was a harmless conversation and Mr Drake asked Mr Maunder a casual question about what he was doing at the Pre-strip Christmas party. This evidence is at odds with Ms Builder's evidence and I prefer Ms Builder's account. I also do not accept Mr Bird's attempts to paint himself as an innocent by-stander who had no idea what was going on before Mr Maunder confronted him for no reason. Ms Builder's evidence makes clear that Mr Drake was endeavouring to stir Mr Maunder up by engaging with Mr Maunder and that Mr Bird became involved in that verbal altercation. Even allowing for over-exaggeration and that Ms Builder was intent on exonerating Mr Bird and implicating Mr Drake in the events on 6 December, Ms Builder's evidence establishes that there was a verbal altercation involving both Mr Drake and Mr Bird.

[120] I accept Mr Maunder's evidence that both Mr Drake and Mr Bird questioned his presence at the event on 6 December 2018 and that this degenerated into a verbal altercation. That both were involved is apparent from the evidence of Ms Builder about how quickly a very tense situation developed. It is improbable that this situation would have occurred or that

Mr Maunder would have ended up in a verbal altercation with Mr Bird that resulted in mutual holding of the others' shirt front, if the only person who questioned Mr Maunder's presence at the event was Mr Drake.

[121] In this regard I note Ms Builder's evidence that she sensed tension and assessed the body language of the three men before noting that Mr Drake was stirring Mr Maunder and that this had grabbed Mr Bird's attention. So concerned was Ms Builder at the situation that she went to Mr Bird's side and took him by the chin to get his attention and told him that he was not "*getting involved in all this*". Ms Builder also took the step of physically turning Mr Maunder around and pushing him away from Mr Bird. It is improbable that Ms Builder would take these actions unless she was concerned about the verbal altercation and the possibility that it would become physical.

[122] This is particularly so given Ms Builder's evidence that she was recovering from breast surgery and wanted to avoid getting bumped into at the event. It is highly improbable that Ms Builder would have taken those steps if Mr Bird was an innocent by-stander in the altercation and I do not accept that he was. I also note that Mr Bird's description of Mr Drake as an "*Operator who also worked on C Crew*" was somewhat disingenuous. It is clear from Ms Builder's evidence that Mr Drake and Mr Bird had some history of friendship pre-dating Mr Bird's engagement to Ms Builder. This is also evidenced by the "*past matters*" between Mr Bird and Mr Drake referred to by Ms Builder which were so sensitive that Mr Bird's legal representative asked for them to be the subject of a confidentiality order.

[123] Mr Goulevitch's evidence also makes clear that Mr Bird engaged in a verbal altercation with Mr Maunder to an extent greater than as an innocent bystander who got in the middle of a situation that was not of his making. Mr Goulevitch said in his witness statement in Mr Bird's matter that there were a number of verbal exchanges between Mr Bird and Mr Maunder and that they were "*pretty worked up*".¹¹⁶ In his witness statement in Mr Drake's case, Mr Goulevitch said that Mr Bird and Mr Maunder were "*screaming*" at each other.¹¹⁷ In an interview conducted by Mr Schafferius on 22 January 2019, Mr Goulevitch is recorded as stating that he heard a lot of shouting and yelling between Mr Bird and Mr Maunder and that they grabbed each other at the same time.¹¹⁸

Mr Bird was involved in a physical altercation with Mr Maunder

[124] It is also clear that the verbal altercation started by Mr Drake and joined in by Mr Bird, became physical. Mr Bird concedes that he grabbed Mr Maunder by the shirt and states that he did this because Mr Maunder grabbed him. A number of witnesses gave evidence about this matter. Mr Drake, Ms Builder, Mr Richards and Mr Goulevitch all stated that Mr Bird and Mr Maunder had hold of each other's shirts – albeit Mr Drake said that Mr Maunder had his hands around Mr Bird's throat. Mr Goulevitch's evidence was that Mr Bird and Mr Maunder were 30 cm apart and that each had grabbed the others' shirt. While not specifically stating that he saw Mr Bird and Mr Maunder holding each other's shirts Mr Richards was involved in pulling Mr Bird and Mr Maunder apart. In the face of this evidence, the fact that Ms Lewis did not see any grabbing or holding of shirts is not significant and I am satisfied that it did occur.

[125] However, even if I accept that Mr Maunder approached Mr Bird and that Mr Bird grabbed Mr Maunder to hold him off, Mr Bird's conduct was inappropriate. Mr Bird stated that it was clear to him when Mr Maunder approached that Mr Maunder was very drunk and

was slurring his words and making no sense. If that was the case, there is no reason why Mr Bird engaged in a verbal altercation with Mr Maunder at all.

[126] This is particularly so when Mr Bird's fiancée, Ms Builder, put herself into the middle of the altercation to take his chin in her hands and tell him not to get involved, and took the further step of walking Mr Maunder away by pushing him. Ms Builder states that she did this before Mr Drake punched Mr Maunder. Mr Drake states that he only punched Mr Maunder because he had hold of Mr Bird. Accepting that evidence, there was an opportunity for Mr Bird to remove himself from the altercation. Mr Bird should have listened to Ms Builder and walked away. Had Mr Bird simply removed himself at the point that Ms Builder removed Mr Maunder, there would have been no need for him to have grabbed Mr Maunder by the shirt and no need for Mr Drake to intervene.

[127] There are a number of witnesses who confirmed that Mr Maunder was intoxicated. It is implicit from the evidence of witnesses on behalf of Mr Drake and Mr Bird, and from their own evidence, that the level of Mr Maunder's intoxication was greater than that of Mr Drake and Mr Bird. Both Mr Drake and Mr Bird should have known better than to collectively start and maintain a verbal altercation with Mr Maunder that became physical.

Mr Drake punched Mr Maunder

[128] BHP concluded that both Mr Drake and Mr Bird punched Mr Maunder and that finding is relied on as the valid reason for the dismissals of both Mr Bird and Mr Drake. As part of the task of considering whether there was a valid reason for the dismissal of each person, I am required to decide whether in fact this is what occurred. The evidence about who hit Mr Maunder and how many times he was hit is not satisfactory. Firstly, there was no examination of Mr Maunder by a medical practitioner or even someone with a first aid qualification. Mr Maunder resided in a camp provided by BHP and as soon as Mr Schafferius became aware of the incident he should have ensured that Mr Maunder was seen by someone with at least some first aid training. It is improbable that there was not such a person at the camp or the Mine site. Instead, Mr Schafferius relied on a "*selfie*" photograph taken by Mr Maunder to establish Mr Maunder's injuries.

[129] Notwithstanding these deficiencies, I am satisfied on the basis of that photograph that Mr Maunder was on the receiving end of multiple punches to his face thrown with sufficient force to break his skin and cause bleeding. The photograph of Mr Maunder's face shows several abrasions and it is improbable that they were caused by a single punch.

[130] The identity of the person or persons who punched Mr Maunder and how many times Mr Maunder was punched is problematic. What is clear is that the most likely persons to have punched Mr Maunder are Mr Drake or Mr Bird or both of them. The description by some witnesses of unidentified arms and fists landing on Mr Maunder's face defies logic and it is highly improbable that there was a third person involved in punching Mr Maunder.

[131] Mr Maunder has no independent recollection about the identity of the person or persons who punched him. Mr Maunder's understanding in relation to this matter is based on what he was told by other persons. Despite asserting that he must have been hit more than once, Mr Maunder recalls only the first punch. While he asserts it was thrown by Mr Bird, Mr Maunder conceded under cross-examination that this assertion is based on what he was told by Mr Gardner.

[132] I am satisfied on the balance of probabilities that Mr Drake punched Mr Maunder more than once. The evidence upon which my satisfaction in relation to this matter is based is as follows. Mr Drake accepts that he did punch Mr Maunder at least once but maintains that he has no recollection of having done this and relies on what he was told by other witnesses. Ms Builder was adamant that Mr Drake came from behind Mr Bird and punched Mr Maunder four times and provided a description of the punches landing so close to her face that she was nearly hit.

[133] Mr Goulevitch said in his witness statement in relation to Mr Drake's application that he saw Mr Drake come from behind Mr Bird and attempt to punch Mr Maunder but did not see Mr Drake actually make contact with any part of Mr Maunder's face or body. In paragraph 10 of his witness statement in support of Mr Bird's application, Mr Goulevitch said that as people attempted to break Mr Bird and Mr Maunder apart, he saw a fist come over the top from behind Mr Bird and hit Mr Maunder three times. Mr Goulevitch did not say in that statement whose fist he saw. In his reply statement in Mr Bird's case, Mr Goulevitch states that there were no visible scratches, bruises or blood on Mr Maunder's face to indicate that he had been hit before Mr Goulevitch turned around a second time and saw Mr Drake hit Mr Maunder "*as described in paragraph 10 of his first statement*". While Mr Goulevitch did not specifically state in paragraph 10 of his witness statement in Mr Bird's case that the fist belonged to Mr Drake, the effect of his evidence is that it did. This is apparent from paragraph 14 of Mr Goulevitch's reply statement in support of Mr Bird which reiterates that Mr Drake threw the punches referred to by Mr Goulevitch.

[134] Mr Goulevitch's responses under cross-examination about the inconsistencies in his evidence were somewhat evasive but I am satisfied that Mr Goulevitch did see Mr Drake hit Mr Maunder and in my view the inconsistencies in his evidence and the manner in which he gave it are more about concern to protect his members in difficult circumstances by saying no more than absolutely necessary, than they are about dishonesty.

[135] Mr Goulevitch should have informed Mr Schafferius that he had witnessed the incident before sitting in on investigation meetings as a support person for Mr Drake and Mr Bird. However, I also accept Mr Goulevitch's explanation for not doing so and I found Mr Goulevitch to be a credible witness. In short, it was clear that Mr Goulevitch did not want to provide a statement to the Company in its investigation because he did see Mr Drake hit Mr Maunder and did not wish to be put in a position where he had to say so. It was also clear that Mr Goulevitch was put in a position by Mr Bird whereby he had to make a statement that he saw Mr Drake punch Mr Maunder because Mr Bird nominated Mr Goulevitch as a witness. Once Mr Bird did this, Mr Goulevitch was in the position where he had to inform Mr Schafferius about what he had witnessed and that it was Mr Drake who had punched Mr Maunder.

[136] I am also satisfied that Mr Drake made an inappropriate comment to Ms H. I accept that there is a difference between the comment that Mr Drake admits that he made and the comment that Ms H reported. Ms H did not give evidence in the hearing. Mr Schafferius agreed that he had accepted Ms H's version of the discussion and that Mr Drake's version of events put a different perspective on what was said. However, even if Mr Drake's version of events is accepted it is clear that Mr Drake made an inappropriate comment to Ms H and when she took issue with it, Mr Drake attempted to justify the comment and gave at best, a qualified apology.

Mr Bird did not punch Mr Maunder

[137] I am unable to be satisfied on the balance of probabilities that Mr Bird punched Mr Maunder for the following reasons. It is improbable that Mr Goulevitch would make a statement to Mr Schafferius or in his evidence to the Commission that was detrimental to Mr Drake's case, unless that statement was the truth. I can also see no reason why Mr Goulevitch would state that only one of his members – Mr Drake – punched Mr Maunder if he knew that both Mr Drake and Mr Bird had engaged in such conduct. As previously noted, I found Mr Goulevitch to be a credible witness who was placed in a difficult situation by Mr Bird. While Mr Goulevitch conceded in cross-examination that it was possible that there were two altercations and that Mr Bird may have hit Mr Maunder while Mr Goulevitch was not watching, this concession is not sufficient to swing the balance in favour of a finding that this is what occurred.

[138] Mr Bird maintains that he did not punch Mr Maunder and that he does not know who did. Mr Bird maintained this position at all stages of the investigation and at the hearing. It is clear from Mr Shafferius' evidence that in deciding that Mr Bird had punched Mr Maunder, he had regard to a record of interview with Mr Bird made on 18 December which stated incorrectly that Mr Bird said he could not remember whether he punched Mr Maunder. Mr Scheffarius conceded that Mr Bird had actually denied punching Mr Maunder as recorded in Mr Goulevitch's notes of the same meeting. This is not an insignificant error.

[139] Mr Richards said that there was no way that Mr Bird could have punched Mr Maunder because the punches he saw hit Mr Maunder while he and Mr Bird were holding each other's shirts were in a downward motion. Mr Richards also maintained that he did not see the person who hit Mr Maunder, just the person's fist. Mr Richards did not depart from his evidence under cross-examination.

[140] Mr Gardner's evidence was that he saw people holding Mr Bird back and that Mr Bird punched Mr Maunder in the head three times. Mr Gardner did not give evidence that he saw Mr Bird and Mr Maunder holding each other's shirts. Mr Gardner later conceded the possibility that the punches he saw hitting Mr Maunder were not thrown by Mr Bird, but by a person standing behind Mr Bird. If Mr Gardner saw Mr Bird being pulled back and did not see him holding Mr Maunder's shirt, then it is more probable than not that he saw the altercation after the shirt holding occurred. In my view if Mr Bird did punch Mr Maunder it is more probable that he did it before the shirt holding than after given the sequence of events established by the evidence of other witnesses.

[141] The only witness who saw two people punching a third person was Ms Lewis who was unable to identify any of the protagonists. Ms Lewis confirmed that no-one from BHP spoke to her about the incident until May 2019 when she made a statement for the current proceedings. This is surprising given Mr Schafferius' evidence that Mr Maunder was shown photographs of a number of persons including Mr Drake and Mr Bird during an interview shortly after the incident in order to assist him to identify who hit him. It is not clear why the same course could not have been taken with staff at the Bowls Club in the days after the incident to attempt to obtain a positive identification of those involved in the incident. While it is not expected that employers should conduct an investigation to the same standards as the Police I do not accept that such a step could not have been taken. If a statement could be obtained from Ms Lewis for the proceedings in the Commission it could and should have been obtained as part of the investigation. I am not prepared to place significant weight on

the evidence of a witness who cannot identify the persons involved in the assault on Mr Maunder and who was not interviewed or requested to make a statement until five months after the event and Ms Lewis' statement does not swing the balance in favour of a finding that Mr Bird punched Mr Maunder.

[142] I am also of the view that the fact that Mr Bird and Mr Maunder were holding each other's shirts reduces the likelihood that Mr Bird punched Mr Maunder. Mr Bird's hands were occupied holding Mr Maunder and Mr Bird and Mr Maunder took hold of each other's shirts when Mr Maunder walked back to Mr Bird after they initially yelled at each other. That Mr Bird and Mr Maunder were holding each other's shirts is also contrary to the version of events posited by Mr Maunder and suggests that Mr Bird's version is to be preferred. There were other witnesses who gave evidence that Mr Bird and Mr Maunder were holding the other's shirt and I am satisfied that this was the case.

[143] When all of the evidence is considered, it is more probable than not that Mr Drake punched Mr Maunder more than once by coming over the top of Mr Bird while Mr Bird and Mr Maunder were holding onto each other's shirts. At best, the propositions that Mr Bird punched Mr Maunder and the proposition that he did not, are equally probable and I am therefore not able to be satisfied to the required standard that Mr Bird engaged in such serious misconduct. This can be contrasted with the evidence against Mr Drake which makes it clear that he Mr Drake did punch Mr Maunder more than once.

Mr Drake's conduct was not a reasonable response to the conduct of Mr Maunder

[144] I do not accept that Mr Drake's conduct was a reasonable response to the conduct of Mr Maunder or that he was defending Mr Bird. I do not accept that Mr Maunder had his hands around Mr Bird's throat when the punches were thrown by Mr Drake or at any time. It is probable that if Mr Maunder's hands were around Mr Bird's throat, Ms Builder would have made a statement to this effect, given her proximity to the incident and her insistence that she had seen all relevant events. It is also the case that Ms Builder was intent on exonerating Mr Bird and that this evidence would have assisted his case.

[145] It is clear from the evidence that when Mr Drake hit Mr Maunder, Mr Maunder was holding the front of Mr Bird's shirt and Mr Bird was holding the front of Mr Maunder's shirt. Mr Bird was at no risk of being hit by Mr Maunder given his evidence that he was holding Mr Maunder off and was not hit by Mr Maunder. In short, Mr Drake hit Mr Maunder while he was using both hands to hold Mr Bird's shirt front and was being held by Mr Bird. Unsurprisingly, Mr Maunder did not see Mr Drake's punch coming. It is also the case that there were people around Mr Bird and Mr Maunder pulling them apart and there was no necessity for Mr Drake to get involved.

[146] The severity of Mr Drake's conduct is heightened by the fact that he knew that Mr Maunder was intoxicated and that Mr Drake had previously made comments to Mr Maunder questioning his presence at the Christmas party which were calculated to annoy or antagonise Mr Maunder. There was no excuse for Mr Drake punching Mr Maunder and I do not accept the matters Mr Drake raised mitigate the seriousness of his misconduct.

Mr Drake and Mr Bird breached BHP Charter Values and Code of Business Conduct

[147] I am satisfied that the conduct engaged in by both Mr Drake and Mr Bird on 6 December 2018 was caught by the BHP Charter. The Charter provides for Respect by embracing openness, trust, team work, diversity and relationships that are mutually beneficial. Mr Drake's conduct was not consistent with the Charter in that he made inappropriate comments to Ms H, that were related to her sex and her personal appearance and were disrespectful and contrary to the values of team work and diversity. Mr Drake's conduct in starting a verbal altercation with Mr Maunder before punching him more than once was also entirely inconsistent with the Charter Value of Respect. The exchange with Ms H and the altercation with Mr Maunder occurred in an environment where 90 persons comprising some 60 BHP employees and their family members were gathered to attend a Christmas event sponsored or contributed to by BHP. Even if BHP had made no contribution to the event, it is arguable that it was work related and that the Charter and the Code applied to employees who were present.

[148] Mr Bird's conduct was also inconsistent with BHP's Charter values. Mr Bird engaged in a verbal altercation with Mr Maunder which led to a physical altercation involving Mr Bird and Mr Maunder holding onto the others' shirt. Mr Bird was an active participant in the verbal altercation. The comments that were made by both Mr Drake and Mr Bird were designed to question the presence of Mr Maunder – a person from another crew – at their crew's Christmas event. They were gratuitous and unnecessary comments which were disrespectful and contrary to the value of team work particularly given that they were made at a Christmas event which had been advertised widely on the basis that all were welcome.

[149] I am also of the view that the conduct of both Mr Drake and Mr Bird was inconsistent with BHP's Code of Business Conduct with respect to harassment and bullying. The behaviour of both Mr Drake and Mr Bird was offensive, insulting, intimidating, malicious and humiliating. The fact that I am unable to be satisfied that Mr Bird punched Mr Maunder does not mean that his conduct did not breach the Code. That Mr Maunder decided to attend another Christmas party after the one attended by his crew had ended – which had been advertised on the basis that all were welcome – should not have been cause for Mr Maunder to be verbally accosted while he was attempting to purchase a drink. The fact that Mr Maunder was intoxicated and that Mr Bird and Mr Drake noted this is more reason why they should have left him alone and not started a verbal altercation about his presence at the Pre-strip Christmas party. As previously noted, the verbal altercation between Mr Maunder and Mr Bird became physical when they held each other's shirts. This was a further breach by Mr Bird and Mr Maunder of the Code of Business Conduct.

[150] Mr Drake's conduct in punching Mr Maunder more than once was a further and more serious breach of the Charter Values and the Code of Business Conduct. As I have previously stated it is arguable that the breach would have occurred even if BHP had made no contribution to the event. C Crew did not have a moratorium on being at the Moranbah Bowls Club on the evening of 6 December 2018. Further, for reasons set out above, I do not accept that Mr Drake and Mr Bird did not know that BHP had involvement in the function and regardless the extent of their knowledge does not excuse the conduct of Mr Drake and Mr Bird at that event or result in that conduct not breaching the Charter Values and the Code of Business Conduct.

WHETHER MR DRAKE'S DISMISSAL WAS UNFAIR

Was there a valid reason for the dismissal related to Mr Drake's capacity or conduct?

[151] Mr Drake's central assertion is that notwithstanding his admission that he punched Mr Maunder, when considered in context, the conduct he engaged in does not, in all of the circumstances, justify dismissal. It was submitted for Mr Drake that it is a case of substantive rather than procedural unfairness. In relation to whether there was a valid reason for dismissal it is also asserted BHP has not established that there was a connection between Mr Drake's conduct and his employment so that it provided a valid reason for dismissal. It is submitted that what Mr Drake believed about the nature of the function at the time the conduct occurred is relevant because it provides an explanation for why he behaved in the way that he did. Mr Drake's lack of knowledge about the nature of the event is also said to be relevant to whether his assurance that he will not do it again is capable of being accepted. Other considerations relevant to whether there was a valid reason for dismissal are said to be that Mr Drake was intoxicated, provocation and Mr Drake's desire to defend his mate. These are submitted to be matters that should result in a finding that Mr Drake's conduct was not a valid reason for dismissal.

[152] It is first necessary to consider whether Mr Drake engaged in the conduct alleged against him. For the reasons set out above I am satisfied and find that Mr Drake punched Mr Maunder in the head more than once. I am also satisfied that Mr Drake did this in circumstances where he started a verbal altercation with Mr Maunder by making comments to Mr Maunder questioning his attendance at the Pre-strip Christmas party. There was no legitimate reason for Mr Drake to question Mr Maunder's attendance and given the evidence about the level to which the verbal altercation escalated, I do not accept that Mr Drake did so

innocently. I also accept Ms Builder's evidence that Mr Drake was attempting to stir up Mr Maunder who was noticeably intoxicated.

[153] I do not accept that Mr Drake punched Mr Maunder because he was defending Mr Bird. There is no evidence that Mr Bird needed defending – to the contrary, Mr Bird was defending himself at the point that Mr Drake hit Mr Maunder and there is no evidence that Mr Bird was in any danger of being assaulted by Mr Maunder. I do not accept that Mr Maunder had his hands around Mr Bird's throat. I do not doubt that Mr Bird would have given evidence to this effect if Mr Maunder had assaulted him in this way or that Ms Builder would have added this fact into her account of events, given that it would have assisted Mr Bird's case.

[154] The evidence establishes that Mr Bird and Mr Maunder were holding each other by the fronts of their respective shirts and were doing so at the time that Mr Drake punched Mr Maunder. As a result, Mr Drake hit Mr Maunder in circumstances where Mr Maunder could not defend himself because his hands were holding Mr Bird's shirt. I do not accept that provocation had any role in the events on 6 December 2018. Mr Maunder was noticeably drunk and there is no evidence that he posed a physical threat to Mr Bird or Mr Drake or that Mr Maunder did anything other than react angrily to a question that Mr Drake knew or should reasonably have known, would cause such a reaction.

[155] Further, I do not accept that Mr Drake did not know that the function on 6 December 2018 had been organised by BHP. For the reasons set out above I do not accept Mr Drake's evidence in this regard. Even if the function was not organised by BHP I would find that it was work related because it was attended by some 60 persons who all worked on the same crew and on the same roster and their family members. Furthermore, Mr Drake knew that Mr Maunder was an employee of BHP at the time he punched Mr Maunder in the head. Mr Drake punched Mr Maunder in the head in a public place where some 60 work colleagues and their families were gathered and whether it was a Company sponsored event or not is not determinative of whether Mr Drake's conduct provided a valid reason for his dismissal.

[156] Accordingly, I am satisfied and find that there was a valid reason for Mr Drake's dismissal on the basis that he punched Mr Maunder in the head more than once and there were no extenuating circumstances to mitigate his conduct. Further, I am satisfied and find that this conduct occurred at a work event and was sufficiently connected to Mr Drake's employment to constitute a valid reason for his dismissal.

Was Mr Drake notified of the reason for his dismissal?

[157] I am satisfied and find that Mr Drake was notified of the reason for his dismissal. The allegations and findings made by BHP in relation to Mr Drake's conduct were clearly put to him as part of a show-cause process and in the letter notifying him that his employment was to be terminated.

Was Mr Drake given an opportunity to respond to any reason related to his conduct or capacity?

[158] Mr Drake submits that BHP failed to properly and genuinely consider his responses to the allegations and that had those responses been properly considered a different conclusion would have been reached in relation to the termination of his employment.¹¹⁹ In support of

this submission reference was made to BHP's response to Mr Drake's response to the show cause letter and that BHP's response made only brief reference to the matters raised by Mr Drake in his own defence including that Mr Drake had acknowledged that his actions on 6 December were regrettable and the explanations that he provided in relation to reacting to an assault against Mr Bird.

[159] I do not accept that submission. In my view Mr Drake was given an opportunity to respond to the allegations and his responses were considered. It is simply the case that the responses were not accepted and the matters raised by Mr Drake were not considered to adequately show cause as to why he should not be dismissed. In my view it was reasonable for the Company to refuse to accept the explanations provided by Mr Drake in response to the allegations.

[160] Those explanations were that Mr Drake reacted to Mr Maunder grabbing Mr Bird by the throat and that his intervention was reasonable and proportionate and not intentional or without reason. For the reasons set out above, the evidence does not support Mr Drake's version of events. In particular, Mr Maunder did not grab Mr Bird by the throat so that it was reasonable for Mr Drake to intervene and Mr Drake was not required to defend Mr Bird from an assault. To the contrary, the evidence establishes that Mr Drake punched Mr Bird in the face while he was using both hands to hold the front of Mr Bird's shirt and Mr Bird was likewise holding the front of Mr Maunder's shirt.

[161] Mr Drake's assertion that the event at which the incident occurred was not work related and did not breach any policy or procedure was also wrong. For the reasons set out above, I have concluded that the event was work related and that BHP was entitled to take disciplinary action against employees who engaged in conduct at that event that breached the Company's Charter Values and Code of Business Conduct. Further, BHP was entitled to place minimal weight on the fact that Mr Drake conceded that he punched Mr Maunder while attending the event on 6 December 2018, in circumstances where he did not accept that his conduct was a breach of its Charter Values and Code of Business Conduct. I am also of the view that it was reasonable for Mr Schafferius to conclude that he could not trust Mr Drake not to repeat the conduct given Mr Drake's refusal to accept that it occurred at a work related event and his insistence that it was justified on the basis that he was defending Mr Bird, where that was not the case.

[162] The investigation conducted by BHP was inadequate in some respects, particularly insofar as there was a failure to properly record Mr Maunder's injuries and to interview staff at the Bowls Club immediately following the incident. I also accept that the instruction given to Mr Drake by the Company during the investigation that he not discuss the matter with anyone would have made it difficult for Mr Drake to gather evidence in support of his position. There was also some evidence that records of interviews did not accurately reflect what participants said. However, none of these issues are material to the outcome of the investigation of Mr Drake's conduct.

[163] Other than the deficiencies I have pointed to the Company's investigation was reasonable and thorough. There is no evidence that a relevant witness was not spoken to or that evidence which should have been considered was not. Mr Schafferius was a very credible witness. He made concessions where it was appropriate to do so notwithstanding that the concessions were contrary to his interests and those of BHP. After observing Mr Schafferius give his evidence I do not accept that there is any basis for an assertion that he had pre-judged

the outcome of the investigations into the events of 6 December 2018 or that he did not bring an open mind to the consideration of the evidence before him or that there was unfairness associated with the decision making process he conducted with respect to the termination of Mr Drake's employment.

[164] I accept the submission for BHP that it is difficult to understand Mr Drake's assertion that his responses to the allegations were not considered when the Respondent relied on Mr Drake's own admissions to his conduct.¹²⁰ It is also the case that Mr Drake has had a full hearing in the Commission in relation to whether his dismissal was unfair and has produced no evidence that was not considered by the Company in its investigations. Mr Drake has not established any circumstances to mitigate his conduct. Further, Mr Drake has not produced any evidence that could have led to a different outcome than his dismissal.

Was there any unreasonable refusal by the employer to allow Mr Drake to have a support person present to assist at any discussions relating to dismissal?

[165] Mr Drake was assisted by a support person in discussions relating to his dismissal and this consideration is not relevant.

If the dismissal related to unsatisfactory performance – whether Mr Drake was warned about that unsatisfactory performance before the dismissal?

[166] The dismissal of Mr Drake did not relate to unsatisfactory performance and this consideration is not relevant in the present case.

Did the size of the employer's enterprise impact on the procedures followed in effecting the dismissal of Mr Drake?

[167] BHP is a large organisation and should not be excused on the basis of its size for any procedural deficiencies in investigating the matter.¹²¹ Those deficiencies have been considered above and this matter is not otherwise relevant.

Did the absence of dedicated human resource management specialists or expertise in the enterprise impact on the procedures followed in effecting Mr Drake's dismissal?

[168] BHP has dedicated Human Resource Management specialists and expertise and it should not be excused for any procedural deficiencies in investigating the matter. Other than the deficiencies addressed above, this consideration is not otherwise relevant.

Are there any other relevant matters?

[169] Mr Drake submits that the following matters are relevant to consideration of whether his dismissal was unfair. Mr Drake states that it is his understanding that Mr Maunder was offered an opportunity to resign his employment rather than being dismissed. This is said to be differential treatment that goes to the unfairness of Mr Drake's dismissal.¹²² It is submitted on behalf of Mr Drake that Mr Maunder's conduct was more serious due to his seniority in the company.¹²³ Inconsistent treatment of employees engaging in similar conduct may be considered relevant to whether a dismissal is unfair.¹²⁴ However, the Commission must be satisfied that any examples of differential treatment are properly comparable.¹²⁵

[170] Mr Drake gave evidence about the impact of the dismissal on his personal or economic situation. I accept Mr Drake's evidence that it will be almost impossible for Mr Drake to find comparable, full-time permanent employment in the mining industry in Queensland, and that there are few comparable jobs outside of the mining industry in Queensland.¹²⁶ I also accept Mr Drake's submission that his dismissal has caused personal and financial stress¹²⁷ and has affected his relationship with his partner and his ability to assist his mother who has limited financial resources and is ill and requires assistance.¹²⁸

[171] In addition Mr Drake states that he has two children aged 15 and 11 for whom he pays child support of \$1,300 per month.¹²⁹ If he were required to move to obtain alternative employment, Mr Drake submits that his relationship with his children would be put under significant strain which he believes would likely have a significant impact on his children's wellbeing.¹³⁰ Mr Drake has a loan of \$110,000 relating to a family financial issue that requires repayments of \$3,300 per month.¹³¹ Since his dismissal he has had to cancel a novated motor vehicle lease because he could not afford the repayments.¹³²

[172] It is also submitted that Mr Drake demonstrated contrition, remorse and insight into his conduct each of which should have militated against termination of his employment, but which were flatly rejected by the Respondent. Further it is submitted that Mr Drake has been a loyal and dedicated employee since August 2013, whose performance reviews reflect positively on his work performance. Mr Drake has no disciplinary history and no history of and submits that he does not have a history of aggressive behaviour and has a positive working relationship with other employees.

[173] In relation to Mr Maunder being given the opportunity to resign, there is evidence which I accept, that Mr Maunder was told that BHP had decided to dismiss him and that Mr Maunder asked for an opportunity to resign rather than be dismissed. This was agreed to by Mr McNamara who dealt with the investigation of Mr Maunder's conduct. Mr Maunder lost his employment over his part in the incident of 6 December 2019. There is no basis for Mr Drake to complain of differential treatment in circumstances where he did not request an opportunity to resign. Accordingly I do not accept that there was differential treatment or that this is a factor weighing in favour of a finding that Mr Drake's dismissal was unfair. I also note that Mr Maunder was allowed to return to work while the investigation was ongoing and Mr Drake and Mr Bird were stood down. However, this was addressed by Mr Schafferius who acted swiftly as soon as he was aware that Mr Maunder was back at work, so that Mr Maunder was again stood down for the duration of the investigation.

[174] I accept that Mr Drake's personal and financial circumstances are such that his dismissal has had a significant impact on his own wellbeing and the wellbeing of his family members. This is a matter that weighs in favour of a finding that his dismissal was unfair. However, balanced against this consideration is an expectation that such a long serving employee would follow the policies and procedures of BHP.

[175] I am also of the view that it was reasonable for Mr Schafferius to consider that the contrition, remorse and insight shown by Mr Drake into his conduct did not sufficiently militate against the matters weighing in favour of dismissal. Mr Drake did not accept that his conduct justified dismissal on the basis of his assertion that the event he attended was not work related. Mr Drake also maintained that his conduct in punching Mr Maunder in the head was reasonable and proportionate to Mr Maunder's conduct and that he acted in defence of

Mr Bird. Mr Drake continues to maintain these views and in my view he has no reasonable basis to do so.

[176] As I have previously found the event was a BHP Christmas party and even if it was not, PJ night drinks involving some 60 employees of the Company and their family members are sufficiently work related so that a physical altercation in such circumstances is appropriately covered by BHP's Code of Business Conduct and Charter Values. If the conduct Mr Drake engaged in at the 6 December 2018 Christmas event was engaged in by Mr Drake at regular PJ night drinks, it is also arguable that this would have constituted a valid reason for dismissal.

[177] I do not accept that the matters raised by Mr Drake – either individually or collectively – are sufficient to render his dismissal unfair, in circumstances where I am satisfied that there was a valid reason for dismissal and the dismissal was effected in a manner that was, on balance, procedurally fair and where there are no mitigating circumstances sufficient to outweigh the misconduct Mr Drake engaged in.

Conclusion in relation to Mr Drake's unfair dismissal application

[178] In all of the circumstances I find that the termination of Mr Drake's employment was not harsh, unjust or unreasonable. Accordingly, Mr Drake's application for an unfair dismissal remedy must be dismissed and an Order to that effect will issue with this Decision.

WHETHER MR BIRD'S DISMISSAL WAS UNFAIR

Was there a valid reason for the dismissal related to Mr Bird's capacity or conduct?

[179] The reason for Mr Bird's dismissal asserted by BHP as a valid reason for the purposes of s. 387(a) of the Act is that Mr Bird punched Mr Maunder in the face at least once. For the reasons set out above, it has not been established on the balance of probabilities that Mr Bird did punch Mr Maunder. No alternative proposition to the effect that the conduct of Mr Bird otherwise provided a valid reason for dismissal was advanced, either in the dismissal process or at the hearing of Mr Bird's unfair dismissal application.

[180] Mr Bird's conduct on the evening of 6 December 2018 was totally inappropriate. Mr Bird engaged as an active participant in a verbal altercation with an intoxicated person in the presence of 90 people including 60 work colleagues, during which Mr Bird yelled, swore and grabbed Mr Maunder by the front of his shirt. Notwithstanding the inappropriateness of this conduct, it was not contended by BMA that it provided a valid reason for dismissal. Mr Schafferius conceded that the conduct he took issue with and the basis of his decision to dismiss Mr Bird was the conclusion that he punched Mr Maunder. Mr Schafferius further conceded that had Mr Bird not punched Mr Maunder then termination of his employment would not have been appropriate. As I have previously observed, Mr Schafferius struck me as an honest and credible witness who made appropriate concessions and that concession was appropriate.

[181] Counsel for BHP objected to the line of questioning in relation to Mr Schafferius' belief about Mr Bird's conduct, arguing that the Commission is required to make a finding as to whether there was a valid reason for dismissal regardless of the reasonableness or otherwise of the views of the person who decided to dismiss. I accept that the views and belief

about misconduct of an employee of the person who decides to dismiss that employee are not determinative of whether there was a valid reason for the dismissal. The Commission must satisfy itself that there was a valid reason for dismissal and that where that reason is misconduct, the misconduct occurred and it was sufficiently serious so that dismissal was a sound, defensible or well-founded response.

[182] However, the views of the decision maker and the basis upon which those views were formed are a contextual matter relevant to considering whether there was a valid reason for dismissal and may also be relevant to other considerations under s. 387 including those related to procedural fairness and to the question of remedy. In the present case, even if Mr Schafferius had not made that concession, dismissal would not have been a valid, defensible or well-founded response to the conduct engaged in by Mr Bird, given that I am unable to be satisfied that he punched Mr Maunder.

[183] I am satisfied and find that there was not a valid reason for Mr Bird's dismissal, notwithstanding that his conduct at the event of 6 December 2018 was completely inappropriate and worthy of strong censure. This is a matter to which I will return.

Was Mr Bird notified of the reason for his dismissal?

[184] Mr Bird submits that he was not advised as to how his conduct breached the relevant policies. I do not accept this submission. I agree with BHP that this submission is one of form over substance. Mr Bird was informed that the reason for his dismissal was that he had engaged in an argument with Mr Maunder and had punched Mr Maunder in the face. I am satisfied that Mr Bird was notified of the reason for his dismissal in the two show cause letters that he received and in the dismissal letter.

Was Mr Bird given an opportunity to respond to any reason related to his capacity or conduct?

[185] In response to Mr Bird's submission that his ability to respond was affected by the Respondent's direction that Mr Bird not speak with potential witnesses, BHP submits that *'it is difficult, if not impossible to understand how this can be said to have prevented Mr Bird from responding to the allegation.'*¹³³ BHP also submits that it undertook a detailed investigation and provided sufficient opportunity for Mr Bird to respond to the allegations.¹³⁴ Mr Schafferius advises that Mr Bird declined to provide a written statement during the investigation.¹³⁵

[186] I accept that an employer who directs employees against whom allegations are made not to discuss those allegations with anyone other than a support person during an investigation, places the employee subject of the allegations in position where he or she is dependent on the employer conducting a proper and thorough investigation. I also accept that there is an onus on the employer to take greater care to be thorough than would be the case if no such direction was made to employees subject of allegations.

[187] In the present case, I accept that in directing Mr Bird not to discuss the allegations with anyone, BHP placed some impediment on his ability to defend himself. However, I do not accept that this was material or that it resulted in unfairness to Mr Bird. BHP conducted a reasonably thorough investigation into the incident on 6 December 2018. Mr Bird was offered an opportunity early in the investigation to provide a written statement and in a record

of interview dated 7 December 2018 is recorded as stating that he did not wish to do so “*at this stage*”. Once the investigation progressed Mr Bird had numerous opportunities to defend himself. It is surprising that Mr Bird would allege in his evidence to the Commission that it is usual for persons subject to investigations to be given an opportunity to make a written statement and imply that he was unfairly treated by not being given such an opportunity, when he was given such an opportunity.

[188] It is also the case that Mr Bird was informed during the investigation that he could nominate persons who may have witnessed the incident and that the Company would interview them. Mr Bird nominated one witness – Mr Goulevitch – in addition to those the Company had already interviewed. Mr Schafferius interviewed Mr Goulevitch when he was named as a possible witness by Mr Bird. It is hardly surprising that Mr Schafferius did not put much weight on what Mr Goulevitch told him given that Mr Goulevitch had been a support person for Mr Drake and Mr Bird in their interviews during the investigation and had not disclosed that he had also witnessed the incident. By the conclusion of the investigation, all of the witnesses nominated by Mr Bird were interviewed along with others identified by the Company. The substance of their statements, including the allegations in relation to Mr Bird’s conduct, were put to Mr Bird in two show cause letters.

[189] Mr Goulevitch’s reluctance to make a statement at all evidences the reasons why BHP may have thought it appropriate to conduct interviews with witnesses without revealing their identities to Mr Drake and Mr Bird and to direct Mr Drake and Mr Bird not to discuss the matter with potential witnesses.

[190] It is also the case that Mr Bird has put no new evidence before the Commission in his unfair dismissal hearing, notwithstanding that he had access to all of the statements taken by the Company and has not called evidence from any person who was not interviewed by the Company during its investigation.

[191] I have found on the balance of probabilities that BHP has not proven that Mr Bird punched Mr Maunder. This conclusion was not reached without considerable difficulty given Mr Bird’s other inappropriate conduct at the event on 6 December 2018 and his persistent refusal to acknowledge that he was in any way responsible for the series of events on that night. It was not entirely unreasonable for Mr Schafferius to have concluded – based on the reasonably thorough investigation that he conducted – that Mr Bird had punched Mr Maunder. Mr Bird’s attitude and responses during the investigation contributed to that view.

[192] There may be cases where limitations placed on persons the subject of allegations of misconduct during an investigation of those allegations, will result in a finding that those persons were not given an opportunity to respond to the allegations. This is not such a case. I am satisfied and find that Mr Bird had an opportunity to respond to the allegations against him and this consideration does not support a finding that his dismissal was unfair.

[193] I do not accept that Mr Bird’s ability to respond to the allegations was impacted by any failure on the part of BHP to identify how his conduct breached the Company’s Charter or Code of Business Conduct or to provide him with a copy of those documents. The documents were provided on the day of the meeting at which Mr Bird’s employment was terminated and he was given an opportunity to comment on his conduct in light of those policies. Contrary to Mr Bird’s assertion his conduct was not human error and he did not respond instantly and in self-defence. Mr Bird could and should have walked away and not

become involved in an altercation with Mr Maunder. As I have previously stated it goes without saying that employees should not conduct themselves at Company events as Mr Bird did, and it was entirely appropriate for the conduct to have been the subject of an investigation. It would also have been appropriate for Mr Bird to have been issued with a warning for his part in the altercation with Mr Maunder.

[194] I do not accept that Mr Schafferius pre-judged the outcome of the investigation into Mr Bird's conduct or that he did not bring an open mind to the consideration of the evidence before him or that there was unfairness associated with the decision making process he conducted with respect to the termination of Mr Bird's employment. To the contrary, Mr Schafferius went to great effort to ensure a fair investigation was conducted and did not lightly decide to dismiss Bird.

Was there any unreasonable refusal by the employer to allow Mr Bird to have a support person present to assist at any discussions relating to dismissal?

[195] Mr Bird was assisted by a support person in discussions relating to his dismissal and this consideration is not relevant.

If the dismissal related to unsatisfactory performance – whether Mr Bird was warned about that unsatisfactory performance before the dismissal?

[196] The dismissal of Mr Bird did not relate to unsatisfactory performance and this consideration is not relevant in the present case.

Did the size of the employer's enterprise impact on the procedures followed in effecting the Mr Bird's dismissal?

[197] BHP is a large organisation and should not be excused on the basis of its size for any procedural deficiencies in investigating the matter.¹³⁶ Those deficiencies have been considered above and this matter is not otherwise relevant.

Did the absence of dedicated human resource management specialists or expertise in the enterprise impact on the procedures followed in effecting Mr Bird's dismissal?

[198] BHP has dedicated Human Resource Management specialists and expertise and it should not be excused for any procedural deficiencies in investigating the matter. Other than the deficiencies addressed above, this consideration is not otherwise relevant.

Are there any other relevant matters?

[199] I do not accept the submissions made on behalf of Mr Bird to the effect that he was not the aggressor and did not provoke Mr Maunder. For the reasons set out above, I am satisfied that Mr Bird was far from an innocent bystander and engaged in a verbal altercation with Mr Maunder which turned physical when Mr Bird and Mr Maunder each took hold of the other's shirt.

[200] I do not accept that Mr Bird did not know that BHP had any involvement in the event on 6 December 2018 or that he acted instinctively in defence of Mr Maunder's aggression. Mr Bird had plenty of opportunity to walk away from the altercation with Mr Maunder

including when his fiancée Ms Builder walked Mr Maunder away from Mr Bird to attempt to defuse the tense situation which she states was occurring. I do not accept that Mr Bird did not know that Mr Maunder was an employee of BHP. At the very least Mr Bird knew that Mr Maunder was an employee of BHP when Mr Drake asked him about whether the Coal production Christmas party had ended and questioned Mr Maunder's presence at the Pre-strip Christmas party.

[201] Mr Bird's statement during the investigation that he was entitled to defend himself from a stranger approaching him at the bar is disingenuous to say the least. Mr Maunder was not a stranger and on the basis of Mr Bird's own evidence and his statements during the investigation, Mr Bird knew that Mr Drake had made a comment about his presence at the Pre-strip Christmas party rather than the "coalies" Christmas party before he got involved in the altercation and it is improbable that Mr Bird did not know that Mr Maunder was an employee of BHP.

[202] In relation to Mr Bird's assertion that BHP had not communicated its expectations with respect to his behaviour or the consumption of alcohol at the event on 6 December 2018 I do not accept that this is a consideration relevant to whether Mr Bird was unfairly dismissed. Quite simply the fact that BHP does not warn its employees that they should not get involved in a verbal or physical altercation with other employees in a public place is so obvious that it goes without saying. Grown men should not need to be told that at an event where 90 persons including 60 work colleagues and their family members are present, they should behave appropriately and refrain from making gratuitous comments to other attendees resulting in a verbal altercation followed by physical altercation involving holding of shirts and punches being thrown.

[203] On the evidence of his own witnesses – Mr Goulevitch and Ms Builder – Mr Bird was screaming and yelling at Mr Maunder in the middle of a public place and was engaging in a verbal altercation that was of such concern that his fiancée Ms Builder saw the need to endanger herself by walking into what became a physical altercation, to attempt to defuse it by taking Mr Bird's chin in her hand and then pushing Mr Maunder away. Mr Bird should have known that he could not engage in a verbal altercation with a work colleague and then a physical altercation involving each holding the other's shirt, in the presence of 90 persons including 60 work colleagues without his conduct being considered to have been engaged in at a work related event. His insistence that it was not a work related event is of great concern.

[204] I am satisfied that Mr Bird's conduct in engaging in a verbal and physical altercation with Mr Maunder at the event on 6 December 2018 was a breach of the BHP Charter Values and the BHP Code of Business conduct, notwithstanding that I am unable to be satisfied that Mr Bird punched Mr Maunder. Mr Bird knew or should have known that this was the case. Mr Bird's assertion during the investigation process that there was no reason for his job being on the line when he was attacked by a BHP supervisor in his own time, shows a lack of judgement and insight into his own conduct which was maintained throughout the hearing of his unfair dismissal application. This is a matter to which I will return later. BHP would have been entitled to issue Mr Bird with a warning up to and including a final warning for his part in the events on the evening of 6 December 2018.

[205] I accept Mr Bird's evidence that his dismissal has had a significant impact on his personal and economic situation. Mr Bird and his partner have primary care of three children under the age of six. As a result of Mr Bird's dismissal his family has been required to leave

Company subsidised accommodation for which they paid rent of \$60 per week and to move into accommodation for which they are required to pay rent of \$500 per week. Mr Bird has been unable to secure alternative employment and his fiancée Ms Builder has been required to take on additional shifts.

[206] I also accept that Mr Bird has a relatively lengthy period of employment and has a good record with only one previous disciplinary issue involving him rolling through a stop sign without coming to a complete stop some six years before his dismissal. These are matters which weigh in favour of a finding that Mr Bird was unfairly dismissed.

Conclusion in relation to whether Mr Bird was unfairly dismissed

[207] After weighing the considerations in s. 387 I am satisfied that Mr Bird was unfairly dismissed on the basis that his dismissal was harsh, unjust and unreasonable. The dismissal was harsh because of its consequences for Mr Bird's personal and economic situation. Mr was required to remain in Moranbah because his daughter is starting school and to move out of his Company subsidised accommodation. Mr Bird now pays rent which is significantly more than he previously paid. His partner Ms Builder has been forced to take on more shifts and he is undertaking increased childcare duties. The dismissal was also harsh because it was disproportionate to the gravity of the conduct that Mr Bird engaged in.

[208] The dismissal of Mr Bird was unjust because he was not guilty of the misconduct on which the employer acted. The dismissal was also unreasonable because it was decided to dismiss Mr Bird on misconduct grounds in circumstances where inferences were drawn about that misconduct which were not available on the material before the employer, including errors about what Mr Bird did and did not concede during the investigation process. In short, the dismissal was substantively unfair and the fact that it was carried out in a generally procedurally fair manner does not, in all of the circumstances, outweigh the fact that there was no valid reason for dismissal.

REMEDY IN RESPECT OF MR BIRD'S UNFAIR DISMISSAL

[209] Given that I have found that Mr Bird's dismissal was unfair, it is necessary to consider the question of remedy. As required by s.390 of the Act, I am satisfied that Mr Bird was protected from unfair dismissal and that he has been unfairly dismissed. I am also of the view that Mr Bird should have a remedy for his unfair dismissal. Mr Bird seeks reinstatement.

[210] Reinstatement is the primary remedy for unfair dismissal. Compensation can only be awarded where the Commission is satisfied that reinstatement is inappropriate. I am concerned at Mr Bird's insistence that his conduct was not in breach of BHP's Charter or Code of Business Conduct and the disingenuous nature of some of his evidence in relation to that conduct. I am also concerned about the lack of remorse for his conduct displayed by Mr Bird and his attitude that he should not have been required to defend himself against dismissal for his conduct. If Mr Bird harbours any doubts about his conduct he should be disabused of them. It warranted censure to the point of a final warning.

[211] Balanced against my concerns is the fact that I am not satisfied to the required standard that Mr Bird engaged in the misconduct for which he was dismissed. BHP submits that should the Commission find that either of the Applicants dismissals was unfair, reinstatement is not practicable and is inappropriate given the nature of the misconduct.¹³⁷ In

this regard, BHP submits that regard should be given to the impact any such decision would have in undermining the behavioural standards and expectations that are set by the Company.¹³⁸ Further, that the lack of genuine remorse or contrition, particularly in the case of Mr Bird, demonstrates that reinstatement would be impracticable.¹³⁹

[212] Mr Schafferius' statement indicates that he has concerns about Mr Bird's behaviour and a similar incident occurring in the future if he was reinstated. In this regard, Mr Schafferius gave evidence about a number of occasions where Mr Bird lost his temper.¹⁴⁰ There was no evidence that Mr Bird was warned in relation to those occasions and Mr Bird's evidence in relation to the only incident about which details were provided by Mr Schafferius was that Mr Bird was upset because a crib room in which he was required to eat his lunch had not been cleaned and had a robust discussion with Mr Schafferius which was resolved satisfactorily after Mr Bird apologised to a supervisor he had sworn at over the two way radio. Mr Schafferius also said that he understood during that discussion that Mr Bird was affected by marital issues at that time and that the behaviour was not characteristic.

[213] For this reason, Mr Schafferius sent Mr Bird home on full pay to assist him to manage those issues. There had been no issue since that time, other than the matters for which Mr Bird was dismissed. In relation to his evidence that Mr Bird was aggressive in investigation meetings, Mr Schafferius accepted that it was more accurate to describe Mr Bird as being upset rather than aggressive and that Mr Bird was upset at the prospect of being dismissed.

[214] In circumstances where I am not satisfied that Mr Bird hit Mr Maunder, I am unable to accept that Mr Schafferius' view that there is a danger that Mr Bird will repeat this conduct, is valid. Accordingly, this is not a barrier to reinstatement. I have also had regard to Mr Schafferius' evidence that if Mr Bird did not punch Mr Maunder, termination of his employment would not have been appropriate. Given that I am unable to be satisfied that Mr Bird did punch Mr Maunder and that Mr Bird's conduct was otherwise not sufficiently serious as to constitute a valid reason for dismissal, I do not accept that reinstatement will undermine behavioural standards. Further, I am of the view that there is no relevant loss of trust and confidence in Mr Bird in circumstances where it has not been established to the required standard that he engaged in the misconduct for which he was dismissed. Mr Sheffarius conceded a number of errors in his assessment of Mr Bird's conduct and I do not accept that the employment relationship cannot be re-established.

[215] Accordingly, I am satisfied that reinstatement is not inappropriate and I have concluded that Mr Bird should be reinstated to the position that he held immediately before his dismissal. An Order requiring that Mr Bird be reinstated within 7 days of the date of release of this Decision will issue. I also consider that it is appropriate to make an order that the continuity of Mr Bird's employment be maintained.

[216] I do not consider that it is appropriate for me to make an order that BHP pay Mr Bird an amount for remuneration lost or likely to be lost because of his dismissal for the full amount of that loss. Mr Bird's conduct on the evening of 6 December 2018 was completely inappropriate. Mr Bird's lack of insight in relation to his conduct on that evening and his failure to exhibit any remorse is of concern. Mr Bird's conduct during the investigation also left much to be desired and I am of the view that his evidence to the Commission was somewhat disingenuous. This was particularly the case with respect to Mr Bird's evidence about the nature of the event on 6 December 2018, Mr Bird's attempts to portray himself as an innocent bystander in the verbal altercation with Mr Maunder and to down play his

previous relationship with Mr Drake, which was clearly more than simply that of work colleagues.

[217] It is also the case that my finding that Mr Bird did not punch Mr Maunder was made on the balance of probabilities and in the circumstances of this case, the balance was fine. This was in no small part due to Mr Bird's inappropriate conduct on the evening of 6 December 2018.

[218] Further I am of the view that Mr Bird has not made reasonable attempts to find alternative employment. This is despite the fact that Mr Bird would have had some difficulty in obtaining alternative employment because of his family responsibilities. However, even making allowances for these matters, there is little evidence of any attempts by Mr Bird to mitigate the loss of his employment. Mr Bird and his fiancée both worked prior to his dismissal. These matters support a deduction from the amount for lost remuneration as part of Mr Bird's reinstatement.

[219] The termination letter provided to Mr Bird indicates that he was paid four weeks wages in lieu of notice. A payslip was tendered by Mr Bird that was said to be his last payslip before his dismissal. The payslip covers the period from 13 to 19 January 2019. It indicates that Mr Bird's annual salary was \$155,799.80 and that he was paid a base salary of \$2,996.15 gross and a fixed bonus of \$288.46 for the period 13 to 19 January 2019. The superannuation contribution paid to Mr Bird's Auscoal account for that period was \$337.63. Mr Bird's dismissal took effect on 24 January 2019.

[220] At the date of release of this Decision, the remuneration lost by Mr Bird because of the dismissal is in the order of 36 weeks wages allowing for the payment of four weeks in lieu of notice. In that period Mr Bird would have been paid a base salary of \$107,861.40 and superannuation contributions of \$12,154.68. It is not clear what the fixed bonus amount shown on Mr Bird's payslip is based on and what amount Mr Bird would have been paid (if any) had he remained in employment. Accordingly, I have insufficient evidence upon which to make a finding in relation to lost remuneration.

[221] I have determined that in the circumstances of this case, it is appropriate to make a deduction from the amount awarded for lost remuneration in the amount of 75% on the basis of Mr Bird's conduct at the event on 6 December 2018 and due to his failure to take reasonable steps to mitigate the loss of his employment.

[222] An Order requiring BHP to reinstate Mr Bird to the position that he held immediately before the dismissal with effect from 6 November 2019, will issue with this Decision. The parties are directed to confer and to attempt to reach agreement on the total amount for remuneration including superannuation, lost by Mr Bird for the period from 21 February 2019 until 6 November 2019. The parties are further directed to advise the Commission of the outcome of those discussions including any agreed amount, by 6 November 2019. In the event that agreement is not reached the matter will be relisted for further hearing. If agreement is reached the amount of 75% will be deducted from the total amount and a further Order will issue requiring BHP to pay the adjusted amount to Mr Bird by 13 November 2019.



DEPUTY PRESIDENT

Appearances:

Mr L Tiley of Hall Payne Lawyers for Mr Drake.

Mr A Rich of Slater and Gordon for Mr Bird.

Mr D Mahendra of Counsel instructed by Ms D Fairbairn of Herbert Smith Freehills for BHP.

Hearing details:

Mackay.

10, 11 and 12 June.

2019.

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¹ Exhibit A1 Statement of Bradley Drake; Exhibit A2 Reply Statement of Bradley Drake.

² Exhibit A12 Statement of Leon Joseph Malone in relation to Mr Drake's case.

³ Exhibit A14 Statement of Steven Thomas Johnson.

⁴ Exhibit A11 Statement of Wayne Thomas Goulevitch in relation to Mr Drake's case.

⁵ Exhibit A7 Amended Statement of Nat Redgrave in relation to Mr Drake's case.

⁶ Exhibit A3 Statement of Andrew Bird; Exhibit A4 Reply Statement of Andrew Bird.

⁷ Exhibit A9 Statement of Wayne Thomas Goulevitch in relation to Mr Bird's case; Exhibit A10 Witness Statement in Reply of Wayne Thomas Goulevitch in relation to Mr Bird's case.

⁸ Exhibit A12 Statement of Leon Joseph Malone in relation to Mr Bird's case.

⁹ Exhibit A8 Reply Statement of Geoffrey Andrew Richards.

¹⁰ Exhibit A5 Statement of Sarah Christina Monique Builder; Exhibit A6 Reply Statement of Sarah Christina Monique Builder.

¹¹ Exhibit R1 Statement of Michael Ian Schafferius.

¹² Exhibit R3 Statement of Roderick Maunder.

¹³ Exhibit R2 Statement of Clayton Gregory Gardner.

¹⁴ Exhibit R4 Statement of Trudi Anne Lewis.

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- ¹⁵ Exhibit R1 Appendix “MS-48”.
- ¹⁶ *Allied Express Transport Pty Ltd v Anderson* (1998) 81 IR 410 at 5; *Yew v ACI Glass Packaging Pty Ltd* (1996) 71 IR 201 at 204.
- ¹⁷ *Selverchandron v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at 373.
- ¹⁸ *Rode v Burwood Mitsubishi Print R4471* at [90] per Ross VP, Polites SDP, Foggo C.
- ¹⁹ *Miller v University of NSW* [2003] FCAFC 180 at pn 13, 14 August 2003, per Gray J.
- ²⁰ *Bista v Glad Group Pty Ltd* [2016] FWC 3009.
- ²¹ *AWU-FIME v QLD Alumina Limited* (1995) 62 IR 385 at 391.
- ²² (1995) 62 IR 385.
- ²³ *Ibid* at 393.
- ²⁴ Print Q9292 [1998] AIRC 1592 (4 December 1998)
- ²⁵ (1938) 60 CLR 336; cited in *Barber v Commonwealth* (2011) 212 IR 1, 33 [93].
- ²⁶ *Ibid* at 362-363.
- ²⁷ (1992) 110 ALR 449.
- ²⁸ *Ibid* at 450.
- ²⁹ *Ibid* at 451.
- ³⁰ *Stewart v University of Melbourne* (U No 30073 of 1999 Print S2535) Per Ross VP citing *Byrne v Australian Airlines* (1995) 185 CLR 410 at 465-8 per McHugh and Gummow JJ.
- ³¹ Exhibit A1 Statement of Bradley Drake, para 8.
- ³² Exhibit A7 Statement of Nat Redgrave, para 8.
- ³³ *Ibid* para 9.
- ³⁴ *Ibid* para 12
- ³⁵ Exhibit A7 Statement of Nat Redgrave, para 15.
- ³⁶ *Ibid* para 13.
- ³⁷ Exhibit A7 Statement of Nat Redgrave Annexure “NR-2”.
- ³⁸ Exhibit A7 Statement of Nat Redgrave, para 14.
- ³⁹ Exhibit A7 Statement of Nat Redgrave, para 22.
- ⁴⁰ Exhibit A7 Statement of Nat Redgrave Annexure “NR-8”.
- ⁴¹ Transcript PN161, 163, 165 – 167.
- ⁴² Exhibit R1 Statement of Michael Ian Schafferius, para 137.
- ⁴³ Exhibit R1 Statement of Michael Ian Schafferius, para 140; see also Attachment MS-54 and MS-55 to statement of Michael Schafferius.
- ⁴⁴ Exhibit R1 Statement of Michael Ian Schafferius Attachment MS-50, MS-51, MS-52, MS-53.
- ⁴⁵ Exhibit A1 Statement of Bradley Drake, para 29 and 30.
- ⁴⁶ Exhibit A1 Statement of Bradley Drake, para 32.
- ⁴⁷ Exhibit A1 Statement of Bradley Drake, para 33.
- ⁴⁸ Exhibit A1 Statement of Bradley Drake, para 34.
- ⁴⁹ Exhibit A1 Statement of Bradley Drake, para 36.
- ⁵⁰ Exhibit A1 Statement of Bradley Drake, para 37.
- ⁵¹ Exhibit A1 Statement of Bradley Drake, para 35.
- ⁵² Letter from Applicant to Respondent dated 15 January 2019.
- ⁵³ Exhibit A13 Statement of Leon Malone, para 17.
- ⁵⁴ Exhibit A1 Statement of Bradley Drake, para 44.
- ⁵⁵ Exhibit A1 Statement of Bradley Drake, paras 47 and 49.
- ⁵⁶ Exhibit A1 Statement of Bradley Drake, para 51.
- ⁵⁷ Transcript PN236 – 237.
- ⁵⁸ Transcript PN242.

- ⁵⁹ Exhibit A3 Statement of Andrew Bird, para 16 – 20.
- ⁶⁰ Exhibit A11 Statement of Wayne Thomas Goulevitch.
- ⁶¹ Exhibit A11 Statement of Wayne Thomas Goulevitch, para 11.
- ⁶² Exhibit A11 Statement of Wayne Thomas Goulevitch, paras 13 – 14.
- ⁶³ Exhibit A9 Statement of Wayne Thomas Goulevitch.
- ⁶⁴ Ibid at para 8 – 10.
- ⁶⁵ Exhibit A10 Statement of Wayne Thomas Goulevitch.
- ⁶⁶ Transcript PN1043 – 1048.
- ⁶⁷ Transcript PN1088 – 1089.
- ⁶⁸ Exhibit A5 Statement of Sarah Christina Monique Builder, paras 12 – 16.
- ⁶⁹ Exhibit R1 Statement of Michael Ian Schafferius Annexure “MS-8”.
- ⁷⁰ Transcript PN672.
- ⁷¹ Transcript PN700 - 702.
- ⁷² Transcript PN718.
- ⁷³ Exhibit A8 Statement of Geoffrey Andrew Richards.
- ⁷⁴ Transcript PN927 – 929.
- ⁷⁵ Transcript PN2555
- ⁷⁶ Transcript PN2137 – 2141.
- ⁷⁷ Transcript PN2175.
- ⁷⁸ Exhibit R4 Statement of Trudi Anne Lewis, para 10.
- ⁷⁹ Exhibit R4 Statement of Trudi Anne Lewis, para 11.
- ⁸⁰ Exhibit R4 Statement of Trudi Anne Lewis, para 22.
- ⁸¹ Exhibit R4 Statement of Trudi Anne Lewis, para 23.
- ⁸² Transcript PN2702 – 2705.
- ⁸³ Exhibit R1 Statement of Michael Ian Schafferius, para 18.
- ⁸⁴ Exhibit R1 Statement of Michael Ian Schafferius Annexure MS-3.
- ⁸⁵ Exhibit R1 Statement of Michael Ian Schafferius Annexure MS-3.
- ⁸⁶ Exhibit R1 Statement of Michael Ian Schafferius Annexure MS-5.
- ⁸⁷ See also Ms Hughes statement at Annexure MS-7 to the statement of Michael Ian Schafferius.
- ⁸⁸ Exhibit R1 Statement of Michael Ian Schafferius Annexure MS-36; See also Ms Builder’s statement at Annexure MS-8.
- ⁸⁹ Exhibit R1 Statement of Michael Ian Schafferius Annexure MS-9.
- ⁹⁰ Exhibit R1 Statement of Michael Ian Schafferius Annexure MS-10.
- ⁹¹ Exhibit R1 Statement of Michael Ian Schafferius Annexure MS-12.
- ⁹² Exhibit R1 Statement of Michael Ian Schafferius Annexure MS-13.
- ⁹³ Exhibit R1 Statement of Michael Ian Schafferius Annexure MS-14.
- ⁹⁴ Exhibit R1 Statement of Michael Ian Schafferius Annexure MS-15.
- ⁹⁵ Exhibit R1 Statement of Michael Ian Schafferius, para 27; see also Annexures MS-16, MS-18 and MS-19 to that Statement.
- ⁹⁶ Exhibit R1 Statement of Michael Ian Schafferius, para 39; see also Annexures MS-20 and MS-22.
- ⁹⁷ Exhibit R1 Statement of Michael Ian Schafferius, para 44.
- ⁹⁸ Exhibit R1 Statement of Michael Ian Schafferius, para 48; see also Annexures MS-23 and MS24.
- ⁹⁹ Exhibit R1 Statement of Michael Ian Schafferius, para 62.
- ¹⁰⁰ Exhibit R1 Statement of Michael Ian Schafferius, para 64.
- ¹⁰¹ Exhibit R1 Statement of Michael Ian Schafferius, para 65; see also Annexures MS-28 and MS-29.
- ¹⁰² Exhibit R1 Statement of Michael Ian Schafferius Annexures MS-30.
- ¹⁰³ Exhibit R1 Statement of Michael Ian Schafferius, para 73, “MS-31”.
- ¹⁰⁴ Exhibit R1 Statement of Michael Ian Schafferius, para 76; see also Annexures MS-32 and MS-33.

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- ¹⁰⁵ Exhibit R1 Statement of Michael Ian Schafferius Annexure “MS-34”.
- ¹⁰⁶ Exhibit R1 Statement of Michael Ian Schafferius, para 93.
- ¹⁰⁷ Exhibit R1 Statement of Michael Ian Schafferius, para 94.
- ¹⁰⁸ Exhibit R1 Statement of Michael Ian Schafferius, para 96.
- ¹⁰⁹ Exhibit R1 Statement of Michael Ian Schafferius, para 106.
- ¹¹⁰ Exhibit R1 Statement of Michael Ian Schafferius, para 97.
- ¹¹¹ Exhibit R1 Statement of Michael Ian Schafferius, para 116.
- ¹¹² Exhibit R1 Statement of Michael Ian Schafferius, para 117.
- ¹¹³ Exhibit R1 Statement of Michael Ian Schafferius Annexure MS-3.
- ¹¹⁴ Exhibit A3 Statement of Andrew Bird Annexure AB-3.
- ¹¹⁵ Exhibit A9 Statement of Wayne Thomas Goulevitch, para 14.
- ¹¹⁶ Exhibit A9 Statement of Wayne Thomas Goulevitch, para 9.
- ¹¹⁷ Exhibit A11 Statement of Wayne Thomas Goulevitch, para 13.
- ¹¹⁸ Exhibit R1 Statement of Michael Ian Schafferius Annexure MS-38.
- ¹¹⁹ Applicant’s outline of submissions, para 39.
- ¹²⁰ Respondent’s outline of submissions, para 27.
- ¹²¹ Applicant’s outline of submissions, para 40.
- ¹²² Applicant’s outline of submissions, para 42.
- ¹²³ Applicant’s outline of submissions, para 21.
- ¹²⁴ *APS Group (Placements) Pty Ltd v O’Loughlin* [2011] FWAFB 5230 at paras 59–61. See also *Sexton v Pacific National (ACT) Pty Ltd* PR931440 at para. 32; *Electricity Commission of New South Wales t/a Pacific Power v Nieass* (1995) 81 IR 46, 66.
- ¹²⁵ *Sexton v Pacific National (ACT) Pty Ltd* PR931440 at para. 36.
- ¹²⁶ Applicant’s outline of submissions, para 44.
- ¹²⁷ Applicant’s outline of submissions, para 45.
- ¹²⁸ Exhibit A1 Statement of Bradley Drake, para 62.
- ¹²⁹ Exhibit A1 Statement of Bradley Drake, para 63 and 66.
- ¹³⁰ Exhibit A1 Statement of Bradley Drake, para 64.
- ¹³¹ Exhibit A1 Statement of Bradley Drake, para 66.
- ¹³² Exhibit A1 Statement of Bradley Drake, para 67.
- ¹³³ Respondent’s outline of submissions, para 26.
- ¹³⁴ Respondent’s outline of submissions, para 28; see also copies of the Just Culture Decision Tree for Mr Drake and Mr Bird at attachments MS-25 and MS-26 to Exhibit R1 Statement of Michael Ian Schafferius.
- ¹³⁵ Exhibit R1 Statement of Michael Ian Schafferius Attachment MS-3.
- ¹³⁶ Applicant’s outline of submissions, para 40.
- ¹³⁷ Respondent’s outline of submissions, paras 37 and 38.
- ¹³⁸ Respondent’s outline of submissions, para 39.
- ¹³⁹ Respondent’s outline of submissions, para 40.
- ¹⁴⁰ Exhibit R1 Statement of Michael Ian Schafferius, para 144 and 145.