DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Mr Jordan Styche
v
The Commonwealth Of Australia (Represented By The Australian Signals Directorate)
(U2021/8199)

COMMISSIONER RIORDAN SYDNEY, 19 MAY 2023

Application for an unfair dismissal remedy

[1] On 9 September 2021, Mr Jordan Styche (**the Applicant**) lodged an application for an unfair dismissal remedy (**the Application**) pursuant to s.394 of the *Fair Work Act 2009* (**the Act**). The Applicant asserted that he had been unfairly dismissed by The Commonwealth of Australia (Represented by The Australian Signals Directorate) (**the Respondent**) on 25 August 2021. The Applicant seeks reinstatement.

[2] The relevant background to this matter is contained in a previous Decision issued on 29 April 2022 [[2022] FWC 273], granting a stay of the Application until 7 November 2022, in light of ongoing criminal proceedings. Following this stay, the Application was scheduled for Hearing at Canberra on 21, 22 and 23 March 2023. I am advised that the Applicant was found not guilty in the Criminal Proceeding, however, the ACT DPP has now appealed that decision to the ACT Supreme Court.

[3] On 17 January 2023, the Respondent filed an application for an order to produce. Also on 17 January 2023, the Applicant's representative filed an application for a further stay of the proceedings.

[4] On 23 January 2023, the Respondent filed further applications for orders to produce.

[5] A Telephone Conference was scheduled on 25 January 2023 to discuss the applications for orders to produce and stay of the proceedings. Following the Telephone Conference on 25 January 2023, Directions were issued for filing of materials in relation to the applications filed by the parties.

[6] On 2 May 2023, the Applicant's representative wrote to Chambers seeking a further extension for the stay of the Commission Proceedings, due to the Court moving the date of the Appeal Hearing to 27 September 2023. The Respondent sought to be heard in relation to this further extension for the stay of the Commission Proceedings.

[7] A Telephone Hearing was conducted on 12 May 2023, at which both parties had the opportunity to provide any further oral submissions they sought to rely on.

[8] This Decision determines the applications for orders to produce as filed by the Respondent, and the application for stay of the proceedings as filed by the Applicant.

Applications for Orders to Produce

Respondent's Submissions

[9] The Respondent submitted that it seeks orders compelling the Applicant (Mr Styche), the ACT Office of the Director of Public Prosecutions (ACT DPP) and the Australian Federal Police (AFP) to produce documents relevant to these proceedings, pursuant to section 590(2)(c) of the Act (**collectively, the Production Applications**).

Background

[10] The Respondent submitted that, enclosed with the Production Applications filed to Chambers, were further supporting documents including:

(a) a statement of facts prepared by the Australian Federal Police (AFP) in connection with the charges against the Mr Styche in the criminal proceedings; and

(b) a charge sheet prepared by the AFP, in connection with the criminal proceedings.

[11] The Respondent submitted that the Production Applications were filed after the Respondent had approached the Applicant's representatives on several occasions, asking that the identified material be provided.

[12] The Respondent submitted that, except for a transcript of the decision provided on 20 January 2023, the Applicant has not provided the requested material.

Material sought

[13] The Respondent has sought production of the following categories of documents:

(a) the brief of evidence in the matter of DPP v Jordan Christopher Styche (the criminal proceedings) from the ACT DPP, AFP and Mr Styche;

(b) relevant to the First Application only, directed towards Mr Styche, a transcript of the criminal proceedings.

(c) all material relevant to the charges against Mr Styche in the criminal proceedings;

(d) relevant to the criminal proceedings, any other documents and footage in relation to:

(i) The Canberra Outlet Centre;
(ii) The Canberra Centre;

(iii) South Point Shopping Centre;
(iv) Rockwear Store (Canberra Outlet Centre)
(v) Rockwear Store (South Point Shopping Centre);
(vi) Connor Clothing Store (Canberra Outlet Centre);
(vii) Parliament Clothing Store (Canberra Outlet Centre);
(viii) Sportscraft (Canberra Centre); and
(ix) Tarocash (South Point Shopping Centre).

[14] The Respondent noted it has since independently obtained a copy of the full transcript of the criminal proceedings for the dates 31 October 2022 and 3 November 2022.

Amendments to Draft Orders to Produce

[15] The Respondent submitted that it has now had the opportunity to review the full transcript of the criminal proceedings. In light of this review, it proposed amendments to the categories of documents sought in this Application (Amended Draft Orders). The Respondent submitted that it no longer seeks orders for the Applicant to produce the transcript of the criminal proceedings. The Respondent attached Amended Draft Orders reflecting this change.

Commission's power to order production of documents

[16] The Respondent submitted that s.590(1) of the Act gives the Commission a broad procedural power to inform itself in relation to any matter before it in such manner as it considers appropriate, except as provided otherwise by the Act. The Respondent submitted that s.590(1) is to be understood as operating in conjunction with s.591, which provides that the Commission is not bound by the rules of evidence and procedure.

[17] The Respondent submitted that s.590(2)(c) of the Act provides that without limiting sub-section 590(1), the Commission can inform itself by requiring a person to provide copies of documents or records, or to provide any other information to the Commission. Pursuant to s.590(2)(c) of the Act, the Commission may, on application or of its own motion, issue orders for the production of documents.

Matters for consideration

[18] The Respondent acknowledged that the Commission's power to issue orders to produce under s.590(2)(c) is discretionary.[1] The Respondent submitted that the principles for determining whether the Commission should exercise its discretion to issue orders to produce were summarised in *Australian Nursing Federation v Victorian Hospitals' Industrial Association*[2] and adopted by the Full Bench in *Esso Australia Pty Ltd v AWU, AMWU and CEPU* (*Esso*).[3]

[19] The Respondent submitted that in *Esso*, the Full Bench relevantly stated:

> "*Matters that will guide the exercise of the discretion to require production include relevance, the particularity with which the documents or category of documents that are to be the subject of the order sought are described, the extent to which the burden placed on a person required to comply with the order is reasonable, the extent to which*

particular documents sought amount to no more than fishing, and the proper administration of justice in the sense that material that is relevant to an issue or issues that fall for determination is available to parties to enable the parties to advance their respective cases."

[20] The Respondent addressed each of the factors in *Esso* as follows:

"*(a) Relevance – material arising out of the Criminal Proceeding is directly relevant to an issue in this proceeding, namely whether:*

(i) Mr Styche engaged in the conduct that led to the charges against him in the criminal proceedings; and

(ii) engaging in this conduct constituted a valid reason for dismissal.

With respect to relevance:

(iii) The test to be applied by the Commission is whether the documents sought have an apparent relevance to the issues in the proceedings.

(iv) The issue in the proceeding is whether Mr Styche was unfairly dismissed, specifically, whether the dismissal was harsh, unjust or unreasonable. This involves a consideration by the Commission of whether there was a valid reason related to the person's capacity or conduct.

(v) To determine the existence of a valid reason for the dismissal that relates to conduct, the Commission must determine whether, on the balance of probabilities, the conduct allegedly engaged in by the employee actually occurred.

(vi) The Commission is required to make its own finding as to whether there was a valid reason for dismissal based on the evidence before it.

(vii) Ultimately, the Commission is bound to determine whether, on the evidence provided, facts existed at the time of termination that justified the dismissal, and is not limited to considering evidence that was before the original decision maker at the time of the dismissal.

(b) Particularity –the documents requested are sufficiently particularised for the parties to whom the orders are directed to identify and produce those documents.

(c) Burden – due to the particularised nature of the document request, the administrative burden on the parties to whom the orders are directed would be limited. The ASD is not aware of any other circumstances which may burden those parties from complying with such an order.

(d) Fishing – given the nature of the application ASD is responding to, being an unfair dismissal application made by Mr Styche, and where the materials requested are limited to those relevant to the issue of valid reason, fishing is not a relevant consideration.

(e) Proper administration of justice – the ASD submits that the requested materials are relevant to an issue in the proceedings, being the existence of a valid reason for dismissal. This consideration is not limited to considering evidence before the original decision maker at the time of the dismissal.

The proper administration of justice requires that the requested material be produced to the Commission, because it will:

(i) allow the ASD to be provided access to information that is relevant to its position that there was a valid reason for dismissal, and to prepare its case in response to Mr Styche's unfair dismissal application;

(ii) allow the ASD to be fully appraised of the facts of its case at the earliest opportunity, to inform its approach more broadly to these proceedings; and

(iii) assist the Commission to make the correct and preferable decision as to whether Ms Styche was unfairly dismissed, in circumstances where:

(A) the Commission is bound to determine whether, on the evidence provided, facts existed at the time of termination that justified the dismissal; and

(B) to make its own finding as to whether there was a valid reason for dismissal based on the evidence before it."

Grounds for objecting to an order for production

[21] The Respondent submitted that the Applicant has previously raised a general objection to providing the Respondent with the material requested in the application for an order against the Applicant, on the grounds that the material sought in that draft order is covered by the 'Harman Undertaking'. The Respondent submitted that it understands the Applicant's position is that the Harman Undertaking prevents him from disclosing the requested material to the Respondent without leave from the ACT Magistrates Court. However, the Respondent submitted that the Applicant has not specified whether all or only some of the requested documents are covered by the undertaking. The Respondent submitted that the scope of the Applicant's objection on this ground and the documents that are apparently covered by this undertaking is currently unclear.

[22] The Respondent made the following general submissions about the Harman Undertaking and its operation with respect to the material sought in the Amended Draft Orders:

"*The Harman Undertaking*

The Harman Undertaking refers to the decision of Harman v Secretary of State for the Home Department [1983] 1 AC 280, and the substantive legal obligation which prevents documents and information produced under compulsion in one court process, from being used for another purpose.

The High Court summarised the Harman Undertaking in the case of Hearne v Street (2008) 235 CLR 125 (Hearne v Street), as follows (emphasis added):

> *"**Where one party to litigation is compelled**, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given **unless it is received into evidence**."*

For this undertaking to apply to the material sought in the Amended Draft Orders, Mr Styche needs to demonstrate that:

(a) the ACT Police / ACT DPP (one party to litigation) were compelled to disclose each of the particular documents / information sought in the Amended Draft Orders to Mr Styche (the party obtaining the disclosure) by way of a rule or order of a Court as part of the criminal proceedings, and the Harman Undertaking therefore covers each individual category of document sought in the Amended Draft Orders; and

(b) if the Harman Undertaking does apply to each individual category of documents sought in the Amended Draft Orders (e.g, the ACT DPP / AFP were compelled to provide it to Mr Styche), that this information was not received into evidence during the criminal proceedings. If the material was received into evidence, the Harman Undertaking will no longer apply."

[23] The Respondent submitted that the Applicant has provided no evidence to support the position that the Harman Undertaking applies to each individual category of documents sought in the Amended Draft Orders, including the brief of evidence. Further, the Respondent submitted that, assuming the Harman Undertaking does apply to some or all of this material sought in the Amended Draft Orders, where the material has been received into evidence, any such undertaking ceases to operate. The Respondent submitted that, at a minimum, this means that the Exhibit Material, and the full transcript of the proceedings are not covered by the Harman Undertaking, because they have been received into evidence in open court during the criminal proceedings.

[24] The Respondent submitted that it also seeks orders for the ACT DPP and AFP to produce the same material that is sought from the Applicant in these proceedings. The Respondent submitted that, in the event the Applicant can satisfy the Commission that, as the party obtaining the disclosure covered by the Harman Undertaking he is prevented from disclosing the material, it does not follow that the same conclusion can be drawn with respect to the material sought from the ACT DPP and AFP. The Respondent submitted:

> "*That is, the Harman Undertaking as summarised by the High Court in Hearne v Street, applies to prevent the party obtaining the disclosure, from using it for any other purpose with leave of the court (unless it is received into evidence).*
>
> *As far as the ASD is aware, neither the ACT DPP nor the AFP would be considered a 'party obtaining the disclosure' of this material. As such, the Harman Undertaking does not apply to prevent these parties from using the material for another purpose, even where this has not been led in evidence (such as, potentially, the brief of evidence). It follows that leave from the Magistrates Court would also not be required for the ACT DPP and AFP to produce the documents that are sought in the Amended Draft Orders*."

[25] For all of the above reasons, the Respondent submitted that the Commission has the power and jurisdiction to issue the Draft Amended Orders and that the factors relevant to exercising the Commission's discretion favours the Respondent.

Applicant's Submissions

Jurisdictional objection

[26] The Applicant raised a jurisdictional objection in relation to the Production Applications and submitted that the correct Court hearing the Applications is the ACT Magistrates Court, being the Court where the documents were produced and to which the implied undertaking was given. The Applicant submitted that this is the only Court that may release the Applicant, the ACT DPP or the AFP from their obligations.

[27] The Applicant relied here on the decisions in *Crest Homes plc v Marks*[4] and *Holpitt Pty Ltd v Varimu Pty Ltd*[5] where Burchett J found that:

> "*It seems to me that the notice of motion should properly have been taken out in the proceedings in which the implied undertaking to the court was given. This is the course which was pursued in Crest Homes, as appears at 854. However, the parties were in agreement that I should deal with the matter on the footing that the motion was properly before me. As all the relevant proceedings were brought in the Federal Court, there seems to be no problem about this*."

[28] The Applicant submitted that in light of his jurisdictional objection, the parties are not in agreement that the Commission should hear the Production Applications and therefore, such orders cannot be made by consent, even if that option was available to the Commission. Further, the Applicant submitted that the Commission does not have the required jurisdiction to release documents that have been produced in a Court. The Applicant accepted, however, that the Commission has the required jurisdiction when releasing documents that have been produced for proceedings conducted in the Commission.

[29] The Applicant submitted that the Commission should dismiss the Respondent's applications for lack of jurisdiction.

[30] Further, the Applicant submitted that the Respondent's submissions are silent in relation to why the Commission is the appropriate jurisdiction to release the sought documents from the

Harman Undertaking, notwithstanding the Applicant put the Respondent on notice and raised this point of contention. The Applicant noted that this was reiterated at the Directions hearing before the Commission.

[31] In relation to the Act the Applicant submitted that s.590 in general, and s.590(2)(c) of the Act in particular, are not applicable in this case. The Applicant submitted that these sections confer the Commission the power to inform itself by requiring a person to provide copies of documents or records, or to provide any other information to the Commission. The Applicant submitted that these sections apply only to circumstances when the relevant documents are not restricted by the Harman Undertaking or any other confidentiality requirements. The Applicant submitted that, given the Harman Undertaking is relevant in these proceedings, s.590 of the Act is not applicable. The Applicant submitted that producing documents when the Harman Undertaking applies constitutes a contempt of the court to which the obligation is owed, and consequently, the party obtaining the documents would be prohibited from using them.

[32] The Applicant submitted that if the Commission finds that the documents can be released pursuant to s.590 the Act, the Applicant contends that the request is a fishing expedition by the Respondent, by attempting to collect evidence that could be readily available through the witnesses the Respondent may call to give evidence in the Commission proceedings.

[33] Further, the Applicant submitted that if any documents are released by the ACT DPP or the AFP, the Commission is precluded from releasing them to the Respondent based on the submissions made above.

[34] The Applicant submitted that if the Commission is against the Applicant in relation to the jurisdictional objection, the submissions below address the Respondent's submissions.

Relevant principles

[35] The Applicant submitted that he relies on the Harman Undertaking when opposing the release of the documents found in his possession and sought by the Respondent. The Applicant submitted that in Australia, this undertaking has been considered by the High Court of Australia in *Hearne v Street* (*Hearne*)[6] where it was determined that:

> "*Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence. The types of material disclosed to which this principle applies include documents inspected after discovery, answers to interrogatories, documents produced on subpoena, documents produced for the purposes of taxation of costs, documents produced pursuant to a direction from an arbitrator, documents seized pursuant to an Anton Piller order, witness statements served pursuant to a judicial direction and affidavits*."[7]

[36] The Applicant also cited the decision in *Prudential Assurance Co Ltd v Fountain Page Ltd* (*Prudential*),[8] cited with approval in *Hearne*, which considered the meaning of 'undertaking':

> "*[…] a useful purpose in that it confirms that the obligation is one which is owed to the court for the benefit of the parties, not one which is owed simply to the parties; likewise, it is an obligation which the court has the right to control and can modify or release a party from. It is an obligation which arises from legal process and therefore is within the control of the court, gives rise to direct sanctions which the court may impose (viz contempt of court) and can be relieved or modified by an order of the court.*"

[37] The Applicant submitted it is undisputed that the documents sought cannot be obtained without the ACT Magistrates Court's release. The Applicant submitted that this is a protectional measure where the Court retains control over documents that otherwise may be use for ulterior purpose by parties to proceedings or third parties. The Applicant submitted that the protection is for the benefit of the parties, in this case the Applicant, who may suffer a prejudice in relation to his criminal matter.

[38] The Applicant submitted that when determining whether the Harman Undertaking applies, the Commission must:

(a) be satisfied that there are special circumstances (as per the decision in Esso) that warrant the release of the documents. The Applicant contends that the Respondent did not show that such special circumstances are made out, either by way of submissions or evidence. The evidence that was given in the original criminal proceedings (and possibly in the appeal proceedings) can be adduced from the same witnesses in the proceedings before the Commission. There is no real impediment for the Respondent to attempt to adduce the same evidence.

(b) ensure that the dispensing power is not freely exercised.

[39] The Applicant submitted that if, despite the jurisdictional objection and the relevancy of the principles regarding the Harman Undertaking, the Commission determines that the Harman Undertaking does not apply and the documents can be released, the only documents that can be provided to the Respondent are those that were given exhibit numbers. The Applicant submitted that this proposition is not disputed by the Respondent, and it follows the decision in *Hearne*, which carves an exception regarding documents that have been admitted into evidence.

[40] The Applicant submitted that the Respondent's submissions are misconceived as the Applicant does not have to provide evidence "*to support the position that the Harman Undertaking applies to each individual category of documents sought in the Amended Draft Orders, including the brief of evidence*". The Applicant submitted that this is strictly a matter of law already determined by the High Court in *Hearne*. The Applicant relied here on his witness statement filed in support of these submissions, which outlines the documents that are in his lawyers' possession which differentiates between the documents that have been admitted into evidence by having an exhibit number, and documents marked for identification (MFI)

which cannot be captured by the Harman Undertaking as they were never admitted into evidence.

[41] The Applicant accepted that the full transcript of the proceedings is not covered by the Harman Undertaking, but for different reasons than the one outlined by the Respondent. The Applicant submitted that the transcript has not "*been received into evidence in open court*", as asserted by the Respondent. The Applicant submitted it is unclear why the transcript has been filed with the Commission as an attachment to the Respondent's submissions, and the Applicant urged that the Commission disregard the transcript and not have regard to it for the purposes of determining this application as it is irrelevant.

[42] The Applicant submitted that if the Respondent wishes to introduce the transcript as evidence at the hearing of the unfair dismissal application, it will be opposed by the Applicant, but it would have to be determined then and not in the current circumstances.

[43] The Applicant accepted that the ACT DPP and the AFP would not "*be considered a 'party obtaining the disclosure' of this material*" as they are the entities that created or sought to obtain these documents. Despite that, the Applicant submitted that the Commission "*(if it were to have jurisdiction)*" would have to ensure that the dispensing power is not freely exercised and consider whether the Applicant would suffer any real prejudice by having these documents disclosed to the Respondent.

[44] For the reasons outlined above, the Applicant submitted that the Commission should be satisfied that it does not have jurisdiction to grant the release of the documents and compel the Applicant to produce them to the Respondent.

Respondent's Submissions in Reply

[45] The Respondent submitted that the Applicant's jurisdictional objection is misconceived.

[46] The Respondent submitted that the Commission has jurisdiction to make the orders sought in the Production Applications by reason of s.590(2)(c) of the Act (as informed by s.590(1)). The Respondent submitted that the Act is a Commonwealth statute that has primacy over State and Territory legislation.

[47] The Respondent reiterated that s.590(1) of the Act gives the Commission a broad discretion to inform itself in relation to any matter before it in such manner as it considers appropriate. The Respondent cited the decision in *Damien Stephen v Seahill Enterprises Pty Ltd & Denise Fitzgibbons* (*Seahill*),[9] in which the Full Bench of the Commission observed:

> "*Section 590 of the FW Act is a provision of general application and applies to proceedings under Pt 6-4B. Section 590(1) confers on the Commission a broad procedural power to inform itself in relation to matters before it in such manner as it considers appropriate, and is to be understood as operating in conjunction with s 591, which provides that the Commission is not bound by the rules of evidence and procedure. Section 590(2)(c) specifically empowers the Commission to inform itself by requiring a person to provide copies of documents or records or other information to the*

> *Commission. It is pursuant to s 590(2)(c) that the Commission, on application or of its own motion, may issue orders for the production of documents*."[10]

[48] The Respondent submitted that the Harman Undertaking, to the extent it applies, does not (and cannot) operate to deprive the Commission of its statutory jurisdiction in the absence of clear words of necessary intendment.

[49] The Respondent submitted that, in any event, it does not seek the production of material that is in fact covered by the Harman Undertaking. However, it submitted that the Applicant has not demonstrated that:

(a) the Harman Undertaking does apply to some, or all, of the categories of documents sought in the Applications; or

(b) if the Harman Undertaking does apply to these categories of documents (which is denied), that the undertaking continues to apply and has not been waived because the relevant evidence has been led in open court.

The Harman Undertaking

[50] The Respondent noted that, as previously submitted, the nature and extent of the Harman Undertaking was summarised by the High Court in *Hearne*. The Respondent submitted that it is not the case that any document provided for the purpose of litigation is automatically covered by the Harman Undertaking. Instead, for the Harman Undertaking to apply, and protect a particular document from disclosure, it is necessary to first show that the particular document in question was produced during legal proceedings as a result of a compulsory court process.[11] The Respondent submitted that it is an order for 'production by compulsion' during proceedings that gives rise to the undertaking.

[51] The Respondent relied here on the decision in *Rowe v Silverstein*,[12] in which the Commissioner of Taxation filed four affidavits in support of an application for a Mareva injunction. Forrest J held that these affidavits were not subject to the implied undertaking, because:

> "*These affidavits were not filed in the course of a compulsory process such as witness statements or answers to interrogatories where rules of a Court or orders if a Court require the production of such material. In this case, the affidavits were filed voluntarily by the Commissioner to obtain the injunction*."[13]

[52] Similarly, in the recent Federal Court case of *Frigger v Trenfield (No 5)* (*Trenfield*),[14] Jackson J accepted the respondent's submissions that the implied undertaking did not extend to a document, including an affidavit, filed at a party's initiative and discretion rather than as a consequence of any compulsion.

[53] The Respondent submitted that where there is no compulsion, and one party is not compelled to provide a document during litigation to another party (either by reason of a rule of court, or by reason of a specific order of the court) the Harman Undertaking will not apply. If the Harman Undertaking does not apply to a document provided during litigation, the party

receiving that document does not need leave of the Court to use that document in another proceeding.

[54] While the Applicant has submitted that the Harman Undertaking applies to all the documents sought in the Production Applications and that leave of the ACT Magistrates Court is therefore required to use this material in these unfair dismissal proceedings before the Commission, the Respondent submitted that this submission does not engage with the substantive operation of the Harman Undertaking at law.

[55] The Respondent submitted that the Applicant has not provided evidence to the Commission that the Harman Undertaking applies to the material sought in the Production Applications. The Respondent submitted that such evidence is necessary for the Commission to evaluate and decide whether:

(a) the Harman Undertaking applies to some, or all, of the material sought in the Applications, and if so, which material in particular; and/or

(b) if it is the case that Mr Styche can demonstrate that the Harman Undertaking does apply to protect certain material from disclosure, whether or not that protection no longer applies because the material was led in evidence in open court.

[56] The Respondent submitted that in his witness statement, the Applicant confirms either he or his legal representatives possess the documents requested in the Applications, and that these are documents in his possession, custody or control. The Respondent submitted that the Applicant and his representatives alone know the source of the requested material (that is, whether each of the categories of documents have been received as a result of an order or rule of the court compelling the production), and therefore it was entirely within his purview to provide the Commission with such evidence. The Respondent submitted that the Applicant has forensically elected not to do so.

[57] The Respondent submitted that it cannot be simply assumed that the Harman Undertaking applies simply because the Applicant asserts that it does. The Respondent submitted that until the Applicant explains why each of the categories of documents sought are, or are not, covered by the undertaking, the Commission remains unable to determine that this is the case.

[58] Further, the Respondent submitted that there is nothing inherently confidential about a brief of evidence. The Respondent submitted that there is also no evidence that the material in the brief was produced by compulsion at or during the criminal proceedings. The Respondent submitted that the submission that any evidence was produced via compulsion in a criminal proceeding is entirely inconsistent with the accused's fundamental "*right to silence*".[15]

[59] The Respondent submitted that in this case, it assumes that the brief of evidence would have been prepared by the AFP (in this case, ACT Police), who, along with the ACT DPP, have provided this to the Applicant voluntarily and of their own initiative in support of the commencement of the criminal proceedings.

[60] The Respondent submitted that it has asked the Applicant to confirm whether this brief is covered by the Harman Undertaking – that is (applying *Hearne*), whether one party to litigation (the ACT DPP or AFP) was compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose these documents or information to the Applicant.

[61] The Respondent submitted that the Applicant has not meaningfully engaged with this question in the Response or otherwise in correspondence with the Respondent. Other than raising the jurisdictional objection, the Respondent submitted that the Applicant does not substantively dispute or engage with the Respondent's Submissions on the matters relevant to the Commission's exercise of its discretion to issue orders to produce pursuant to s.590(2)(c) of the Act.

[62] The Respondent submitted that the Applicant has also not meaningfully engaged with the Respondent's Submissions with respect to the application of the Harman Undertaking to the ACT DPP or AFP. The Respondent submitted that it is clear the material sought is relevant. The Respondent submitted that the Applicant has not provided evidence supporting a valid objection to disclosure, including based on the Harman Undertaking.

[63] In these circumstances, the Respondent submitted that the factors relevant to the exercise of the Commission's discretion to order production under s.590(2)(c) of the Act weigh in the Respondent's favour, and therefore, the orders should be made.

In the alternative – Amended draft orders

[64] The Respondent submitted further and alternatively, to the extent the Commission considers that the Harman Undertaking applies (which is denied) the Commission can and should make orders compelling production of the relevant material that is not the subject of the Harman Undertaking. The Respondent submitted that for the reasons canvassed in its initial Submissions, the material sought in the Applications is plainly relevant to the matters in dispute in this proceeding.

[65] The Respondent submitted that the Commission's orders can then be issued to recipients, including the ACT DPP and AFP, with those parties then able to raise any objections to the provision of the materials in the ordinary course.

Other matters

[66] The Respondent noted that the Applicant has stated that he does not need to provide evidence to support that the Harman Undertaking applies to the material that is sought, and states that 'this is strictly a matter of law already determined by the High Court in Hearne.' The Respondent submitted that this is wrong for the reasons outlined above.

[67] The Respondent submitted that the Applicant's Submissions also contain the statement that 'the Respondent already has a copy of the transcript as obtained independently to the Applicant for which the means of acquisition and source of authority remains unknown', with reference to the Respondent's Submission at [12]. The Respondent submitted that its Submissions at [12] clearly stated that the transcript "*was obtained with the approval of the*

ACT Magistrates Court". The Respondent clarified this to mean the "*acquisition and source of authority*" for this transcript is the ACT Magistrates Court.

[68] For all of the above reasons, the Respondent maintained that the Commission has the power and jurisdiction to issue the orders sought in the Production Applications. The Respondent submitted that the factors relevant to exercising the Commission's discretion favours the Respondent, and in the absence of evidence that the requested materials were produced by compulsion, the Harman Undertaking does not apply to the material sought in the Applications.

Application for Stay of Proceedings

Applicant's Submissions

[69] The Applicant submitted that he has made a second application to stay the unfair dismissal proceedings (**Commission Proceedings**) until after the decision of his criminal matter, now on appeal in the ACT Supreme Court (**Appeal Proceedings**), has been decided. The Applicant submitted that, as a result of a delay in the ACT Supreme Court, the matter is now listed for hearing of the Appeal on 27 September 2023.

Issues for determination

[70] The Applicant submitted that in exercising its power under s.589(1) of the Act, the Commission should consider the following factors, in accordance with the principles set out in *McMahon v Gould*:[16]

> (a) the court's task is one of 'the balancing of justice between the parties', taking account of all relevant factors;
>
> (b) The court should consider whether there is real and not merely notional danger of injustice in the criminal proceedings;
>
> (c) In this regard, factors which may be relevant include:
>
> (i) the possibility of publicity that might reach and influence jurors in the civil proceedings;
> (ii) the proximity of the criminal hearing;
> (iii) the possibility of miscarriage of justice;
> (iv) the burden on the defendant of preparing for both sets of proceedings concurrently;
> (v) whether the defendant has already disclosed his defence to the allegations;
> (vi) the conduct of the defendant, including his own prior invocation of civil process when it suited him.
>
> (**McMahon Principles**)

[71] Further, the Applicant requested that the Commission take into consideration the following factors:

(a) The Applicant's financial position;

(b) The Applicant's employment; and

(c) The Applicant's health situation.

McMahon Principles

[72] The Applicant addressed the relevant principles as below.

The proximity of the criminal hearing

[73] The Applicant submitted that the hearing of the Appeal Proceedings is likely to be set down for mid-2023, noting the Applicant's intention for the appeal to be heard expeditiously and the Court's current available dates for hearings. The Applicant submitted that the timeframe is not that significant to a degree that would cause prejudice to either party if the Commission Proceedings were to be stayed until after the Appeal Proceedings are determined.

[74] The Applicant noted that compensation under the Act is capped, therefore, the Respondent would not face any substantial prejudice by way of a greater potential remedy if the Commission Proceedings are stayed.

[75] The Applicant submitted that the Commission should be satisfied that any potential prejudice suffered by the Respondent is immaterial, and that it is heavily outweighed by the prejudice suffered by the Applicant if the Commission Proceedings were not stayed.

The possibility of miscarriage of justice

[76] The Applicant submitted that he was dismissed because he allegedly "*engaged in highly inappropriate conduct of a sexual nature*". The Applicant submitted that the Criminal Proceeding comprises an appeal of the findings of "*not guilty*" for 11 counts of "*an act of indecency without consent*". The Applicant submitted that the reason for dismissal directly relates to the alleged criminal conduct to which he has pleaded not guilty in relation to all charges.

[77] The Applicant submitted that the ground of appeal relied upon by the ACT DPP is that: "*the learned magistrate's decision to dismiss the informations [sic] should not in law have been made*". Further particulars by the Prosecution allege that Magistrate Lawton:

(a) erred in the principles of Liberato v The Queen (1985) 159 CLR 507;

(b) made findings of fact that were against the weight of the evidence; and

(c) rejected evidence and made findings of fact that were inadequate.

[78] The Applicant submitted it is thus a decision subject to a review appeal under section 2l9B(l)(a) *Magistrate's Court Act 1930* (ACT). The Applicant submitted that this avenue of

appeal is an extremely rare form of appellate jurisdiction which provides for review appeals to be brought following unsuccessful prosecutions. It allows for consideration of the evidence received by the Magistrate's Court and any further evidence called by leave of the Supreme Court. The Applicant submitted that, noting the rarity of this type of appeal, the Prosecution is indicating that in effect, this Appeal Proceeding is serious and of concern.

[79] The Applicant submitted the fact that additional evidence may be filed, even though the Prosecution currently indicates that it will not seek to put further evidence before the Court, has the potential to prejudice the Applicant where he might have to give evidence again but now in the Appeal Proceedings. The Applicant submitted that, in turn, this would have the potential to prejudice the Applicant as any evidence given in the Commission Proceedings could be used against him in the Criminal Proceeding by the Prosecution.

[80] The Applicant submitted, furthermore, the possible outcomes following a review appeal include that the Supreme Court may:

(a) dismiss the appeal if satisfied that the decision of the Magistrates Court should be confirmed; or

(b) set aside or quash, in whole or part, or otherwise vary or amend, the decision by the Magistrates Court.

[81] The Applicant submitted that a further issue to be taken into account by the Commission arises if the latter outcome was to eventuate. The Applicant submitted that in such circumstances, the Supreme Court may remit the matter to the Magistrates Court for rehearing or make any other order the Supreme Court considers necessary to decide the matter to its finality.

[82] The Applicant submitted that the possibility that the matter be remitted to the Magistrates Court is "*very real*". The Applicant submitted that, noting that the Respondent is relying upon the criminal charges as justification for the Applicant's dismissal, it is paramount that a decision of finality is reached in regard to the Appeal Proceedings before the Commission hears the matter and makes findings. The Applicant submitted that where the Supreme Court directs the appeal to be remitted, there is a "*real and highly likely possibility (albeit not certain)*", that the Applicant would give evidence in the Appeal Proceedings, noting that he gave evidence in the original Criminal Proceeding. The Applicant submitted, moreover, there is a strong likelihood and expectation that the witnesses who gave evidence in the original Criminal Proceeding would be called by the Prosecution to give evidence in the Appeal Proceedings.

[83] The Applicant submitted that if and when the unfair dismissal application is heard, the Applicant will provide a statement and give evidence in the Commission Proceedings. The Applicant submitted that if the Commission Proceedings are not stayed, the Applicant may suffer real prejudice in the Appeal Proceedings by giving evidence in the Commission Proceedings.

[84] The Applicant submitted that his right to silence exists regardless of the evidence adduced by the Prosecution in the Appeal Proceedings, and his right to silence is not affected

by that evidence. The Applicant submitted that to the contrary, he cannot conduct his unfair dismissal application unless he gives evidence before the Commission. The Applicant submitted that his claim against the Respondent could simply not be determined without the Applicant's evidence.

Common law principles regarding interim applications

[85] In addition to the McMahon Principles, the Applicant relied on his submissions dated March 2022, made in relation to the first stay application. Relevantly, the Applicant relied on his submission that the Commission must take into account the common law principles regarding interim applications. The Applicant submitted that the March 2022 submissions are relevant and applicable to this current application because:

(a) Despite the fact that now the matter is on appeal, the possibility of the witnesses being called to give evidence in the Appeal Proceedings is a real one. Consequently, it follows that the possibility of the Applicant giving evidence is just as possible. Giving evidence in the Commission Proceedings first may have a real and serious impact on the conduct of his criminal case and he would suffer a greater prejudice compared to the Respondent. Therefore, the balance of convenience favours granting the stay application. Further, the Applicant repeats his previous submission that not giving evidence in the Appeal Proceedings competes unfairly with the necessity for him to give evidence in the FWC Proceedings in order to efficiently put his case forward to the Commission.

(b) The outcome of the Appeal Proceedings will influence to a great extent the outcome of the Commission Proceedings, more so if Magistrate Lawton's decision is overturned and the Applicant is found guilty of at least one charge.

(c) The parties' time may be wasted preparing for the hearing, including any preliminary steps in the matter, if the Applicant is unsuccessful on appeal. Also, the Commission's time should not be wasted on conducting a hearing that may prove futile after the decision in the Appeal Proceedings is made.

The Applicant's financial, employment and health status

[86] The Applicant relied on his statement dated 9 February 2023 with respect to the effect of the current and concurrent proceedings on his financial, employment and health situation.

[87] The Applicant submitted that he had great difficulty to obtain employment due to his criminal charges. Since 18 May 2022, the Applicant has been employed on causal basis as a fill team member at Big W. The Applicant submitted that, given that he has struggled to obtain employment, his financial situation has been impacted and he has relied a lot on his parents' financial support.

[88] The Applicant submitted that he has not been given a formal diagnosis with respect to his mental health. However, the Applicant submitted that he is aware that his mental health has been impacted since he has been charged and his symptoms have escalated again since the Appeal Proceedings have been commenced.

[89] The Applicant submitted that, notwithstanding the above, the impact of preparing for two separate but concurrent proceedings for the Applicant who has a limited source of income is manifest. The Applicant submitted that impact is compounded by the fact that one of the proceedings is a criminal proceeding in which the Applicant potentially faces up to seven years imprisonment if found guilty, and that the Applicant has been required to sell his property and source financial support from his family to enable him to obtain legal representation.

[90] The Applicant provided the same undertaking to the Commission as in the first stay application, that is, if he is unsuccessful on the appeal, he will discontinue the Commission Proceedings.

[91] The Applicant submitted that a stay of the Commission Proceedings would significantly alleviate the impact of the concurrency of the two proceedings on the Applicant.

[92] For all of the above reasons, the Applicant submitted that the Commission should stay the Commission Proceedings until after the hearing of the Appeal Proceedings on the following grounds:

(a) the balance of convenience favours granting the stay application;

(b) the emotional and financial burden on the Applicant of preparing for both sets of proceedings concurrently;

(c) the timing of the two proceedings was not dictated by the Applicant or to his discretion, nor to his benefit, but rather to comply with the relevant limitation periods; and

(d) the Applicant's financial and health status would suffer, were the stay application not to be granted.

Respondent's Submissions

[93] The Respondent opposed the further stay application and the granting of the orders sought by the Applicant.

Background

[94] The Respondent set out a background to this matter, which relevantly included the following:

- On 13 December 2022, Magistrate Lawton of the ACT Magistrates Court handed down his decision in the criminal proceedings. Mr Styche was found not guilty and acquitted of all criminal charges against him.

- On 9 January 2023, the Director of Public Prosecutions (DPP) on behalf of the Appellant filed a Notice of Appeal in the Supreme Court of the ACT (Appeal). The Notice of Appeal seeks orders that:

    (a) the verdicts of not guilty be set aside;

(b) the proceedings be remitted for hearing to a differently constituted court; and
(c) such further or other order or orders as considered appropriate by the Court.

- On 17 January 2023, Mr Styche lodged a further stay application with the Commission.

Commission's power to grant a stay application

[95] The Respondent submitted that the power of the Commission to grant stay applications is contained within s.589 of the Act. That section gives the Commission power to make 'decisions as to how, when and where a matter is to be dealt with'.

[96] The Respondent cited the decision in *Sanford v Austin Clothing Company Pty Ltd trading as Gaz Man* (*Sanford*),[17] in which the AIRC held that:

> "*The respondent is prima facie entitled to have the matter determined as quickly as practicable. An adjournment should not be lightly entertained. The onus to make good the adjournment application lies with the applicant for the adjournment. The applicant is not entitled, of right, to an adjournment in light of the criminal proceedings. Each application for adjournment must be made on its own merits and balance the interests of the parties.*"

[97] The Respondent submitted that the onus is on the Applicant to make good the stay application. The Respondent submitted that the mere existence of concurrent criminal proceedings that concern matters relevant to the civil proceedings, does not automatically entitle an applicant to an adjournment of those civil proceedings until the criminal proceedings are resolved.

[98] The Respondent submitted that the decision in *McMahon v Gould*[18] contains various considerations that may be relevant to the Commission's consideration of whether to exercise its discretion to grant a stay application under s.589 of the Act. The Respondent noted that the McMahon Principles are set out in the Applicant's submissions and are not repeated here.

[99] The Respondent submitted that in considering the application of the McMahon Principles to matters in the Commission, the Full Bench decisions in *Visy Board Pty Ltd T/A Visy Board v Ulben Rustemovski and Fahim Ahmadyar* (*Visy*)[19] relevantly held that:

> "*(a) while the McMahon principles may be of 'some assistance, by way of broad guidance …each case must be determined having regard to its particular circumstances'; and*
>
> *(b) 'the rigid application of the McMahon guidelines…may also operate to inappropriately confine the exercise of the Commission's discretion'; and*
>
> *(c) 'ultimately, the relevant question is: what does justice require in the circumstances'*."

Respondent's submissions on the stay application

[100] The Respondent opposed the granting of the stay application on the grounds that:

> "*(a) Mr Styche has not demonstrated any real prejudice that would flow from not granting the stay application;*
>
> *(b) the ASD is experiencing real and ongoing prejudice to its interest of having the matter heard and resolved as expeditiously as possible;*
>
> *(c) the ongoing delays in this matter are prejudicing the ASD's capacity to properly prepare its case in these proceedings;*
>
> *(d) these delays are leading to the deterioration of witness evidence about matters that occurred in 2020, where this evidence is directly relevant to the Commission's consideration of whether the acts occurred and are a valid reason for dismissal;*
>
> *(e) a prejudice arises from further delays to the Commission Proceedings, where, if Mr Styche is successful in the Commissions Proceedings and is reinstated, the ASD may be ordered to pay wages not received in the interim period*."

[101] The Respondent addressed the Applicant's submissions as to the McMahon Principles as follows.

Proximity of the criminal hearing

[102] While the Applicant has sought a stay of the proceedings on the basis that "*the timeframe is not that significant to a degree to cause prejudice to either party if the FWC Proceedings were to be stayed until after the Appeal Proceedings are determined*", the Respondent submitted this submission should be rejected. The Respondent submitted that the length of the adjournment sought by the Applicant remains unclear, and orders granting the stay application should not be made where it appears that the matter may be stayed indefinitely.

[103] The Respondent submitted that as an initial point, it is not clear to the Respondent whether the Applicant intends for the current stay application to be made / the matter adjourned until:

(a) after the Supreme Court decides whether to grant the Appeal, and make the orders sought; or

(b) if the Supreme Court makes the orders, and the matter is remitted to a differently constituted court, after the decision in the remitted hearing is handed down (e.g. the criminal proceedings are resolved in their entirety).

[104] The Respondent submitted that the Applicant's submissions also conflate the anticipated date of the Appeal hearing with the date of a decision in the Appeal. The Respondent noted that even if the Appeal hearing occurs in mid-2023, it does not necessarily follow that the decision reached in the Appeal will occur on the same date. The Respondent submitted that it may be

that a decision on the Appeal is not available for some time after the Appeal hearing, and therefore, the granting of the stay application until after a decision in the Appeal will likely delay the hearing of these unfair dismissal proceedings until at least a decision in the Appeal is delivered.

[105] The Respondent submitted that in the event the Supreme Court makes the orders sought by the DPP, and the proceedings are remitted for hearing to a differently constituted court, it is also possible the matter could again be delayed until those remitted proceedings are resolved. The Respondent submitted that this would lead to a further delay in hearing these unfair dismissal proceedings, for an indeterminate amount of time.

[106] The Respondent submitted that in these circumstances, the delay that would flow from the granting of the Applicant's stay application is significant, particularly where:

> "*(a) the events leading to Mr Styche's dismissal occurred in 2020;*
>
> *(b) the unfair dismissal application was originally made on 9 September 2021; and*
>
> *(c) the length of the delay is indeterminate and unknown.*"

[107] The Respondent submitted that these delays are prejudicial, where:

> "*(a) the ASD has a legitimate interest in having this matter determined as quickly as practicable, in accordance with the principles in Sanford; and*
>
> *(b) the ongoing delays are prejudicing its ability to fully prepare its case, including by contacting, and taking statements from witnesses about events that occurred in 2020*."

[108] The Respondent submitted that the Applicant has not discharged his "*onus to make good the adjournment application lies with the applicant for the adjournment*", as he has not demonstrated how the considerations that are relevant to the Commission's discretion to grant a stay application weigh in his favour.

[109] The Respondent accepted the Applicant's submission as to compensation being capped under the Act, however, submitted that in the event the Commission made a finding that the Applicant was unfairly dismissed and that an order for reinstatement was appropriate, it is possible that it may also make an order for lost remuneration or 'backpay' because of the dismissal. The Respondent submitted that where an order for backpay remains a possible outcome of these proceedings, the Respondent is prejudiced by the ongoing delays associated with the multiple stay applications initiated by the Applicant.

[110] The Respondent submitted that in the event the Commission is minded to grant the Applicant's further stay application, the Applicant should undertake not to seek an order seeking lost remuneration for the interim periods between lodging the application, and the periods associated with the stay application, where these delays are due to stay applications initiated by the Applicant.

The possibility of miscarriage of justice

[111] The Respondent submitted that it understood the Applicant's submissions to be that he would be prejudiced if the stay application is not granted, because of:

> "*(a) the 'possibility' that the DPP might file further evidence in the Appeal, even though they have expressly stated that they will not; and*
>
> *(b) 'the real and highly likely possibility (albeit not certain)' that if the matter is remitted, Mr Styche might give further evidence in a remittal hearing;*
>
> *(c) in these circumstances, giving evidence in the Commission proceedings could prejudice him in the criminal proceedings, and prejudice his 'right to silence*'."

[112] The Respondent submitted that these submissions are entirely speculative, and no evidence is provided to support them. The Respondent submitted that the Notice of Appeal expressly states that "*the appellant [the DPP] will not seek to put further evidence before the Court*". The Respondent submitted that it is not open to the Commission to look behind this statement and speculate about the accuracy of this statement where the DPP's position is clear.

[113] The Respondent submitted that the Commission is unable to assess what prejudice the Applicant will suffer if the stay application is not granted where the apparent prejudice relates to a hypothetical situation that, based on the current evidence, will not arise. The Respondent submitted that the Applicant's statement that there is the "*real and highly likely possibility (albeit not certain)*" chance that he will give further evidence in the criminal proceedings is also speculative.

[114] The Respondent submitted that the act of the Applicant effectively reserving his position on this point, to be decided at some later date, does not demonstrate that not granting the stay application will cause him 'significant prejudice', or amount to a miscarriage of justice.

[115] The Respondent submitted that in the event the Applicant does give further evidence either in the Appeal hearing or any remitted criminal hearing, unless the Applicant is intending to change his plea or give different evidence to what he previously gave about the same events, this will be the same evidence on the same facts as have already been ventilated in open court in the criminal proceedings that concluded last year.

[116] The Respondent submitted that Magistrate Lawton referred to the evidence before the court in those proceedings as 'extensive'. The Respondent submitted that the Applicant has already given extensive evidence in the criminal proceedings, in both examination in chief and cross-examination. The Respondent submitted that extensive evidence has also been provided by witnesses about the facts underpinning the charges against the Applicant, and therefore, it is unclear what further evidence could possibly be provided in any further Appeal or remitted hearing.

[117] The Respondent submitted that the current situation involves a significant departure from the circumstances of the previous stay application, where the Applicant had yet to give any evidence in the criminal proceedings.

[118] The Respondent submitted that the McMahon Principles include the proposition that the Commission should consider whether there is a "*real and not merely notional danger of injustice in the criminal proceedings*", in determining whether to make orders granting a stay application. The Respondent submitted that the Applicant has not established that there is a real danger of injustice in the criminal proceedings if the stay application is not granted. The Respondent submitted that any risk is merely notional, based on hypothetical possibilities underpinned by limited actual evidence.

[119] The Respondent submitted that no real prejudice to the Applicant's right to silence arises where he has already given evidence on the same facts that are at issue in both the criminal and unfair dismissal proceedings. The Respondent submitted that the facts of this matter are materially similar to the case of *Mr Kun Sroung (Jason) Cheung v State of Victoria T/A Victoria Police* (*Cheung*).[20] That case involved an unfair dismissal application made by a former employee of Victoria Police. Criminal proceedings arose from the same set of alleged facts relied upon as the valid reason for dismissal. Mr Cheung applied for a stay of the unfair dismissal proceedings while the criminal proceedings were on foot. In rejecting this stay application, Commission McKinnon observed that:

> "*[8] Mr Cheung also relies on documents that are for the most part already known to Victoria Police or already on the public record. Documents relied on only in this proceeding are particular to the unfair dismissal jurisdiction, including the Commission's Unfair Dismissal Benchbook and submissions about the adjournment and merits of the application. There is no witness statement either from Mr Cheung or any other person in support of his application and from what I can see, no information that might tend to shed new light on Mr Cheung's involvement in the alleged conduct in question. In those circumstances, it is hard to identify any real prospect of substantial injustice to Mr Cheung in the criminal proceedings if the unfair dismissal application continues although I acknowledge the possibility that Mr Cheung may have chosen to adopt a different course in terms of the evidence led had the criminal proceedings now concluded*."

[120] Commissioner McKinnon also noted that there was no timetable for hearing, increasing the risk of memory fading over time, greater personal and financial resources being required of both parties, and the risk of prejudice to both parties.[21]

[121] The Respondent submitted that similar matters arise in the present matter before the Commission.

Other matters

[122] The Respondent noted that the Applicant has made further submissions regarding the 'common law principles regarding interim applications'. However, the Respondent submitted that no authority has been provided for these 'common law principles' or how they apply to the present matter.

[123] Further, the Respondent submitted that while the Applicant has made submissions with respect to his current financial status and concerns relating to his mental health, these factors do not weigh in favour of granting the stay application.

[124] The Respondent submitted that where the Applicant has already given evidence in the criminal proceedings on the same matters that will be at issue in any Appeal or remitted hearing, the burden of preparing for both sets of proceedings is limited and less than what may have previously been the case.

[125] For all of the above reasons, the Respondent submitted that the Commission should not make orders granting the stay application and that the usual orders for the timetabling of the hearing be made by the Commission.

Applicant's Submissions in Reply

[126] The Applicant confirmed that the Appeal has now been listed for 27 September 2023 in the ACT Supreme Court, therefore, the matter will not be stayed indefinitely, as submitted by the Respondent. Consequently, the Applicant contended that the stay application should be granted until whichever date foreshadowed below occurs first:

(a) If the appeal is not granted and dismissed, until after the ACT Supreme Court makes that order – as a matter of course, an order to grant or not the appeal would be expected to be made ex tempore immediately after hearing the application on 27 September 2023; or

(b) If the appeal is granted, until after the ACT Supreme Court deals with the matter to its finality, or the ACT Magistrates Court hands down its decision regarding the remitted hearing.

[127] The Applicant submitted that the outcome based on one of these two options is contingent on leave being granted in the first instance.

[128] As to the Respondent's concern that it may be exposed to an order for lost remuneration or 'backpay' because of the dismissal, the Applicant undertook not to seek an order for lost remuneration for the interim periods associated with the stay application. The Applicant submitted that this undertaking should alleviate any concerns expressed by the Respondent and give the Commission the confidence that the Respondent will not be financially prejudiced.

[129] The Applicant relied on the Commission's previous findings in relation to the same issue.

[130] While the Respondent has made extensive submissions in relation to the Applicant's potential prejudice stating that they are "*entirely speculative, and no evidence is provided to support them*", the Applicant submitted that despite the fact that the ACT DPP will not seek to put further evidence before the Court, if the matter were to be remitted, it is not indicative to the position that might be taken by the Applicant. The Applicant submitted that on that occasion, he will be able to elect to again give evidence or put the prosecution to proof in relation to the charges. The Applicant submitted that this potential outcome does not make the

Applicant's submissions speculative regarding the potential prejudice he may suffer if the Commission Proceedings are heard first.

[131] Further, the Applicant submitted that there is no evidence that the Applicant could provide in relation to potential prejudice he may suffer as that has to be assessed by the Commission as it cannot be quantified subjectively by the Applicant.

[132] The Applicant submitted that the Commission cannot disregard the potential prejudice the Applicant may suffer simply because the ACT DPP will not seek to submit further evidence. As submitted above, the Applicant's decision in relation to whether he gives evidence or not is not predicated by the lack of new evidence adduced by the ACT DPP.

[133] The Applicant submitted that there is no real increasing risk of witnesses' memory fading over time as they already gave evidence in relation to the same issues at the criminal hearing in 31 October 2022 – 3 November 2022 and their interactions with the Applicant were brief, only minutes, therefore, lacking intricate details regarding events or conversations.

[134] Further, the Applicant submitted that the Commission and both parties' resources (including financial ones) may be spared if the outcome of the appeal is not favourable to the Applicant. The Applicant reiterated his previous undertaking that he would not pursue the Commission Proceedings if the outcome of the criminal matter is not in his favour.

[135] The Applicant submitted that his main concern in these proceedings is his reduced chance to return to working within the local or federal government unless the Commission Proceedings are successful. He noted that he is a young man, and the outcome of the Commission Proceedings could have a very serious impact on his future career.

Consideration

[136] I have taken into account all of the submissions that have been provided by the parties and I have attached the appropriate weight to the evidence of the witnesses. The fact that an issue is not mentioned in this decision does not mean that it has not been taken into account.

Application for Stay of the proceedings

[137] The Commission's power to stay an application is provided under s.589 of the Act:

> "**589 Procedural and interim decisions**
>
> (1) The FWC may make decisions as to how, when and where a matter is to be dealt with.
>
> (2) The FWC may make an interim decision in relation to a matter before it.
>
> (3) The FWC may make a decision under this section:
>
> (a) on its own initiative; or
> (b) on application.

(4) This section does not limit the FWC's power to make decisions."

Determination

[138] In relation to the stay application of the Applicant, I have taken into account the decision of Gostencnik DP in *Bowker v DP World Melbourne Limited* (*Bowker*)[22] where he stated:

"*In considering whether to exercise the discretion to make a decision with the effect that the applications would not be dealt with until after judgement is delivered in the Federal Court proceeding, it seems to me appropriate that I have regard to the relevant considerations that are taken into account by the courts in considering applications of this kind. Conveniently, in Sterling Pharmaceuticals Pty Limited v The Boots Company (Australia) Pty Limited, a case concerning an application to stay a proceeding because another proceeding involving related entities operating with a degree a common management and control, were involved in earlier commenced proceeding in New Zealand, Lockhart J set out a number of considerations his Honour said were relevant to the question whether a stay ought be granted:*

> *"In my opinion relevant consideration is to be taken into account in the present case includes the following:*
>
> - *Which proceeding was commenced first.*
> - *Whether the termination of one proceeding is likely to have a material effect on the other.*
> - *The public interest.*
> - *The undesirability of two courts competing to see which of them determines common facts first.*
> - *Consideration of circumstances relating to witnesses.*
> - *Whether work done on pleadings, particulars, discovery, interrogatories and preparation might be wasted.*
> - *The undesirability of substantial waste of time and effort if it becomes a common practice to bring actions in two courts involving substantially the same issues.*
> - *How far advanced the proceedings are in each court.*
> - *The law should strive against permitting multiplicity of proceedings in relation to similar issues.*
> - *Generally balancing the advantages and disadvantages to each party*".

[139] In assessing this question asked by Lockhart J in the Federal Court of Australia above, I am satisfied and find that:

i) The Criminal Proceedings in the ACT Magistrate Court/Supreme Court were commenced before the Unfair Dismissal Application;

ii) If I were to find against the Applicant in this matter then that information would be used in the criminal proceeding;

iii) No public interest lies in dealing with this application first;

iv) Relevantly and perhaps most importantly, if the Commission were to determine this application and the Applicant is unsuccessful in the criminal case then, based on the commitment from the Applicant that he will withdraw his unfair dismissal application if he is unsuccessful in the criminal case, the Commission and the Respondent may waste a significant amount of time and money for no utility. At a time when the Australian Government is trying to save money and the Commission has limited and diminishing resources, common sense would dictate that, financially, the most prudent and efficient approach is to grant the stay application;

v) The Respondent will not be prejudiced due to any further delay in the proceeding. The Applicant has submitted that, if he is successful in this application and the remedy ordered by the Commission is compensation or if he is reinstated with backpay, he would expect the period of time awarded from both this stay application and the previous application would be discounted from any such order;

vi) Further I accept the argument from the Applicant that there is little or no chance of the witnesses forgetting any relevant evidence due to the delay. I accept the submission of the Applicant that the Applicant's alleged interaction with these witnesses was for a very short period of time.

[140] Further, the Applicant has submitted that he has been found not guilty in his criminal case. The ACT DPP has appealed this decision. I expect the Applicant to give evidence in this matter. If the transcript of the Applicant's evidence, a copy of his witness statement or any decision of the Commission in this matter were then tendered in the criminal matter, then this information may prove to be prejudicial to the Applicant. I am satisfied that the conduct and outcome of this proceeding has the real potential to be more prejudicial to the Applicant in his criminal matter compared to any prejudice which may be suffered by the Respondent due to the delay in this matter.

[141] For the reasons stated above, I grant the stay application until the Criminal Appeal Proceedings have been concluded.

Applications for Orders to Produce

[142] Section 590 of the Act relevantly provides as follows:

"**s.590 Powers of the FWC to inform itself**

(1) The FWC may, except as provided by this Act, inform itself in relation to any matter before it in such manner as it considers appropriate.

(2) Without limiting subsection (1), the FWC may inform itself in the following ways:

(a) by requiring a person to attend before the FWC;

(b) by inviting, subject to any terms and conditions determined by the FWC, oral or written submissions;

(c) by requiring a person to provide copies of documents or records, or to provide any other information to the FWC;

(d) by taking evidence under oath or affirmation in accordance with the regulations (if any);

(e) by requiring an FWC Member, a Full Bench or an Expert Panel to prepare a report;

(f) by conducting inquiries;

(g) by undertaking or commissioning research;

(h) by conducting a conference (see section 592);

(i) by holding a hearing (see section 593)."

[143] In *Kennedy v Qantas Ground Services* [2018] FWCFB 3847, a Full Bench said:

"*[23] The power conferred by s.590(2)(c) is a discretionary one to be exercised for the purpose of the Commission informing itself as to a matter before it. The Commission will be guided in the exercise of its discretion by the practice followed by courts in civil proceedings when issuing subpoenas. The documents sought must have apparent relevance to the issues in the proceedings. Access to the documents sought must be for the purpose of supporting a case which is intended to be advanced, not to explore if there is a supportable basis for a case that might potentially be advanced. The documents required to be produced must be described with sufficient particularity, and the burden of producing them must not be oppressive*".

(citations omitted)

[144] It is plainly obvious that the material sought by the Respondent will be of some relevance in this proceeding. However, I note that the alleged conduct of the Applicant appears to have occurred outside of normal business hours. The Applicant has advised he is in possession of all the documents. I am satisfied that production by the Applicant will not provide an onerous burden upon the Applicant.

[145] Further, there is no evidence before the Commission that the documents sought by the Respondent were obtained under any form or degree of compulsion by the Applicant. As such, a key element of a document being subject to a Harman Undertaking has not been satisfied.

[146] In *Cadbury Schwepps Pty Ltd v Amcor Limited* [2008] FCA 398, Gordon J said:-

"*13 However, the resolution of any tension between what would otherwise be competing and inconsistent obligations, is readily apparent; resolution lies in properly identifying*

the contents of the implied undertaking. In particular, it is necessary to recognise that the undertaking impliedly given in one proceeding not to use documents compulsorily produced in that proceeding except for the purposes of that proceeding is necessarily subject to other requirements of the law. So to take what may be a clearer example of the limits of the undertaking, the implied undertaking given in one proceeding would provide no answer to a subpoena for production of these documents in another proceeding. When a party is subpoenaed to produce documents obtained in another proceeding, it is no answer to say that "I am subject to an undertaking about how I may use these documents". The party's undertaking in the first proceeding restricts the uses to which that party may choose to put the documents. But the undertaking is no answer to otherwise valid compulsive processes of law: Esso Australia Resources Ltd v Plowman (1995) 183 CLR 10, 32, 36-37, 46. As the Court in Plowman stated (at 33):

> *No doubt the implied obligation must yield to inconsistent statutory provisions and to the requirements of curial process in other litigation, eg discovery and inspection, but that circumstance is not a reason for denying the existence of the implied obligation.*"

[147] I am satisfied that, even if the Harman Undertaking applied in this case, the undertaking does not prohibit the production of these documents because the production is a "*valid compulsory process of law*".

[148] I am satisfied that the implied undertaking, known as the Harman Undertaking, is not relevant in this circumstance. There is no evidence before the Commission which would indicate that the material sought by the Respondent was received by the Applicant under a compulsory process. Further, the Commission has very broad powers under s.590 of the Act. I am satisfied that the documents sought by the Respondent will be relevant to these proceedings.

[149] I am satisfied that the Applicant will not be prejudiced in his criminal matter by producing these documents. These documents are already before the Courts in his criminal matter, so no further prejudice can possibly eventuate by producing them to the Commission. Further, as a result of my earlier decision on the Applicant's stay application, these documents will not be before the Commission until after the Applicant's criminal matter has been concluded.

Conclusion

[150] The Applicant is facing very serious criminal charges. In my view, the Applicant should be able to focus on that proceeding to the exclusion of any civil proceeding. Based on the obiter in *Bowker* and the reasons identified above, I am satisfied and find that a 'stay' of the application before the Commission, until the decision of the Criminal Appeal is known, is fair and appropriate.

[151] I Order that the Applicant produce the documents as identified in the Respondent's draft order to produce by 12 noon on 30 June 2023. An Order to this effect will issue separately to this Decision.

[152] On the basis that the Applicant has advised that he has all of the requested documents, no order has been issued against ACT DPP or ACT Police.

[153] I so Order.

COMMISSIONER

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[1] *Esso Australia Pty Ltd v AWU, AMWU and CEPU* [2017] FWCFB 2200.

[2] [2011] FWA 8756.

[3] [2017] FWCFB 2200.

[4] [1987] AC 829 at 854.

[5] [1991] FCA 354 at [2].

[6] (2008) 235 CLR 125, [2008] HCA 36.

[7] Ibid at [96].

[8] [1991] 3 All ER 878 at 885.

[9] [2021] FWCFB 2623.

[10] Ibid at [60].

[11] See *Harman v Secretary of State* [1983] 1 AC 280 (Harman); see also *Frigger v Trenfield (No 5)* [2020] FCA 827 (*Trenfield*) (citing (at [30[) *Davey v Silverstein* [2019] VSC 724 (Richards J, relying on *Hearne and Bashour v Australian and New Zealand Banking Group Limited* [2017] FCA 163) (Bashour)).

[12] [2009] VSC 157.

[13] Ibid at [25].

[14] [2020] FCA 827.

[15] The Respondent submitted: for a discussion of the nature of that right, see *Sanchez v R* (2009) 196 A Crim R 472 at [47]–[52].

[16] (1982) 7 ACLR 202.

[17] Dec 881/00 M Print S8287.

[18] (1982) 7 ACLR 202.

[19] [2018] FWCFB 1255.

[20] [2020] FWC 4401.

[21] Ibid, at para [9].

[22] [2014] FWC 7326.