



# DECISION

*Fair Work Act 2009*  
s.394—Unfair dismissal

**Joe Sleiman**

v

**Illawarra Coal Holdings Pty Ltd T/A South32**  
(U2023/4076)

COMMISSIONER P RYAN

SYDNEY, 15 APRIL 2024

*Application for an unfair dismissal remedy*

## Introduction

[1] Mr Joe Sleiman (**Applicant**) has made an application to the Fair Work Commission (**Commission**) under s.394 of the *Fair Work Act 2009* (Cth) (**FW Act**) for a remedy, alleging that he had been unfairly dismissed from his employment with Illawarra Coal Holdings Pty Ltd (**Respondent**).

[2] The Applicant was employed as an Operator at the Appin Colliery and West Cliff Coal Preparation Plant (**Appin Mine**).

[3] On 23 March 2023, the Applicant was the driver of a Personnel Transport Vehicle – also known as a Driftrunner or SMV (**SMV**) – which was involved in an incident at Appin West Pit Bottom.

[4] Following an investigation, the Respondent dismissed the Applicant on 1 May 2023. In support of its decision to dismiss the Applicant, the Respondent relies on four instances of misconduct arising out of the incident:

- (i) That the Applicant drove the SMV through a shared zone and continued to accelerate the SMV, travelling at unsafe speeds in excess of 10km per hour;
- (ii) That the Applicant lost control of the SMV as it rounded a corner causing the vehicle to slide in an uncontrolled manner for a short period;
- (iii) That following the incident, the Applicant failed to adequately answer a Deputy’s questions as to whether the Applicant was driving the SMV and about the Applicant’s driving of the SMV; and

- (iv) That the Applicant failed to report the incident at any time after it occurred, before being informed by the Respondent that the incident would be subject to an investigation.

[5] The Commission conducted an inspection of the Appin West Pit Bottom on 15 September 2023. The inspection included travelling in the same SMV<sup>1</sup> that was driven by the Applicant on 23 March 2023 around the Appin West Pit Bottom Loop Road, down an access road known as the “Drift”, and for a short distance through the mine before returning to Appin West Pit Bottom.

[6] The matter was heard before me on 10, 11 and 25 October 2023.

[7] I exercised my discretion to grant permission to the parties to be represented by a lawyer, as I was satisfied as to the matters set out in s.596(2)(a) of the FW Act. The Applicant was represented by Mr A Howell. The Respondent was represented by Mr B Rauf.

[8] Witness statements were tendered from the following persons, who each gave evidence at the hearing except for Mr Drury:

- The Applicant (**Exhibit A1** and **Exhibit A2**);
- Mr Adam Fuller, employed by the Respondent as an Operator: (**Exhibit A5** and **Exhibit A6**);
- Mr Paul Wilton, employed by the Respondent as an Operator: (**Exhibit A7** and **Exhibit A8**);
- Mr Christopher Williams, employed by the Respondent as a Mechanical Specialist: (**Exhibit A9**);
- Mr Bradley Drury, employed by PPK Mining Equipment as the Engineering Manager (**Exhibit R1**);
- Mr Benjamin Patten, employed by the Respondent as a Mining Engineering Manager (**Exhibit R2** and **Exhibit R3**);
- Mr Andrew Hyslop, employed by the Respondent as the General Manager of the Appin Mine (**Exhibit R5**);
- Mr Gareth Caswell, employed by the Respondent as a Production Manager (**Exhibit R6**);
- Mr James Hudson, employed by Nexus Mining as a Level 3 Mineworker based at the Appin Mine (**Exhibit R7**); and
- Mr Murray Richardson, employed by the Respondent as a Statutory Deputy (**Exhibit R9**).

[9] The following documents were admitted into evidence:

- A letter from the Applicant to Mr Clinton Page, Manager Production dated 10 July 2014 (**Exhibit A3**);
- A document titled “Correction Joe Sleiman” (**Exhibit A4**);
- A document titled “BP41 ICAM Revised Copy” being an amended version of Annexure BP41 to Exhibit R2 (**Exhibit R4**); and
- A map of Appin Mine Pit Bottom marked by Mr James Hudson (**Exhibit R8**).

[10] The following submission documents were marked for identification:

- The Respondent’s Objections to Statements (**MFI 1**);
- A document titled “Patten BP6 Video – Applicant’s Aide Memoire” (**MFI 2**); and
- A document titled “Analysis of Applicant’s Earnings” (**MFI 3**).

**When can the Commission order a remedy for unfair dismissal?**

[11] Section 390 of the FW Act provides that the Commission may order a remedy if:

- (a) the Commission is satisfied that the Applicant was protected from unfair dismissal at the time of being dismissed; and
- (b) the Applicant has been unfairly dismissed.

[12] Both limbs must be satisfied. I am therefore required to consider whether the Applicant was protected from unfair dismissal at the time of being dismissed. If I am satisfied that the Applicant was so protected, I must then consider whether the Applicant has been unfairly dismissed.

**When is a person protected from unfair dismissal?**

[13] Section 382 of the FW Act provides that a person is protected from unfair dismissal if, at the time of being dismissed:

- (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
- (b) one or more of the following apply:
  - (i) a modern award covers the person;
  - (ii) an enterprise agreement applies to the person in relation to the employment;

- (iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

### **When has a person been unfairly dismissed?**

[14] Section 385 of the FW Act provides that a person has been unfairly dismissed if the Commission is satisfied that:

- (a) the person has been dismissed; and
- (b) the dismissal was harsh, unjust or unreasonable; and
- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
- (d) the dismissal was not a case of genuine redundancy.

### **Relevant Background**

[15] The Appin Mine is an underground metallurgical coal mine located in the Wollondilly region of New South Wales, consisting of three pit top locations (or portals) – Appin West, Appin East and Appin North and a coal preparation plant known as the Westcliff Washery.<sup>2</sup>

[16] The extraction of coal is undertaken by longwall mining and roadway development. Once the coal is brought to the surface and washed, it is transported to BlueScope Steelworks for steelmaking or to Port Kembla Coal Terminal for export.<sup>3</sup>

[17] The Applicant commenced working at the Appin Mine with PYD Contracting on 20 June 2004. On 12 November 2004, the Applicant commenced employment with Delta Mining Pty Ltd.<sup>4</sup>

[18] On 2 October 2006, the Applicant commenced full-time employment with the Respondent in the role of Operator.<sup>5</sup> The Applicant's role primarily involved the driving, or operation of, continuous miners, coal trams, and mine transport vehicles used to transport crew and materials in and out of the mine pit.<sup>6</sup>

[19] In addition to his role as an Operator:

- (i) the Applicant was appointed as a Site Safety Health Representative (**SSHR**) at the Appin Mine pursuant to Division 3 of Part 5 of the *Work Health and Safety (Mines and Petroleum Sites) Act 2013*;<sup>7</sup> and
- (ii) the Applicant is the President of the Appin Lodge, a division of the Mining and Energy Union (**MEU**). The Appin Lodge represents approximately 460 members who are employed by the Respondent. In the role of President, the Applicant represents the industrial interests of members on a range of issues including enterprise agreement entitlements, pay disputes, rostering disputes, safety issues and incidents and disciplinary matters.<sup>8</sup>

[20] Both parties accepted,<sup>9</sup> and it is plainly obvious, that underground mining operations are inherently dangerous workplaces. To that end, the Respondent has implemented a range of work, health and safety conditions, requirements, policies, and procedures directed at ensuring the safety of all persons that attend the work site, whether underground or on the surface, some of which are overarching in nature, while others apply to a specific location within the site, a specific piece of equipment or plant, or a particular function.

[21] The Applicant's contract of employment includes the following conditions of employment:<sup>10</sup>

Safety Policy: *It is a condition of appointment for all employees to comply with the company safety policy rules and procedures at all times to work in a safe manner.*

...

*I also understand and accept that it is a further term and condition of employment that I:*

- 1. Obey all lawful directions and instructions given by the employer.*
- 2. Obey all safety and health rules and requirements prescribed by the employer.*
- 3. Where and use on-the-job such safety equipment and clothing as provided by the employer.*
- 4. Report for work regularly.*
- 5. Complete from time to time other documentation relevant to their normal work.*
- 6. Understand that the following actions on the employers plant are forbidden (known as the Cardinal Rules). A breach of these rules will result in disciplinary action and may lead to dismissal:*

...

- v) ***Safety is a condition of employment. All accidents and incidents are to be reported.***

*No deliberate concealment of significant accident or incident information.*

*No reckless, threatening or violent conduct.*

*No riding conveyors.*

*No ignoring isolation (danger tag) procedures.*

- 7. Undergo a medical examination at the expense of the employer as per the Coal Mines Regulation Act.*
- 8. Maintain acceptable work performance at all times.*
- 9. Will be bound by the Appin Mine Workers Agreement 2004.*
- 10. Comply with Company policies and procedures, as varied from time to time.*

(Emphasis in original)

[22] In operation at all material times were the *Illawarra Metallurgical Coal Workplace Health and Safety Obligations (IMC WHS Obligations)* and the *South32 Code of Business Conduct (South32 Code)*.

[23] The IMC WHS Obligations relevantly provide as follows:

*All workers and visitors of Illawarra Metallurgical Coal have health and safety obligations, including:*

- a. taking reasonable care for your own health and safety and not do, or omit to do, anything that would adversely affect the health and safety of others on site;*
- b. complying with all instructions, safety and legal directions in company policies and procedures;*
- ...*
- e. ensuring you use incomplete risk and Hazard identification tools. If a hazard is identified and unable to be controlled using the risk and Hazard identification tools, you must stop work and report the hazard to the relevant supervisor immediately.*
- ...*
- h. understanding and complying with the South32 Code of Business Conduct.*<sup>11</sup>

(Emphasis added)

[24] The South32 Code requires all persons on site to be aware of, and comply with, the Respondent's health and safety standards, procedures and practices. Furthermore, the South32 Code requires persons to "*stop work and report if [they] consider a task unsafe and to Speak Up if the health or safety of anyone else is at risk.*"<sup>12</sup>

#### Appin West Pit Bottom

[25] In relation to the Appin West Portal, the workers are transported underground by an elevator (also known as a winder or a cage) to Appin West Pit Bottom.<sup>13</sup>

[26] Appin West Pit Bottom is the access point to underground operations and houses various infrastructure including a crib room, the parking lane for SMV's (also known as the 'Go-Line'), diesel refueling points, and a supply storage area.<sup>14</sup>

[27] There is a road that runs through Appin West Pit Bottom known as the Loop Road. The Loop Road is one-way and is approximately 650 metres long. The Respondent has implemented a number of safety and operational controls along the Loop Road at Appin West Pit Bottom such as a traffic lights, signage and a shared pedestrian and vehicle zone (**Shared Zone**).<sup>15</sup>

[28] The Shared Zone was implemented in 2010<sup>16</sup> and is a straight concreted section of the Loop Road and includes the designated SMV parking lane/Go-Line and diesel and water supply points. Located approximately two-thirds of the way along the Shared Zone is an access path

to the cage. Upon arrival at Appin West Pit Bottom, workers exit the cage and walk along an access path to the Shared Zone and then to their allocated SMV to be transported to their work area via the 'Drift'.<sup>17</sup>

[29] While pedestrians can be present at Appin West Pit Bottom at any time, at shift changeovers there can be extensive pedestrian traffic as the incoming shift workers arrive underground and the outgoing shift workers exit the mine.<sup>18</sup>

[30] In 2016, the Respondent implemented the *Roads or Other Vehicle Operating Areas Principal Hazard Management Plan Appin Colliery (Roads HMP)*.<sup>19</sup> Section 4.2 of the Roads HMP sets out a range of controls for vehicle operations underground. The revision log of the Roads HMP records that it was amended on 12 November 2019 to include the Shared Zone sub-section.<sup>20</sup>

[31] Section 4.2.2.1 of the Roads HMP is titled 'Shared Zones' and states:

#### **4.2.2.1 Shared Zones**

a) *A shared Zone is an area within an underground roadway where high levels of pedestrian and vehicle interactions occur. Additional controls have been implemented and hard barriers separate pedestrians from vehicles. The following areas are considered to be a 'Shared Zone':*

- *Appin West Pit Bottom*

b) *Due to the possibility of a moving vehicle within the pedestrian no go zones, additional controls for a shared zone include:*

- *well-lit area,*
- *concreted floor,*
- *low vehicle speeds,*
- *hard barriers separating pedestrian and vehicles and*
- *designated driving / parking / walking areas.*<sup>21</sup>

[32] The Roads HMP also provides that personnel operating mobile equipment shall:

- Carry a radio and to be contactable by the control room operators;
- Ensure lights are operational;
- Ensure operators and passengers wear seatbelts and keep body parts within the confines of the vehicle when it is in operation;
- Complete pre-operational inspections and rectify defects prior to use;
- Slow down and stop vehicles at least 10 metres from a pedestrian and allow the pedestrian to walk 10 metres past their vehicle before moving on; and

- Observe signs, directions and any specific procedural requirements such as the use of radios underground.<sup>22</sup>

[33] In his SSHR role, the Applicant was involved in reviewing and developing some of the additional controls that were implemented in the Shared Zone.<sup>23</sup>

[34] In addition to the Roads HMP, the Respondent has implemented a set of policies and procedures known as the *Standard – Equipment No Go Zones (Equipment Standard)*.<sup>24</sup> The Equipment Standard was implemented in or about March 2019 and is an amalgamation of former policy documents. The purpose of the Equipment Standard is to clearly define zones in and around equipment at the Appin Mine where access for personnel is restricted, as a control against unplanned interactions between personnel and machines and exposure to airborne contaminants. The Equipment Standard applies to equipment both on the surface and underground.<sup>25</sup>

[35] On 19 August 2019, the Respondent issued a direction to all employees across all shifts that vehicles driving in the Shared Zone are required to be operated in first or second gear. The direction was set out in an Appin Mine Start of Shift Brief document and states:<sup>26</sup>

*Message:*

*To reduce the risk of pedestrian and vehicle interactions at Appin West Pit Bottom a designated pedestrian standing zone has been installed.*

*The standing zone is located between yellow posts and the redlined and is signposted.*

*The standing zone is not designed to be a walkway for pedestrians.*

*Pedestrians can stand in the standing zone in a place of safety alone vehicle to drive past.*

*If pedestrians are not standing in the standing zone then vehicles must stop and allow the pedestrians to walk past before proceeding.*

**All vehicles are to drive in 1<sup>st</sup> or 2<sup>nd</sup> gear with Caution through the Pit Bottom Area.**

(Emphasis added)

[36] In November and December 2019, modifications were made to the steel bollards in the Shared Zone and signage was installed stating, “Use 2<sup>nd</sup> Gear Or Lower”.<sup>27</sup> The signage can be seen in a video of the Loop Road which was annexed to the statement of Mr Patten.<sup>28</sup>

[37] The review history of the Equipment Standard records that it was modified on 27 November 2019 for the reason of “Addition of Shared Zone requirements”.<sup>29</sup>

[38] In respect to the Shared Zone, the Equipment Standard states:<sup>30</sup>

### ***3. Definitions***



**Shared Zone** A Shared Zone is an area within an underground roadway where high levels of pedestrian and vehicle interactions occur. Additional controls have been implemented and hard barriers separate pedestrians from vehicles.

...

#### 4.3.2 Shared Zone Operation

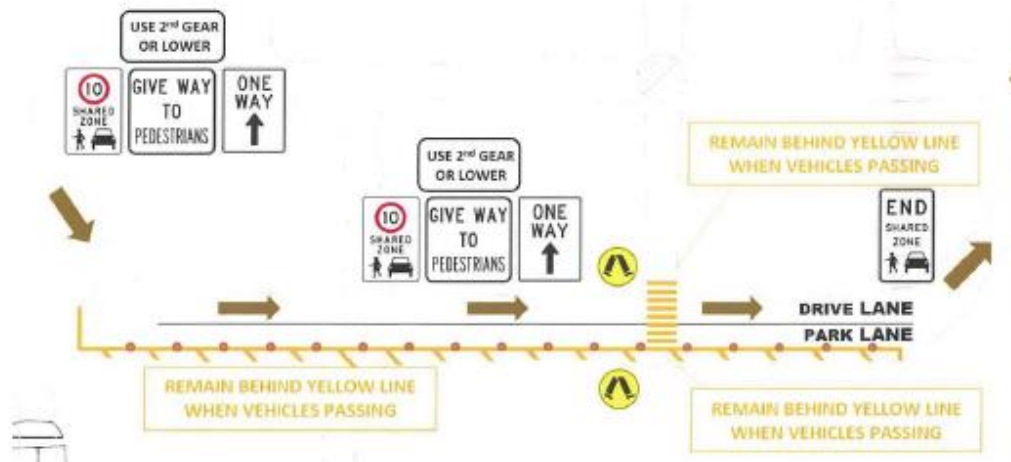
A Shared Zone is an area within an underground roadway where high levels of pedestrian and vehicle interactions occur. The following areas are identified and marked as a 'Shared Zone'

- Appin West Pit Bottom

Additional controls for a shared zone include:

- Well-lit area
- Concreted floor
- Low vehicle speeds
- Hard barriers separating pedestrian and vehicles
- Designated driving / parking / walking areas.

[39] Immediately below section 4.3.2 of the Equipment Standard is the following diagram:<sup>31</sup>



[40] Notwithstanding the implementation of these policies and controls, there was some dispute between the parties as to whether operators of vehicles, including SMV's, are required to use second gear or lower in the Shared Zone, and whether signage to that effect was displayed immediately before the start of, and throughout the Shared Zone as at 23 March 2023.

[41] In their evidence before the Commission, Mr Fuller and Mr Wilton both stated that they could not recall any signage requiring the use of second gear or lower other than immediately prior to entering the Drift and stated that operators regularly drove SMVs throughout Appin

West Pit Bottom in third gear as it was a smoother ride and the SMV can still be driven at a slow speed.<sup>32</sup>

[42] The Applicant stated that he could not recall whether there was signage stating “*Use 2<sup>nd</sup> Gear Or Lower*” at the commencement of the Shared Zone and that the only location that he could recall that signage was immediately prior to entering the Drift.<sup>33</sup>

[43] The Applicant stated that there was no “*hard and fast rule*” requiring operators to drive SMVs in second gear or lower in the Shared Zone. The Applicant further stated that SMV’s were regularly driven around Appin West Pit Bottom (including the Shared Zone) in third gear as it was “*less jerky*” and the SMV can be driven at walking pace or under 10km per hour in third gear.<sup>34</sup>

[44] However, that evidence is inconsistent with the Applicant’s evidence that he believed the second gear or lower signage was referring to Load-Haul-Dump Loaders (LHDs), which suggests the Applicant was aware of the signage.<sup>35</sup> It is also inconsistent with Mr Patten’s evidence that during the investigation the Applicant confirmed that operators “*should drive at 2 gears normally*”.<sup>36</sup>

[45] The Applicant also participated in risk assessments undertaken over the period of 12 November 2019 to 21 November 2022 to review and verify the adequacy of risk controls for the operation of mobile equipment underground and on the surface at the Appin Mine.<sup>37</sup>

[46] Furthermore, annexed to Mr Patten’s witness statement is a map of the Appin West Pit Bottom identifying the location of various signs<sup>38</sup> and video footage of an SMV travelling the Loop Road which was taken on 3 April 2023 as part of the investigation.<sup>39</sup>

[47] Having regard to the evidence before me, I find that:

- The Respondent implemented a policy that operators of SMV’s must drive vehicles in first or second gear within the Shared Zone in 2019;
- The Respondent communicated that policy to employees and contractors from 2019 onwards through the Appin Mine Start of Shift Brief document, the Equipment Standard, and signage stating “*Use 2<sup>nd</sup> Gear Or Lower*” located immediately before the start of, and throughout, the Shared Zone; and
- The Applicant was aware that he was required to operate SMVs in second gear or lower within the Shared Zone and such other areas throughout Appin West Pit Bottom designated by signage.

#### Driftrunners/SMV’s

[48] A Driftrunner or SMV is a four-wheeled, diesel engine-powered, rubbered-tyred vehicle which is typically used for transporting personnel in and out of mines.<sup>40</sup>

[49] An SMV has three gears which work on forward and reverse travel and has a maximum operating speed of 35km per hour. However, the rate of acceleration and top speed of an SMV

can be affected by the number of passengers, the type and condition of the tyres, road conditions and environmental conditions. The tare mass for an SMV is 5,900 kilograms.<sup>41</sup>

[50] There are different configurations of SMV's. The configuration for SMV CMG046 has two seats in the front cab and seating facing inwards for 10 passengers in the rear.<sup>42</sup>

[51] The Applicant was trained in the correct and safe operation of an SMV, including driving the vehicle to suit road conditions, selecting the correct gear and slowing down when approaching corners, crib rooms and men at work.<sup>43</sup>

[52] The Applicant also trained and assessed other workers in the correct and safe operation of mining vehicles, including SMVs.<sup>44</sup>

### Dust Suppressant and Watering

[53] The Respondent hoses down the Shared Zone to ensure it is clean and safe for vehicles and pedestrians. This usually occurs three times per day between the morning, afternoon and night shifts.<sup>45</sup> To minimise dust at Appin West Pit Bottom, the Respondent applies salt to the roads or adds a dust suppressant to the water when watering the unsealed roads. The use of the dust suppressant can make the roads slippery.<sup>46</sup>

### Qualitative Risk Assessments

[54] The Respondent also undertakes risk assessments to review and verify the adequacy of risk controls for operation of mobile equipment underground and on the surface at the Appin Mine.<sup>47</sup>

[55] The risk assessment is reviewed and revised on a periodic basis as well as following any significant incident.<sup>48</sup>

[56] In his capacity as a SSHR, the Applicant participated in the assessments undertaken over the period of 12 November 2019 to 21 November 2022.<sup>49</sup>

[57] The most recent Risk assessment was completed on 21 November 2022. The risk assessment records that it was facilitated by Mr Nick Mottee and the person responsible for the risk assessment was Mr Patten.<sup>50</sup>

[58] The risk assessment identifies speed as a direct or contributing cause to the risk of "collisions with vehicles and people". The underground controls indicated for this risk include:

5. *Signage and signalling (Block light sections)*
6. *Transport rules*
7. *1-way system at pit bottom*
- ...
9. *Speed limiting vehicles.*<sup>51</sup>

[59] The risk assessment also identifies the risk of “loss of vehicle control and possible impact” with the direct or contributing cause being “slippery road conditions”. The underground controls indicated for this risk include:

1. *Control of water on roads*
2. *Concreting of selected areas*
3. *Operator and driver awareness in the application and location of dust suppressants*
4. *Communication of slippery areas via control.*<sup>52</sup>

#### Applicant’s Disciplinary History

[60] There was no dispute that the Applicant has an extensive disciplinary history which was summarised in the evidence of Mr Hyslop as follows:<sup>53</sup>

- 30 April 2007 – the Applicant was counselled about causing a reportable incident by tying a rear light to a machine in an attempt to keep work going, in breach of the Respondent’s safety requirements;
- 14 May 2008 – the Applicant was counselled about his operation of Man Transports at shift change, which resulted in the Applicant’s rubber tyre vehicle (**RTV**) tickets being revoked for a period of 2 weeks;
- 30 July 2009 – the Applicant was counselled about deliberately driving a vehicle with a flat tyre to pit bottom and directed to work to the Respondent’s procedure in future;
- 22 December 2011 – the Applicant was counselled for leaving site without permission;
- 15 March 2012 – the Applicant was counselled for attending work late at 6.30am and did not attend his underground duties;
- 4 May 2012 – the Applicant was counselled for leaving site without permission;
- 28 February 2013 – the Applicant was counselled in relation to his harassment of workers at the Appin Mine by calling them “scabs”;
- 24 December 2023 – the Applicant was counselled following a safety incident involving a cable hanger which resulted in equipment damage;
- 3 July 2014 – the Applicant was asked to show cause and counselled for telling employees to “chuck a sickie” in a shift briefing. In relation to this conduct, the Applicant wrote a letter of apology to the then Production Manager of the Appin Mine.<sup>54</sup> The Applicant also prepared a statement on Appin Lodge letterhead which was posted on a noticeboard at the Appin Mine which stated that his comments were intended as a joke and that all employees are to comply with their contract of employment, the enterprise agreement and the Respondent’s policies;<sup>55</sup>

- 23 August 2017 – the Applicant was counselled for inappropriate behaviour in the workplace which included calling out “bullshit” and making derogatory and inappropriate remarks during Risk and Change Management Training.
- 5 February 2018 – the Applicant was counselled for disruptive and inappropriate behaviour arising from him seeking to raise grievances in a group setting during the shift briefing, rather than complying with the Respondent’s grievance procedures;
- 26 July 2018 – the Applicant was issued with a written warning for conduct in the workplace on 11 July 2018 and 23 July 2018, at which time he:
  - Sought and obtained permission to attend a meeting after a Supervisor had previously declined to give you permission to attend for operational reasons; and
  - Behaved in a disruptive and disrespectful way during the start of shift briefing.
- 14 August 2018 – the Applicant was issued with a Final Written Warning arising from your noncompliance with the Respondent’s PPE standard and disrespectful behaviour towards Supervisors, Jeff Henderson, Trent Smith and Richard Johnson;
- 10 September 2019 – the Applicant was issued with a Final Written Warning arising from a failure to follow management direction and adequately prepare to proceed Underground. The Applicant was subsequently placed on a 6-month performance improvement plan;
- 12 November 2019 – the Applicant was counselled in relation to a breach of confidentiality following his participation in an investigation interview as a support person; and
- 9 November 2020 – the Applicant was issued a Final Written Warning arising from writing disparaging comments on a Code of Business Conduct training record. The Applicant was placed on a further 6-month performance improvement plan.

[61] Mr Hyslop stated that between late October 2022 and late January 2023, the Applicant exhibited further behaviour which was unacceptable, inappropriate, or in breach of the Respondent’s expectations, policies and procedures.<sup>56</sup> This prompted Mr Hyslop to send correspondence to the Applicant on 7 March 2023 which was titled “Disciplinary record and statement of behavioural expectations” (**Expectations Letter**).<sup>57</sup>

[62] The Expectations Letter summarised the Applicant’s disciplinary history (see [60] above), as well as setting out the more recent matters as follows:<sup>58</sup>

1. ***Inappropriate towards Leader.** In late October 2022 you were overheard in the Appin West muster room talking disrespectfully and swearing at Undermanager Ben Brennan. During this interaction your conduct was unacceptable and was loud enough to be*

*heard and offended several employees working in offices nearby. I addressed the behaviour with you at the time and following this discussion you apologised to the employees for your conduct.*

- 2. *Finishing shift early/exiting mine without prior permission.*** *On 19 December 2022 you exited the mine at 3.00pm one hour earlier than your shift finish time of 4.00pm. You did so in circumstances where you were aware that you were required to seek prior permission to exit the mine early, and failed to do so. This incident forms part of a long history of instances of you finishing work early/leaving site without permission, as outlined below.*
- 3. *Failing to comply with evidence requirements for from work.*** *You were absent from 3 to 5 January 2023. Upon return work, you failed to provide any evidence for this absence. It is a requirement under the Enterprise Agreement that greater than two rostered shifts requires evidence be provided. Additionally, communicated to employees each public holiday, the Company requires medical evidence to be provided for before or after public holidays.*
- 4. *Absent without approved leave.*** *When requested by Gareth Caswell, Production Manager on Wednesday 25 January 2023 to attend a meeting on Monday 30 January 2023 you advised that you would be unable to attend as you were on Annual leave. Upon review of your approved leave application, your leave commenced on Wednesday 1 February 2023. You did not apply or have approved leave from work on 30 and 31 January 2023. You failed to attend for these shifts or provide any evidence for this absence. Additionally, as communicated to employees each public holiday, the Company requires medical evidence to be provided for absences before or after public holidays.*

[63] The Expectations Letter further stated:

***Statement of behavioural expectations***

*If there is any further breach of South32's standards of behaviour it is certain that further consideration will be given to termination of your employment.*

*With that in mind one purpose of this letter is to emphasise why it is important that you do comply with South32's behavioural standards in place at the Appin Mine, and to make it clear that South32 will be unable to tolerate any further breach in this regard.*

*As the President of the Appin Lodge, and a Site Safety and Health Representative you have an important role to play in relation to the raising of issues within the workforce and the protection of employees' rights. This role is and has always been respected by South32. It is an important role which contributes to the safety and wellbeing of the Appin workforce.*

*However, a consequence of you holding these positions, you are also a role model within the workforce. Other employees may look to and follow your example in relation to standards of behaviour in the workforce.*

*Any relaxation of our standards, or any conduct by anyone which might contribute to the development of a culture of non-compliance, will have adverse consequences for the Company and for our workforce, and in particular may lead to adverse safety outcomes.*

*In writing to you in these terms, I am not suggesting that you are or should be held to a higher standard than other employees who do not hold the same roles. That is of course not the case, and in fact it is understood that in some your legitimate activities in your roles can lead to unavoidable conflict.*

*Therefore, we have also always taken great care to ensure that your disciplinary issues are dealt with taking this into account and to ensure that you are not disadvantaged a consequence of the legitimate discharge of these functions. That will be the approach we take in the future well.*

*Finally, the best outcome for all concerned will be for you to take care to ensure that you do meet our behavioural and conduct standards and act consistently with South32's values at all times, and I strongly encourage you to do so.*

*In order to ensure you understand the Company expectations you will be required to be retrained in the South32 Code of Conduct, IMC behavioural expectations and Workers Obligations.*

*It is very unlikely that South32 will be able to exercise leniency if there is a further breach.*

*I am available to discuss this correspondence, or any aspect of it, with you at any convenient time and I assure you of my support for your continued long-term employment as long as our basic expectations continue to be met.*

**[64]** After Mr Hyslop issued the Expectations Letter to the Applicant, he communicated to the shift Undermanagers that the letter had been issued and requested that he or Ms Rebecca Nasta, the Respondent's Human Resources Lead, be informed of any further behavioural issues or breaches of policies and procedures by the Applicant.<sup>59</sup>

**[65]** Notwithstanding the Applicant's disciplinary history, there was no dispute that the Applicant was a good worker with a strong work ethic.<sup>60</sup> Indeed, a number of the counselling or warning documents stated as much, and that the Respondent did not want any particular instance of counselling to demotivate the Applicant's work ethic.<sup>61</sup>

**[66]** Mr Williams also gave evidence regarding the work ethic and general character of the Applicant.<sup>62</sup> Mr Williams stated that the Applicant is a good worker who is well respected by his colleagues and an asset to the Appin Mine.<sup>63</sup>

**[67]** Furthermore, Mr Hyslop stated in the Expectations Letter that it was his strong preference to maintain the Applicant's employment.<sup>64</sup>

### **23 March 2023 Incident**

[68] As set out earlier, the Applicant was dismissed following an incident at Appin West Pit Bottom on 23 March 2023. The Applicant was driving SMV CGM046 around the Loop Road returning to the Shared Zone at the end of shift. The incident occurred at approximately 3:40pm as the Applicant entered the Shared Zone and executed a left turn into the straight section.

### Applicant's Evidence

#### *The Applicant*

[69] The Applicant stated that he was driving an SMV back to the Appin West Pit Bottom and as he turned the corner the rear end of the SMV briefly broke traction and stepped out a little. The Applicant stated that the front end of the SMV still had traction and was heading in the right (correct) direction.<sup>65</sup>

[70] The Applicant stated that the area where he briefly lost traction is often wet and is "notorious" for being slippery as it is where the coal road changes to the concrete road. The Applicant stated that the area is hosed down at least three times per day between shifts to remove mud and other material, such as fuel and oil that may have accumulated there.<sup>66</sup>

[71] The Applicant stated that after coming around the final turn into the Shared Zone, he parked the SMV, got out and stood by the driver's door. The Applicant stated that he was approached by Mr Richardson who said "Who was fucking driving that?" The Applicant stated that he was a bit shocked by Mr Richardson's manner and as a joke responded, "Who do you think, Casper?" The Applicant stated Mr Richardson did not reply and left the area.<sup>67</sup> The Applicant stated that Mr Richardson did not ask him whether the road was slippery, whether there was a safety issue, whether the Applicant lost control of the SMV, or whether the Applicant hit another SMV, or say anything else.<sup>68</sup>

[72] The Applicant stated that based on his experience as an Operator, he was driving at a safe speed and does not believe that he was driving in excess of 10km per hour. The Applicant further stated that he thought he was driving at a speed where the SMV would not lose traction. The Applicant stated that he considers safety to be critical when working underground and would not deliberately drive in a manner that is unsafe.<sup>69</sup>

[73] In his show cause response, the Applicant stated that he was in the correct gear but has subsequently accepted that he may have been in third gear. The Applicant stated that an SMV can still travel under 10km per hour in third gear.<sup>70</sup>

[74] The Applicant stated that he did not lose control of the SMV and that the rear tyres briefly lost traction and stepped out a little when travelling from the muddy coal road and onto the concrete. The Applicant stated that oil, fuel, coal and stone dust, and other contaminants on the road get mixed when the concrete section gets hosed down.<sup>71</sup>

[75] The Applicant stated that he did not fully appreciate the true conditions of the road until he was driving on it. In this respect, the Applicant stated that he could see the road was wet, but not how slippery it would be.<sup>72</sup>



[76] The Applicant stated that he was involved in the development of the rules for the Shared Zone within the Roads HMP.<sup>73</sup>

[77] The Applicant stated that he received correspondence from Mr Patten on 27 March 2023 advising that he was being stood down pending an investigation into allegations that he:<sup>74</sup>

- Was observed driving in the walk zone of Appin West Pit Bottom at the end of shift at an unsafe speed whilst there were workers in the vicinity;
- Collided the vehicle into the rib;
- When asked by a statutory official regarding how you drove into pit bottom you failed to respond;
- Further upon exiting the mine you failed to report the collision to your statutory official.

[78] The Applicant and Mr Bob Timbs from the MEU stated that he attended an investigation interview with Mr Patten and Ms Nasta on 3 April 2023. The record of that interview is annexed to the statement of Mr Patten. The Applicant agreed that the record accurately reflects his responses given in that interview.<sup>75</sup> The record of interview is as follows:<sup>76</sup>

***BP [Ben Patten] - It has been reported that on Thursday 23 March 2023 at end of shift you were observed driving in a Shared zone of Appin West Pit Bottom at an unsafe speed in breach of speed requirements whilst there were workers in the vicinity. Can you please explain your recollection of events?***

*JS [Joe Sleiman] - pretty vague, didn't think anything of it, completely surprised by all this attention, PB roads were watered, mine dust product which was slippery when was put down, bus got a little bit sideways, I was driving, wasn't excessive speeds, if you let go of accelerator bus goes too far or goes the other way, I don't think vehicle out of control, did not impact the rib or anything at all categorically deny I hit anything*

*Approached by Murray in an aggressive un professional manner, never denied driving, I was standing at the drivers door, I thought it was a joke trying to diffuse the situation, then I said Casper, the ghost, using sarcasm to diffuse the situation, that was it, he mumbled something, I cant remember, and that was all. I didn't think of it anything at all after that, nothing to be had or be heard, bus came around the last corner and went like that (JS hand movements demonstrating bus swerved off the road and then corrected it whilst driving), may have sounded loud, could be that extra revs from my driving and the wheel spinning. There was dust suppressant on the road, little revs from the bus, then I parked and that was it, I don't know what else to say, that is my recollection of the whole event*

*- What caused bus to correct itself?  
o I was me driving, I corrected it*

***BP- Can you tell us how many people were in the bus? who were they?***

*JS – wasn't full, had 2 busses, enough to justify 2 busses, we do face change, because I am on machine, I do handover with supply person, I drive to face that day was a maintenance day, 6 maybe 8 people in the bus, Paul Wilton, Nick Henderson, Daniel Noonan, I can't remember who*

***BP- It has been reported that your vehicle came into contact with the rib, is this correct?***

*JS- categorically denied*

***BP- It has been reported that at the time of the incident that there was a loud sound that your vehicle came into contact with another vehicle on the go line is this correct.***

*JS- I did not touch another vehicle, I didn't touch bollards, I didn't touch anything*

***BP- if no, what would be the sound from?***

*JS- could have been a toolbox closing, not from the vehicle or my driving, there was a metre gap from me and next vehicle up on the go lone.*

***BP- When approached by a statutory official who asked you what had happened it as alleged you failed to respond. Is this true and, if true, why didn't you respond?***

*JS- the conversation was not much, I said Casper was driving, he was angered in his approach, tried to make light of the situation, not thinking anything of it, I said Caper was driving, I didn't know what to say or do in that situation. There was no touching of the rib, or impact so I was, not sure what he was trying to achieve, coming at me in an aggressive manner like that asking me if I was driving*

***BP- Why did you not report the incident to your Deputy or Undermanager as an event?***

*JS- there was no incident to report, in my eyes, it's a car that lost traction for 3 m and parked up, no one else at PB that was demanding info of me, it just seems that this is blown out of proportion, exaggerated*

*Like I said if back wheels have broken traction, may have sounded like I was acceleration, but I wasn't going fast, speedos don't work on vehicles, so can't quantify km/hr, just sound of motor could have sounded that way*

***BP- Can you tell me your understanding of transport rules at Pit Bottom and shared Zones at Appin mine?***

*JS- yeah, it's the need to slow down to a safe speed, maybe 10km/h, no working odometers on vehicles, slow down to a safe speed. The walkway zone behind bollards, no one was in the immediate vicinity. Should drive at 2 gears normally, I think I may*

*have been in 2nd maybe 3rd gear, been on that stuff (dust suppressant) before when freshly watered, get very little traction at best of times.*

***BP- Can you please explain what hazards and controls are associated driving at Pit Bottom? What do you believe is the maximum reasonable outcome if an event was to occur?***

*JS- yes, absolutely, could be fatality, squashed limb, I was driving nowhere near the bollards, likelihood is low, but it is a potential for anywhere in the mine, at PB there is increased traffic. I didn't see crib room if it was full or not. Understand higher risk because of PB and shift change time.*

***BP – Do you regularly drive around the mine and pit bottom at excessive speed?***

*JS- no, definitely not*

***BP - Do you have any other information that you want us to consider?***

*JS- no not really.*

***BT [Bob Timbs] - will joe be involved in ICAM***

*JS- like you to consider incident that mine dust suppression was used, I slid down the drift with duck's bill and a trailer, rodgo said stop, going down Hume 1 to point where ding dong (?), almost took out High Pressure valve, I disconnected trailer, used way too much of the dust. 8:30/9am we were having trouble driving. No event reports*

***BP- we would always look into events that are reported, this was not reported so we were not aware***

***RN [Rebecca Nasta]- why didn't you report that?***

*JS- I don't know why there wasn't an event report, seems funny, go to this length drift runner that momentarily stepped out of line, likely hood yes can be potential there with a shared zone and pedestrians at PB*

***BT- feels like an overreach, normally come to these things when these are stood down, why is this so?***

***BP- the event reported occurred in a shared zone is there a vehicle pedestrian risk that is increased I the area***

***BT- are you looking into the dust being laid on the road?***

***BP- all these factors will be considered as part of the icam process, Mine services employees will be involved,***

***JS- why now?***

*BP- you were unavailable last week, so today is the first opportunity we had to speak with you.*

*BT- when will an outcome be reached here?*

*BP- icam tomorrow, sometime this week position to finalise.*

*RN- any further questions? BP will check in later in the week*

*BT- no.*

*Meeting Close.*

[79] In his evidence before the Commission, the Applicant:

- Stated that he has driven through the Shared Zone countless times and would usually approach that corner at walking pace in second or third gear and just coast around. The Applicant stated that by coasting he meant “not fanging it”.<sup>77</sup>
- Stated that he cannot recall if he was in second or third gear at the time of the incident on 23 March 2023.<sup>78</sup> The Applicant further stated that the gear you are in doesn’t really matter as long as you’re going at a pace where no one in the back is screaming at you for them bumping their heads or for an uncomfortable ride.<sup>79</sup>
- Agreed that in third gear it is possible he could be doing well above 10km per hour but stated that it is also possible that he was under 10km per hour.<sup>80</sup> The Applicant accepted that he did not know what speed he was travelling, stating no-one does as there is no working speedometer in the SMV.<sup>81</sup>
- Stated that the rear end of the SMV broke traction and it stepped out, or drifted, for about a metre, maybe a metre-and-a-half, off centre as it came off the coal and onto the concrete. The Applicant stated that he regained traction or control after about three metres of forward travel.<sup>82</sup> The Applicant denied that the SMV slid on four-wheels or that the front also slid.<sup>83</sup>
- The Applicant stated that the rear wheels were accelerating during loss of traction.<sup>84</sup>
- Stated that he did not brake or slow down, rather he maintained his foot on the accelerator and kept the same sort of, or constant, displacement on the accelerator until the rear wheels regained traction.<sup>85</sup>
- Accepted that he had to take corrective action by maintaining his foot on the accelerator, powering out of the slide, and steering to the right.<sup>86</sup>
- Agreed that he was not certain why the SMV lost traction.<sup>87</sup>
- Stated that concerns about slippery or wet roads should be reported.<sup>88</sup>

- Stated that he did not report the incident because it was over in about three seconds, no one was whinging in the back, and no one got pushed around or hit their head.<sup>89</sup>
- Accepted that where external factors are the cause, there is a risk that every other SMV coming around the corner could slide out.<sup>90</sup>
- Agreed that on his version of the incident there is an increased risk to operators as something happened that required him to operate the vehicle differently to regain traction which is enough to raise it or report it.<sup>91</sup> Despite this, the Applicant did not report the incident,<sup>92</sup> and ultimately refused to accept that he should have reported the incident or his concern about the conditions.<sup>93</sup>
- Stated that he understood Mr Richardson was a Deputy<sup>94</sup> and that he could tell by Mr Richardson's mannerism and the way he was walking when he approached the Applicant that Mr Richardson he was angered and aggressive.<sup>95</sup>
- Stated that Mr Richardson "barked" at him to ask who was driving.<sup>96</sup> The Applicant stated that his response "Casper" was an attempt to diffuse the situation because he could see that Mr Richardson was aggrieved.<sup>97</sup>
- Stated that he thought Mr Richardson would have known he was joking even though he did not smile or chuckle when he responded.<sup>98</sup>
- Initially refused to accept that his response was inappropriate before accepting that the appropriate response would have been to answer the question of the Deputy when asked if he was driving.<sup>99</sup>

*Adam Fuller*

**[80]** Mr Fuller stated that he was seated as passenger in the back of SMV CGM046 as it returned to Appin West Pit Bottom. Mr Fuller stated that as the SMV turned the last corner into the Shared Zone, it felt like the SMV "slid out a bit... not dramatically, but it did step out to the right" but it did not drift or slide around the whole corner.<sup>100</sup>

**[81]** Mr Fuller stated that it did not feel like the SMV was out of control or that it was going to smash into anything. Mr Fuller stated that the SMV did not hit or strike the rib/wall or another SMV, nor did he hear or feel it hit anything else.<sup>101</sup>

**[82]** Mr Fuller stated that the corner in question is where the Loop Road transitions from an unsealed coal dirt road to concrete and that SMVs and other vehicles drag dirt and mud onto the concreted section. Mr Fuller stated that the concreted section is regularly cleaned by hosing and is always wet.<sup>102</sup>

**[83]** Mr Fuller stated he did not get lifted off his seat as the SMV turned that corner, nor did he see any other passenger in the back of the SMV get lifted off their seat.<sup>103</sup>

**[84]** Mr Fuller stated that after the SMV parked he got out of the SMV and started walking towards to the cage. After exiting the SMV he heard someone, who he believed was a Deputy, say “who was driving that bus?”<sup>104</sup>

**[85]** In his evidence before the Commission, Mr Fuller:

- Accepted that the Shared Zone has additional controls to avoid risk of collision or injury to workers with vehicles and agreed that when operating vehicles in the Shared Zone it is critical to comply with road rules and signage.<sup>105</sup>
- Accepted that non-compliance with a procedure or rule is a serious matter that could have serious consequences for him and other workers.<sup>106</sup>
- Agreed that it is important to be aware of, and to work and drive to, the conditions and be cautious when operating a vehicle. Mr Fuller accepted that one way to do this is to operate the vehicle at 10km per hour or less and to have it in second gear.<sup>107</sup>
- Accepted that driving at walking pace in the Shared Zone is a guideline that has been issued.<sup>108</sup>
- Accepted that it is possible that an operator can unintentionally or otherwise travel a higher speed in third gear.<sup>109</sup>
- Stated that as the SMV turned the corner the back wheels slid or stepped out slightly to the right like a very small slide and that it was corrected in about 1 second.<sup>110</sup>
- Stated that the Applicant probably would have used steering to straighten the SMV up, but he could not recall whether the SMV continued to accelerate after it slid out.<sup>111</sup>
- Stated that he heard Mr Richardson yell “who was driving that bus?”<sup>112</sup>
- Agreed that a loss of traction in the rear, such that the vehicle slides and requires the operator do something to correct it, is by definition loss of control.<sup>113</sup> Mr Fuller agreed that this is because the operator has lost control of the vehicle such that it cannot be operated normally and something has to be done to regain control and that this is what occurred on 23 March 2023.<sup>114</sup>
- Accepted that if he was the operator of an SMV in a shared zone turning a corner and there was a loss of traction in the rear wheels and the SMV stepped out it would be a matter of concern, even though an SMV has got the potential to slide extremely easy there due to the prevalent conditions.<sup>115</sup>
- Agreed that if it was the conditions that resulted in the vehicle sliding, then that would give rise to a concern that other vehicles might also slide and that is a matter that needs to be addressed, reported and looked at “pretty closely”.<sup>116</sup>

*Paul Wilton*

[86] Mr Wilton stated that he was seated as a passenger in the back of SMV CGM046 directly behind the driver as it returned to Appin West Pit Bottom. Mr Wilton stated that as the SMV turned the last corner into the Shared Zone, he felt the “back end of the bus lose traction and slip out.”<sup>117</sup>

[87] Mr Wilton stated that he had his seat belt on and did not get lifted off his seat.<sup>118</sup>

[88] Mr Wilton stated that the SMV did not come into contact with the rib/wall or another SMV and if the SMV had of lost control or hit something “I certainly would have felt it.”<sup>119</sup>

[89] Mr Wilton stated that there is always coal and mud falling from vehicles onto the concrete section of the Shared Zone and there can also be oil and fuels that have been spilled or leaked. Mr Wilton stated that the practice is to keep the road as clean as possible by hosing it down a few times each day.<sup>120</sup>

[90] Mr Wilton stated that after he exited the SMV he heard Mr Richardson say “Who was driving that bus?”<sup>121</sup>

[91] In his evidence before the Commission, Mr Wilton:

- Agreed that an issue with the unsafe operation of a vehicle or non-compliance and how are vehicles operated is a serious matter.<sup>122</sup> Mr Wilton also agreed that in a shared zone, non-compliance can have serious consequences for yourself and other workers, and that it is critical to be cautious as one enters a shared zone.<sup>123</sup>
- Agreed that a shared zone should be approached at a reduced speed, being walking pace for an SMV.<sup>124</sup>
- Stated that the back end of the bus broke traction for a second and slid towards the rib. Mr Wilton stated that he did not really pay that much attention at the time but “it felt like a brief time.”<sup>125</sup>
- Disagreed that the SMV went around the corner in a four-wheel slide or that it was sliding sideways.<sup>126</sup>
- Stated that when the loss of traction occurred the Applicant “kept accelerating through” before he backed off. Mr Wilton further stated that he assumed the Applicant had accelerated through the loss of traction because if the Applicant applied the brakes Mr Wilton would have felt it.<sup>127</sup>
- Stated that he did not know and could not make a judgment as to how fast the SMV was going but accepted that when an SMV is in third gear it can go at a higher speed compared to gears one and two.<sup>128</sup>
- Stated that if he lost traction, he would assume the roads were wet, “take his foot off the accelerator and turn in - go straight.”<sup>129</sup>

- Accepted that if he was operating an SMV in a shared zone and the rear tyres lost traction and slid, that in that moment, he would have lost control of the SMV and steps would need to be taken to regain traction or control, which involves operating the vehicle differently to how he might otherwise operate the vehicle when turning a corner.<sup>130</sup>
- Accepted that if he had lost traction while he was driving in a shared zone he would assume the conditions were the cause and would ask the question whether the roads had been watered or whether there was a reason why the conditions were dangerous.<sup>131</sup>
- Agreed that it was “very important” to take steps to understand why it happened and make sure it doesn’t happen again.<sup>132</sup>
- Stated that he was the last passenger to get out of the back of the SMV and heard Mr Richardson ask “who was driving that bus” in firm, angry tone.<sup>133</sup>

### Respondent’s Evidence

#### *Murray Richardson*

[92] Mr Richardson was located in the crib room area talking to three or four members of the vent crew waiting for a shift change to occur and witnessed the incident on 23 March 2023.<sup>134</sup>

[93] Mr Richardson stated that he heard the roar of a motor and turned to see headlights appearing 4-5 metres from him before an SMV appeared.

[94] In his witness statement filed prior to the hearing, Mr Richardson stated:

*The SMV was travelling at high speed. It went about two thirds of the way around the corner ‘drifting’, and then travelled the last third of the corner sideways on two wheels. By drifting I mean its tyres lost traction on the road and slid.*<sup>135</sup>

[95] During the proceedings, Mr Richardson made a correction to his statement to insert the word “sliding” and to delete “two wheels” and insert “four wheels”. Upon that correction, Mr Richardson’s statement read as follows (correction underlined):

*The SMV travelling at high speed. It went about two thirds of the way around the corner ‘drifting’, and then travelled the last third of the corner sliding sideways on four wheels. By drifting I mean its tyres lost traction on the road and slid.*<sup>136</sup>

[96] Mr Richardson stated that he saw “around six to eight men in the back of the SMV” and “saw the passengers get lifted off their seats and pushed against the right-hand side of the SMV as it turned the corner.”<sup>137</sup>

[97] Mr Richardson stated that he then “saw the SMV drive out of the corner and make contact with the mine wall” which caused the SMV to straighten up. The SMV then veered into



the line of parked SMVs about 40-50 metres from where he was standing and he “*saw and heard the SMV bump into the SMV in front of it whilst parking.*”<sup>138</sup>

[98] Mr Richardson stated that he was concerned that there may have been a safety incident and a risk of injury to workers. He then approached the SMV and identified it as SMV CGM046. Mr Richardson stated that he asked the workers “are you guys alright? Where did you come from?” Mr Richardson stated that none of the workers responded.<sup>139</sup>

[99] Mr Richardson stated that he saw a person standing next to the driver’s side door. He walked over and saw that it was the Applicant. Mr Richardson stated that he asked the Applicant, “*where did the bus come from? Were you driving the bus?*”. Mr Richardson stated that the Applicant did not respond. Mr Richardson stated that he then said, “*In all my time, I’ve never seen anything as dangerous as what happened just then.*”<sup>140</sup>

[100] Mr Richardson then proceeded to the area adjacent to the cage and made telephone calls to the control room and to the shift Undermanager, Mr Sam Hill, to report the incident. Mr Hill asked Mr Richardson to complete an event report which he completed straight away.<sup>141</sup>

[101] The event report completed by Mr Richardson is on a form titled “Event Report & Basic Investigation” and records that the incident occurred at 3:40pm and that it was reported at 3:48pm. In the sections titled description and immediate actions, Mr Richardson wrote:<sup>142</sup>

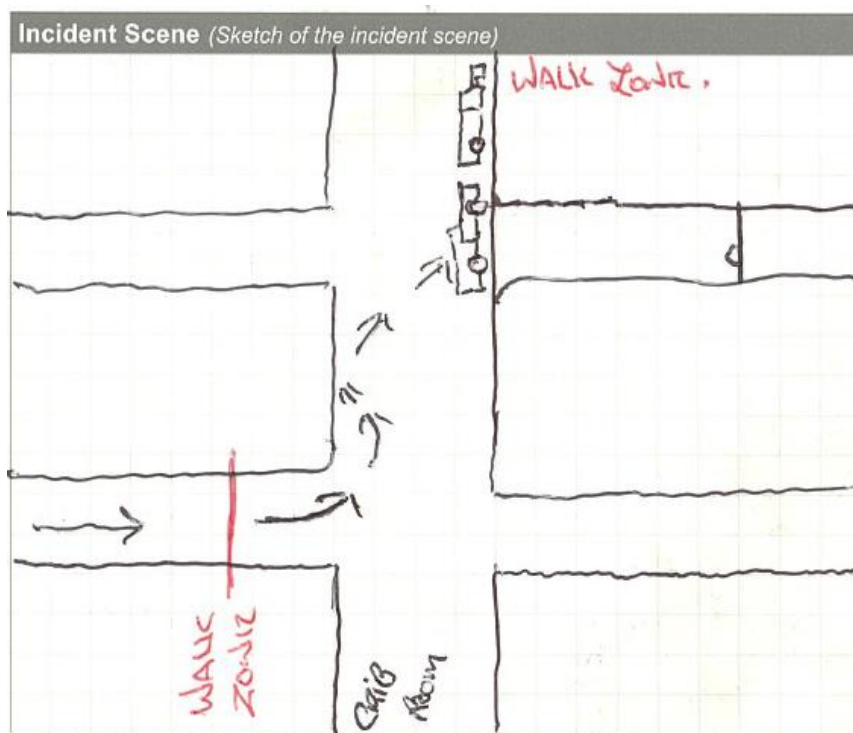
*Description*

*I was in the p/Bottom crib room, noticed a SMV at speed coming around the corner at p/Bottom, full of men in a walk zone.*

*Immediate Action Taken*

*I walked up to SMV 046, asked men in the back were did you come from. How was driving. Just looked at me. Walk to the driver’s door. Mr J Sleiman was standing by the door, asked him how was driving just looked at me.*

[102] The event report also includes a sketch drawn by Mr Richardson as follows:<sup>143</sup>



[103] On 24 March 2023, Mr Richardson received a telephone call from Mr Patten during which Mr Richardson explained to Mr Patten his recollection of the incident in more detail. Mr Patten asked Mr Richardson to provide a further written statement containing that additional information.<sup>144</sup>

[104] Later that day, Mr Richardson prepared a handwritten statement as follows:<sup>145</sup>

*I Murray Richardson was at p/Bottom on 23-3-23 S.O.S A/S when I heard the roar of a SMV coming into p/Bottom in a walk zone. I turned around to see a SMV fall of man in a 4wheel slide around a left-hand turn into p/Bottom out of control hitting the left side front of the SMV into the rib then pulling into the lineup bumping another SMV. I walk up to the SMV & asked the man in the back where did you come from' just looked at me. I then walked up to the driver's side door, Mr J Sleiman was standing beside the SMV046, I asked him the same, how was driving he just looked at me.*

*I then went and rang control, asked where did SMV046 come from Bully told me M/G 710B. I then asked a Deputy from D/S where did Mr Sleiman mainly work I was told 710B. I then ran D/S U/M & reported it to him.*

[105] On 27 March 2023, Mr Richardson attended an investigation interview with Mr Patten and Ms Nasta. The notes of that interview are as follows:<sup>146</sup>

**BP [Ben Patten] – Thanks for your time, and reporting the event, we have reviewed your statement and have a few additional questions.**

- *where was the vehicle when he first saw it;*
- *did he witness an impact;*

**MR [Murray Richardson]** - *yes when the event occurred yesterday I had to report it, was one of the silliest things I've seen UG, I can't believe it the bus was out of control as it approached the go line. Hit the rib and then another vehicle.*

*I was in the PB crib room with the vent crew and dan de Sousa, and I just saw it and thought you have to be joking and walked over to the bus, when I got there, I could see the guys I to the back had moved around, from what I could see unsure if they did have seatbelts and I said, where did you come from, they just looked at me*

*When I walked to the drivers side of the bus, joe was standing next to the door and I said where did you come from and he just looked at me and didn't respond.*

- *what is his best estimate of the speed of the vehicle*

**MR-** *3rd gear going flat out around that corner, I heard it coming*

- *were there any pedestrians in the vicinity, if so who and where were they;*

**MR-** *not where he came around the corner, but if there was they would have been taken out, you know at that time of the day there are usually people everywhere at EOS*

- *would the driver have been able to see them clearly before he turned the corner; what were the light conditions etc.*

**MR-** *around that corner you would not be able to see what you were driving into, lighting at PB is well lit compared to other areas of the mine and signs around*

**BP - Do you have any other information that you want us to consider?**

**MR-** *not acceptable to be driving like that, we need to report thing like this we see as if there was someone there you could have been taken out as it came around, spoke to Dan DS and said he needs to put in a statement for what he saw.*

**[106]** In his evidence before the Commission, Mr Richardson:

- Stated that when he prepared his evidence-in-chief he included that the SMV went up on two wheels in paragraph [9], but upon reflection, and after carefully reading it again, he corrected paragraph [9] as set out above. Mr Richardson denied that the original wording was an attempt to exaggerate what occurred.<sup>147</sup>
- Stated that he was standing five to six metres back from the corner in question and that he could see about four or five metres down the road from which the SMV approached the Shared Zone.<sup>148</sup>

- Stated that he heard a “roar of the motor revving,” and everybody stopped talking and turned around.<sup>149</sup>
- Stated that he saw the SMV approaching the corner quickly.<sup>150</sup>
- Stated that he could see the front of the SMV sliding towards the right-hand side rib/wall and could see the driver’s door. Mr Richardson further stated that he watched the “whole thing slide” around and then saw the back of the SMV flick out about half-way around the corner before it bumped into the left-hand side rib/wall.<sup>151</sup>
- Disagreed that he only saw the back end of the SMV flick out to the right towards the right-hand rib/wall. Rather, Mr Richardson confirmed that he could see the front and back and the whole driver’s side of the SMV sliding around the corner.<sup>152</sup>
- Agreed that the SMV did not go so far around that he could see the passenger side.<sup>153</sup>
- Stated that the SMV drove into the parking lane/Go-Line and that he *heard* it hit a parked SMV.<sup>154</sup>
- Accepted that he *did not see* the SMV hit another parked SMV and that his earlier statements that he *saw* the SMV hit another parked SMV “were wrong”.<sup>155</sup>
- Stated that upon witnessing the incident he made a beeline straight to the SMV to see if the workers were all right and who was driving.<sup>156</sup>
- Agreed that, contrary to his witness statement, he did not say, “are you guys all right?”<sup>157</sup>
- Stated that the neither the workers in the back of the SMV or the Applicant responded to him.<sup>158</sup> Mr Richardson denied that he used an angry tone or swearing when he spoke to the workers or the Applicant. Mr Richardson stated that he did not hear the Applicant say anything referring to Casper the Ghost.<sup>159</sup>
- Agreed that he attended a pre-shift briefing at 2:00pm that day during which he was advised that the roads at Appin West Pit Bottom had been recently watered with dust suppressant and were slippery.<sup>160</sup>
- Accepted that it is particularly important for a Deputy to be as accurate and particular to the best of their ability when completing a record such as an event report.<sup>161</sup>
- Agreed that the initial event report he completed on 23 March 2023 was an important document and that he was careful to make sure the details were as good as could be at the time when his memory was “freshest”.<sup>162</sup>
- Agreed that the initial event report he completed on 23 March 2023 does not refer to the SMV striking the rib/wall, striking another parked SMV, that workers in the

back of the SMV were thrown from one side thrown from one side to the other, or that the SMV slid on four wheels.<sup>163</sup>

- Denied that those matters were not included because they did not happen, but rather stated what he observed was so unbelievable that he was focused on stopping what happened and getting to the bottom of it.<sup>164</sup>
- Denied that he exaggerated his statement to include the SMV striking the left-hand rib/wall because the Applicant did not respond to him and/or to elevate the seriousness of the incident.<sup>165</sup>
- Stated that the arrows in the sketch he made in the initial event report on 23 March 2023 depict where the SMV hit the left-hand rib/wall.<sup>166</sup>
- Agreed that the reference to workers being thrown from one side of the SMV to the other as it went around the corner was not included in his handwritten statement prepared on 24 March 2023, but denied that it was because he exaggerated it later.<sup>167</sup>

*Paul Hudson*

[107] Mr Hudson was located in the crib room area approximately 15-20 metres from the intersection where the incident occurred and witnessed the incident on 23 March 2023.<sup>168</sup>

[108] Mr Hudson stated that on 27 March 2023 he was approached by Mr Hill, an Undermanager and asked to prepare a statement describing what he witnessed.<sup>169</sup> Mr Hudson prepared an ‘Event Witness Statement’ later that day, a copy of which was annexed to his statement, which states:<sup>170</sup>

*Witnessed an SMV enter the go line area of Appin West Pit Bottom at a high speed under acceleration. SMV then slid sideways around the corner.*

*As SMV pulled into the go line a loud noise was heard possibly striking another SMV or post.*

*Did not see who driver of SMV was.*

[109] In his evidence before the Commission, Mr Hudson:

- Accepted that there is minor gradient on the approach to the corner in question and that there is a need for an SMV full of people to be under power to get up it.<sup>171</sup>
- Stated that if an SMV loses traction there is an increase in the RPM which would mean the “accelerator was still down” as an SMV “is not going to rev up on its own.” Mr Hudson accepted this would be the case irrespective of whether the accelerator was depressed further or maintained at the same level.<sup>172</sup>
- Stated that he was in the crib room area talking with Mr Richardson and some other workers when he heard the SMV coming and turned his head to look before it came

around the corner as it “sort of stood out more than the rest” was “definitely louder” and “noticeably louder” than other SMVs coming around the corner.<sup>173</sup>

- Agreed that the reference to “high speed” in his statement was that the SMV came around the corner quicker than other SMVs.<sup>174</sup>
- Disagreed that the that SMV was travelling at a “light jog speed” and estimated that it was travelling at “35km per hour”.<sup>175</sup>
- Stated that he has a good understanding of how SMVs work as he is a mechanical fitter by trade. He stated that an SMV is a five-tonne machine and is not going to slide at 15km per hour.<sup>176</sup>
- Stated that usually when coming around the corner in question, people will have dropped right back in the gears and are going very slowly at walking pace.<sup>177</sup>
- Stated that as the SMV came around the corner he saw the back end of the SMV flick out to the right for “about a second” before it corrected itself. Mr Hudson also stated that “the whole bus was sliding and it wasn’t just the back” and that as the SMV slid he could see the front wheels from the left side of the vehicle.<sup>178</sup>
- Stated that the SMV then proceeded to the go line “very fast” and entered the go line in between SMVs “fast.”<sup>179</sup>
- Agreed that he did not see SMV hit anything, including that he did not see the SMV strike the rib/wall, another parked SMV, or a bollard.<sup>180</sup>
- Accepted that he did not even know if the loud noise referred to in his Event Witness Statement was made by the SMV.<sup>181</sup>
- Stated that he attended a pre-shift briefing at 2:00pm that day during which he was warned that the roads at Appin West Pit Bottom had just been watered with dust suppressant and may be slippery,<sup>182</sup> but clarified that even if the roads have been watered, an SMV will not slide in second gear at a jogging or slower speed, or at full speed in second gear.<sup>183</sup>

### Other Workers

**[110]** As part of the investigation, the Respondent obtained Event Witness Statements from the following workers, none of whom were called to give evidence:<sup>184</sup>

- Mr Daniel De Sousa who was in the crib room;
- Mr Shane Jones who was in the crib room;
- Mr Aaron Stoker, a passenger on SMV CGM046 at the time of the incident;
- Mr Brandon Langford, a passenger on SMV CGM046 at the time of the incident; and
- Mr Nicholas Henderson, a passenger on SMV CGM046 at the time of the incident.

[111] Mr De Sousa's statement goes no further than stating that he heard an SMV coming around the last corner at Appin West Loop Road and that he heard Mr Richardson saying "*No that's not on. He was sideways.*" I have not given this statement any weight.

[112] Mr Jones stated that the SMV came around the corner accelerating and at a speed faster than walking pace before losing control. Mr Jones further stated that he heard the SMV striking something when pulling into the parking lane/Go-Line but did not see what the SMV hit or who was driving. I have not given this statement any weight as the CTV Footage shows that the SMV did not strike anything when parking (see below).

[113] Both Mr Stoker and Mr Langford stated that they were thinking about their weekend and did not notice anything unusual. I have not given either of these statements any weight.

[114] Mr Henderson stated that he was seated in the back of the SMV and thought it was the same as every other day and that there was no contact with the rib/wall or any other vehicle. I have afforded this statement limited weight, as it is consistent with the witnesses called by the Applicant and Mr Hudson that the SMV did not strike the rib/wall.

#### CCTV Footage of Appin West Pit Bottom

[115] Annexure BP6 to Exhibit R2 is CCTV Footage of Appin West Pit Bottom on 23 March 2023. The camera is located at the corner of the access path to the cage and the Shared Zone and the angle of the camera captures the driving lane the parking lane/Go-Line in the Shared Zone.

[116] The CCTV Footage does not capture the corner in question. However, before SMV CGM046 comes into view, the CCTV Footage at 5.40 shows the headlight beams moving to the right and then back to the centre of the road over a period of about 1 second.

[117] The Applicant submitted that the movement of the headlight beams is consistent with the back of the SMV stepping out to the right, but accepted only limited weight can be attributed to that.<sup>185</sup> The Respondent agreed, submitting that what the movement means is in the realm of speculation.<sup>186</sup>

[118] I agree with the submissions of the parties that very little weight can be attributed to the movement of the headlight beams and what can be derived from them. For example, the movement of the headlight beams do not assist in determining whether the SMV slid on all four wheels around the corner before it stepped out to the right or whether any slide was limited to the back of the SMV stepping out to the right for about 1 second.

[119] However, the CCTV Footage does capture SMVs as they approach and park in the parking lane/Go-Line and records six SMVs arriving at the parking lane/Go-Line.

[120] From 5.46, the CCTV Footage captures the sixth SMV driven by the Applicant arriving at the parking lane/Go-Line and parking behind the fifth SMV.

[121] The Applicant submitted that the speed of SMV CGM046 is no faster than any of the previous five SMVs as it approaches and parks in the parking lane/Go-Line.<sup>187</sup> I agree. The

approach of SMV CGM046 is not “very fast”, nor is it “fast” or otherwise markedly different to the speed and approach of the previous five SMVs.

[122] I also agree with Mr Patten’s evidence<sup>188</sup> that the CCTV Footage shows that SMV CGM046 did not strike another parked SMV, or bollard and that the Applicant was able to exit the SMV and walk between the fifth and sixth SMV, meaning there was a gap between those SMVs.

### **23 March 2023 Incident - Investigation**

[123] Mr Patten stated that upon reviewing the event report, he became concerned that the incident was serious given the description of an SMV approaching Appin West Pit Bottom at speed. Mr Patten decided that the incident required investigation.<sup>189</sup>

[124] Mr Patten stated he commenced seeking further information about the incident. On 24 March 2024, Mr Patten had discussions with:<sup>190</sup>

- Mr Richardson, during which he asked Mr Richardson to complete a further statement;
- Mr Hill, the Afternoon Shift Undermanager at the time the incident was reported by Mr Richardson;
- Mr Stephen Downie, the Deputy on the MG710B Panel who was the supervisor of the crew that were in SMV CGM046 when the incident occurred. In this discussion, Mr Downie advised Mr Patten that he had been informed by Mr van der Merwe that there was a slippery surface at Appin West Pit Bottom on 23 March 2023;<sup>191</sup>
- Mr John van er Merwe, the Day Shift Undermanager who had completed the end-of-shift debrief with shift deputies on 23 March 2023;
- Mr Dylan Berning, who was the Undermanager on duty for the weekend shifts (including Friday 24 March) to determine if any ongoing hazard needed to be addressed;
- Mr James Hutton, Superintendent Maintenance Services who is responsible for diesel vehicles at the Appin Mine.

[125] Mr Patten also reviewed the CCTV Footage of the Shared Zone and obtained copies of shift reports.<sup>192</sup>

[126] At approximately 10:07am on 24 March 2023, Mr Patten received a witness statement from Mr Richardson in which Mr Richardson stated that the SMV had made contact with the rib/wall and another SMV.<sup>193</sup> Mr Patten stated that as Mr Richardson’s statement referred to a collision involving a vehicle or mobile plant, he formed the view that the incident was a “High Potential Incident” requiring notification to the Resources Regulator pursuant to Regulation 124 of the *Work Health and Safety (Mines and Petroleum Sites) Regulation 2022*.<sup>194</sup>



[127] Mr Patten also formed the view that the incident was a Level 4 incident under the Appin Incident and Event Management Trigger Action Respondent Plan, as an incident that causes, or has the potential to cause, a single fatality.<sup>195</sup>

[128] Mr Patten discussed these matters with Mr Hyslop who agreed that the incident was notifiable as a High Potential Incident and that it should be treated as a Level 4 incident under the Appin Incident and Event Management Trigger Action Respondent Plan, requiring an Incident Cause Analysis Method (ICAM) Investigation.<sup>196</sup>

[129] At approximately 1:42pm on 24 March 2023, Mr Patten submitted the Incident Notification to the Resources Regulator.<sup>197</sup>

[130] In accordance with the Appin Incident and Event Management Trigger Action Respondent Plan, Mr Patten oversaw the ICAM Investigation commencing on 27 March 2023.<sup>198</sup> Mr Patten stated that the purpose of an ICAM Investigation is to analyse all of the available evidence to determine why an incident has occurred and identify all of the factors that have contributed to an incident.<sup>199</sup>

[131] Mr Patten selected Mr Adam Scard, Superintendent Health Safety Risk and Training at Dendrobium Mine to facilitate the ICAM Investigation, and assembled an ICAM Investigation Team comprising, in addition to Mr Scard and himself:

- Joel Langham-Williams, Compliance Superintendent (who was performing the role of scribe for the ICAM team);
- Mark Hall, Mine Services Coordinator;
- Josh Stringer, Deputy;
- Aaron Bowler, Site Safety and Health Representative;
- Peter Wilson, Road Crew Operator; and
- Grant Woodford, Mine Services Operator.<sup>200</sup>

[132] The Applicant was stood down on 27 March 2023 and Mr Patten then proceeded to obtain witness statements, conduct interviews, obtain copies of Mine Service Reports and obtain footage of the Loop Road.<sup>201</sup>

[133] On 4 April 2023, Mr Patten received a copy of various reports Mr Andrew Stuckey, Superintendent Mine Services.<sup>202</sup> Mr Patten stated that the purpose of obtaining these reports was to verify when the roads at Appin West Pit Bottom had been watered, what conditions were present, and whether any hazards were reported. Mr Patten stated that based on a review of these documents, the roads at Appin West Pit Bottom had been watered at the commencement of the previous night shift.<sup>203</sup>

[134] Mr Patten stated that as part of the ICAM process, the ICAM team analysed and assessed the evidence against five key areas: people, environment, equipment, procedure and documents, and organisation.<sup>204</sup>

[135] Mr Patten started that Mr Langham-Williams produced a preliminary draft ICAM Report on 4 April 2023.<sup>205</sup>

[136] On 5 April 2023, Mr Scard sent an email to Mr Patten, Ms Nasta and Mr Hyslop, which stated:<sup>206</sup>

*Hello Ben and Rebecca,*

*Based on the ICAM Investigation regarding EVT-0063086 SMV driving at speed collision with rib and vehicle and Mr Joe Sleiman that occurred on the 23rd of March 2023, **my observations and review of the data collected by the Team** at Appin including witness statements conclusive that Mr Sleiman was not driving to the conditions and the requirements as per the Roads or Other Vehicle Operating Areas PHMP for Appin Colliery APNMP0091 at Appin West Pit Bottom where the incident occurred as reported by Mr Murray Richardson – Mining Supervisor Deputy.*

**Even though there is some disparity and marked differences within the recorded witness statements, I believe the initial Event Report, initial witness statements and the record of conversations from Murray Richardson and Joe Sleiman are a true representation of what occurred on the 23rd of March 2023.**

*Some of the factors that support my view:*

- *There must have been some sort of Unsafe Behaviour or Condition of the SMV to bring it to the attention of Mr Murray Richardson – Statutory Official to have to address as per the event report and statements on the 23rd of March 2023;*
- *The response of Mr Sleiman to the Statutory Official regarding what was asked is unreasonable and not forthcoming*
- *Mr Sleiman should be responsible for his actions and behaviour considering other persons in the SMV or Pitt Bottom were potentially placed at risk unnecessarily*
- *Even though the road area was wet, this area is concrete and the SMV was observed not in control on this surface*
- *This area at pit bottom I'd consider as one of the better roads in the mine even though the GU Deputies report stated that the conditions was fair (This report also includes the drift I believe)*
- *Based on the signage approx. 5 different signs and droppers it clear that you must reduce your speed, use second gear or lower and it's a 10kp/h shared zone*

- *There were no previous issues raised regarding the road conditions and area, plus 4 or 5 other vehicles were able to enter pit bottom and park in a safe manner prior to this event*
- *End of Shift and Last shift of the rostered week, so potentially perceived pressure for Mr Sleiman driving the vehicle involved in the event*

*I'm concerned that some actions such as engineering, isolation and administration controls maybe considered but based on the root cause the individual's actions and behaviour need to be addressed as well as their Transport competencies revoked and placed into retraining.*

*In conclusion Mr Sleiman was not driving to the conditions and has lost control of the SMV which is a behaviour that should not be tolerated.*

(Emphasis added)

[137] On 6 April 2023, Mr Patten obtained a statement from Mr van der Merwe regarding the incident site and whether any hazards were present. Mr van der Merwe's statement is set out as follows.<sup>207</sup>

*Hi Ben,*

*As discussed;*

*After Murray Richardson called regarding the bus incident into the go line I questioned all the DS deputies at the end o sift to ascertain who was driving the SMV in question. The deputies were unable to tell me who was driving the SMV **but did mention pit bottom was slippery as it had been recently water by the water cart due to dusty roads in the area.** Upon asking the deputies if it was hazardous they mentioned due to the low speed of the area and number of corners required to be taken at low speed the slipperiness of the road was **not deemed as hazard** to any coal mine workers if operators where [sic] operating at a low speed an stopping to change over the relevant block lights – as per the roads and other operating areas management plan.*

(Emphasis added)

[138] Under cross examination, Mr Patten agreed that Mr van der Merwe's statement was consistent with what he had been told by Mr van der Merwe on 24 March 2023.<sup>208</sup>

[139] Mr Patten stated that he subsequently finalised the ICAM Report.<sup>209</sup> Mr Patten stated that although he reached the view that it could not be substantiated that the SMV made contact with the rib/wall or any other vehicle, he otherwise agreed with the preliminary findings set out in Mr Scard's email and determined that the ICAM Report could substantiate that the Applicant operated an SMV at unsafe speeds in the Shared Zone and lost control of the SMV.<sup>210</sup>

[140] Mr Patten noted that the ICAM Report records that the roadways at Appin West Pit Bottom were watered at the commencement of the previous night shift and the correct ratio of dust additive or dust suppressant was used.<sup>211</sup>

### **Show Cause and Termination**

[141] On 12 April 2023, Mr Patten, Ms Nasta, and Mr Hyslop discussed the ICAM Investigation and findings of the ICAM Report.<sup>212</sup>

[142] Mr Hyslop determined that given the severity of the incident, the Applicant's disciplinary history, and the temporal proximity to the issuing of the Expectations Letter, warranted the issuing of a show cause letter to the Applicant. Mr Hyslop also made a preliminary determination that, subject to the show cause process, the appropriate outcome may be dismissal.<sup>213</sup>

[143] On 17 April 2023, Mr Patten sent the show cause letter to the Applicant. The show cause letter relevantly stated:<sup>214</sup>

*The investigation has now concluded, and the following **preliminary findings** have been made in relation to your involvement in the incident:*

1. *At the end of your shift on 23 March 2023, at or around 3:30pm, you were operating a Personnel Transport Vehicle (SMV) approaching the parking area at Appin West Pit Bottom.*
2. **You drove the SMV through a shared zone as defined in the Roads or Other Vehicle Operating Areas PHMP (APNMP0091) and Equipment No Go Zones, and:**
  - a. **continued to accelerate the SMV, travelling at unsafe speeds in excess of 10 km/hr; and**
  - b. **lost control of the SMV as it rounded a corner causing the vehicle to slide in an uncontrolled manner for a short period.**
3. *When you were interviewed, South32 also held information suggesting you may have collided with the rib and/or another vehicle. You denied this in the interview, and having reviewed all of the evidence South32 will not pursue this allegation.*
4. *There was no reasonable excuse for your actions, In particular:*
  - a. *you are in compliance with your relevant training, including training in Personnel Transport Operations and as a Health and Safety Representative;*
  - b. *you are experienced and competent to operate SMVs;*

- c. *there is signage of the shared zone at the location where the Incident occurred;*
  - d. *the road on which the Incident occurred was watered at the commencement of the prior night shift, with the correct quantity and concentration of dust additive (dust suppressant). It was not likely to be slippery enough to materially contribute to a loss of control of the SMV (particularly where applicable speed limits are adhered to and/or operators drive to conditions);*
  - e. *the corner at which you lost control of the SMV is considered to be a 'good corner' in the context of the environments in which you have been trained to operate, for the following reasons i.e.: has a flat grade, has concreted floor, has adequate lighting, is a corner that is greater than a 90-degree bend, and widens onto the 'straight'.*
5. *Your acceleration of the SMV to unsafe speeds and failure to drive to conditions were the main contributors to the Incident.*
  6. *Other workers were present in the SMV, and pedestrians were present at pit bottom and throughout the shared zone at the time of the incident. Your actions put the safety of these people at risk.*
  7. ***Following the incident, a statutory official, Deputy, Mr. Murray Richardson, approached you as you stood next to the drivers door of the SMV. Mr. Richardson asked you if you had been driving the SMV and asked about your driving. You failed to adequately answer Mr. Richardson's question. When you did respond you provided a response that was sarcastic in nature stating that "Casper" the ghost was the driver.***
  8. ***You subsequently failed to report the incident at any time after it occurred, before you were informed of the investigation on 27 March 2023.***
  9. *The incident constituted a Potential Severity Level 4 'Severe or Notifiable' incident in accordance with the Appin Incident and Event Management Trigger Action Response Plan. A Level 4 incident is one that has the potential to seriously injure people or result in a fatality.*
  10. *Your conduct is in breach of:*
    - a. *The Personnel Transporter Operations (ICHTRN0057), section 4.7 of which deals with 'Operating' and relevantly states:*

*'Safe Operation of the Personnel Transport*

      - *Check vehicle is driven to suit road conditions – sufficient distance from ribs, correct gear selected, drive so as not to cause damage to people and machinery*

...

- *Slow down when approaching corners, crib rooms, men at work, over pass and intersection’.*

- b. *The Roads or Other Vehicle Operating Areas PHMP (APNMP0091), clause 4.2.2.1 of which deals with ‘Shared Zones’ and relevantly states:*

*The following areas are considered to be a ‘Shared Zone’:*

- *Appin West Pit Bottom*

*Due to the possibility of a moving vehicle within the pedestrian no go zones, additional controls for a shared zone include;*

...

*low vehicle speeds”*

- c. *The Equipment No Go Zones, clause 4.3.2 of which deals with ‘Shared Zone Operation’ and relevantly states:*

*The following areas are considered to be a ‘Shared Zone’:*

- *Appin West Pit Bottom*

*Due to the possibility of a moving vehicle within the pedestrian no go zones, additional controls for a shared zone include;*

...

*low vehicle speeds”.*

*Clause 4.3.2 also provides visual examples of the signage present in shared zones, including the same 10km/hr. speed sign that was present at the site of the incident.*

- d. *Your contract of employment, which outlines that it is a condition of your employment that you comply with South32 policies to perform duties in a manner which observes any legal requirements, and which adheres to safe working practices;*
- e. *The South32 Code of Business Conduct which requires all people within the organisation to act in line with Our Values and to take responsibility for preventing workplace-related injuries and illnesses; and*

- f. *The duties you owe under work health and safety legislation to take reasonable care to ensure that your actions and omissions do not adversely affect the health and safety of other persons.*

*Taking into account the clear expectations South32 recently set with you in the 7 March 2023 letter and the nature of these preliminary findings, the Company believes it may be appropriate to take disciplinary action against you in relation to the incident and is considering terminating your employment.*

*Prior to making a decision, South32 will provide you with an opportunity to respond to the preliminary findings and to show cause as to why the preliminary findings should not be accepted, and, if they are accepted, why your employment should not be terminated.*

(Emphasis added)

[144] On 21 April 2023, the Applicant provided the following response to the show cause letter.<sup>215</sup>

***Response to preliminary finding***

*I refer to our meeting on 4 April 2022, and your letter dated 17 April 2023. Your letter makes a number of allegations against me regarding an alleged incident on 23 March 2023 while I was on shift operating a Personal Transport Vehicle (SMV). My responses to the allegations are set out below:*

1. *On 23 March 2023, I attended work on the day shift. At about 3.30pm which was close to the end of my shift I was operating an SMV. Several workers were passengers in the vehicle. I approached the intersection of the road to turn into the parking area at the Appin West Pit Bottom. The road was very wet and this was the first time I had operated the vehicle during my shift at this location.*
2. *a. I did not travel at unsafe speed in excess of 10km/hr. Based on my experience as an Operator I was driving at a safe speed. I note that the SMVs in the mine do not have speedometers, or the speedometers are not working properly. This has been the case for years.*  
  
*b. I did not lose control of the SMV. It is not correct that the vehicle slid in an uncontrolled manner. The road was very wet and as I turned the corner the road conditions caused the SMV to momentarily lose traction. The rear of the vehicle stepped out and I continued with my foot on the accelerator regaining traction and correcting the rear stepping out. In my experience as an operator of 18 years when there is loss of traction you continue to drive the vehicle out to regain traction which is what I did in this situation.*
3. *During the meeting on 4 April 2022, it was alleged that I collided with the rib and another vehicle. I note that your letter now states that South32 are not pursuing the allegation.*

4.
  - a. *I agree that I was in compliance with relevant training including training in Personal Transport Operations and as a Health and Safety Representative.*
  - b. *I agree that I am experienced and competent to operate SMVs.*
  - c. *I agree there is signage of the shared zone at the location.*
  - d. *Whether the road was watered at the commencement of the night shift, or at another time, from my direct knowledge of the site that day when I drove into the parking area at 3.30pm the road was very wet and appeared to be very slippery. I have reported wet roads and slippery conditions causing traction issues on numerous occasions to Under Managers, and Control. When the road is dry there are rarely traction issues with an SMV. However, when the road is very wet the conditions can cause loss of traction. I don't agree that it was not likely to be slippery enough to materially contribute to a loss of traction. The whole ring track at pit bottom was wet. There is also a diesel bowser directly adjacent to this intersection and there is every possibility that there was some diesel spillage that got washed down to where the coal road meets the concrete road making that corner more hazardous.*
  - e. *As stated above I did not lose control of the SMV. A good corner or not, the road was very wet and slippery which caused my vehicle to lose traction and the rear end to step out on the vehicle. After taking steps to correct the loss of traction the vehicle was safely parked up in line with other vehicles*
5. *I do not agree that I accelerated to an unsafe speed and I do not agree that I failed to drive to the conditions. In my experience I believe I drove to the conditions. If I thought the vehicle was out of control and going to impact an object or person I would have hit the brakes. As I said in my response above I continued to have my foot on the accelerator to regain traction and correct the rear of the vehicle stepping out further.*
6. *I agree that other workers were passengers in the SMV. When I turned the corner and momentarily lost traction there were no workers close to the SMV or in the shared work zone. I agree that further up the road there were workers in a shared work zone however they were not in the vicinity of the SMV I was operating. I do not agree I put those workers at risk or the workers who were passengers at risk. If I had operated the SMV putting them at risk the workers would have no hesitation to call me out on it. No workers who were passengers in the SMV said anything to me about my operation of the vehicle and loss of traction. No workers in the shared zone said anything to me except for the Deputy who approached me and asked if I was driving the SMV.*
7. *As I stated in our meeting on 4 April 2023, the Deputy, Murray Richardson approached me in an aggressive manner. Murray did not ask me about my driving. He only asked me was I driving the SMV. At the time he approached me I had just parked up the SMV and got out of the vehicle. I was standing at the*



*door of the driver's seat of the SMV. The passengers were still in the back of the SMV and were yet to get out. There were no other workers nearby who could have driven the vehicle. When Murray approached me to ask who drove the SMV I believed it was obvious that it was me. Due to his aggressive manner I said "Casper" in an attempt to diffuse the situation.*

8. *I did not report what happened because I honestly did not believe there was an incident to report.*
9. *Based on my experience as an operator and trained Health and Safety representative I do not believe that losing traction on a SMV with the rear momentarily stepping out would constitute a Level 4 incident. I understand that the initial event reports stated the SMV I was operating made contact with the rib and a vehicle. At no time did the SMV make contact with the rib or another vehicle/object. At no time were the workers in the vehicle at risk of injury. There were no pedestrians near the intersection when I turned into the road. No workers were injured or killed. The vehicle remained in the shared zone and did not enter the nominated pedestrian walkway. Momentary loss of traction while operating an SMV is not uncommon in a wet underground road environment. I am not aware of an SMV losing traction in a shared area being deemed a Level 4 incident.*

*The normal workplace procedure following a Level 4 incident is to promptly toolbox the incident with workers at pre-start meetings. No toolbox talks have occurred since 23 March 2023. If the nature of the event was as serious as alleged there is a requirement to hold a tool-box meeting and discuss the issue. In addition, I am not aware of any steps taken to repair the speedometers in SMVs or install speedometers in SMV's that do not have one.*

*I understand the incident was reported to the Resource Regulator, the Department of Primary Industries (DPI) however to my knowledge they have not conducted an independent workplace investigation which is common practice after a Level 4 incident. The incident is not part of any weekly DPI alerts. If the incident was as serious as South 32 claim, the DPI would have investigated it and it would have appeared in a DPI alert.*

*Additionally, I am not aware that the ICAM report has been completed and released. If the incident occurred as alleged the ICAM investigation and would have been released with priority. As far as I am aware no corrective action has been actioned or discussed with the workers at the mine site because of the ICAM investigation.*

10. *I do not agree that I breached the policies and procedures as alleged. I refer to my responses above. I drove to suit the road conditions maintaining a sufficient distance from the ribs, was in the correct gear, and drove so as to not cause damage to people and machinery. I was driving at a low vehicle speed that was safe for the corner and the parking area I was turning into. As an Operator with 18 years' experience, and an elected Site Safety Representative I always take*

*reasonable care to not adversely impact on the health and safety of other persons. That is what I did in this case.*

*In consideration of my responses in the meeting on 4 April 2023 and this letter in relation to the events of 23 March 2023 I believe that the preliminary findings should not be accepted. I do not believe I breached South 32 procedures and policies. The road conditions of the turn into the parking area and the parking area were very wet and slippery. I drove the SMV at a safe speed for the conditions, and when the SMV lost traction I operated the vehicle in a manner based on my experience and skill as an Operator. I do not believe I operated the SMV unsafely, and the wet and slippery conditions were a major factor causing the SMV to lose traction and step out.*

*If the company determines that I am in some way at fault I believe that it should only be a driving error with the conditions being a major contributing factor. Any error on my part does not justify termination of my employment. I would be willing to attend refresher training or retraining for operation of SMVs and I would be willing to not operate an SMV until I had completed the training.*

**[145]** After giving consideration to the Applicant's response to the show cause letter, Mr Hyslop decided that the appropriate disciplinary outcome was termination of employment. Mr Hyslop stated that even without taking the Applicant's disciplinary history and his failure to report the incident into account, termination of employment was appropriate given the seriousness of the incident.<sup>216</sup>

**[146]** Mr Hyslop agreed that he did not personally see the conditions at site of the incident on 23 March 2023, and that he has based his decisions on documents or briefings provided to him.<sup>217</sup>

**[147]** On 1 May 2023, Mr Hyslop and Ms Nasta met with the Applicant and his MEU representative and informed the Applicant of the outcome of the investigation. The Applicant was also issued with a letter of termination of employment which relevant states:<sup>218</sup>

***Consideration of your show cause response***

*I have carefully considered the matters set out in your show cause response prior to reaching a decision on the appropriate disciplinary penalty. In reaching my decision I have taken the following key matters into account:*

- 1. In your response, you deny having travelled at an unsafe speed in excess of 10km/hr, by reference to your experience as an Operator and the lack of an operational speedometer in the SMV you were operating. However, the Company has preferred the consistent evidence provided by the statutory deputy and other witnesses who were present at the time, which is inconsistent with your evidence. Additionally, having regard to the matters set out below, it is my view that you would have been most unlikely to have lost control of the vehicle if you had in fact been travelling at 10km/hr or less and therefore your account has not been accepted.*

2. *In your response, you deny having lost control of the SMV and sliding in an uncontrolled manner. However, you do acknowledge that the vehicle 'momentarily lost traction' and that the rear end stepped out on the vehicle. This constitutes a loss of control, which is supported by the evidence of witnesses. I am satisfied that at least momentarily you were not in control of the vehicle.*
3. *In your response, you reiterate your view that the road was very wet and appeared to be very slippery. You do not agree that the road was not likely to be slippery enough to materially contribute to loss of traction. You also state that there is a diesel bowser directly adjacent to the intersection. I am unable to accept this explanation. If the road was visibly wet and slippery as you state in your response, you should have slowed your speed to drive to the conditions of the intersection. It is not at all unusual for the conditions to apply, and drivers must take this into account and modify speed and driving behaviour so that it safe for the conditions. My conclusion is that the road conditions are not likely to have materially contributed to your loss of control of the SMV, and if they did that is because you failed to drive safely as required to the conditions.*
4. *You have contended that there were no workers close to the SMV or in the shared work zone at the time of the incident. However, there were pedestrians in the vicinity of the SMV at the time of incident including a number of people who were close enough to directly observe the incident. Therefore while it is fortunate that no-one was close enough to the incident to be at immediate risk of harm there was clear potential for your loss of control to cause a genuine health and safety risk to other workers, and the consequences could have been significant. I am also unable to be confident as to what the consequences would have been if you had not been able to rapidly regain control of the vehicle or there were people in the immediate vicinity.*
5. *In any event, whether or not pedestrians were in proximity, your actions posed a threat to your own safety and your passengers' safety, and did not comply with the traffic rules of the area in which you were operating, which are specifically designed to accommodate pedestrians. You had personal involvement in the development of the Shared Zone sub-section at clause 4.2.2.1 of the Roads or Other Vehicle Operating Areas PHMP (APNMP0091), and in light of this I believe you should have a comprehensive understanding of the requirements that these traffic rules place on operators in shared zones, as well as an appreciation of the significance of these rules to maintaining the health and safety of workers on site.*
6. *I acknowledge your explanation in relation to your interaction with Deputy Murray Richardson, and your contention that you honestly did not believe there was an incident to report. However, having lost control of the vehicle, and having had a specific discussion with the Deputy about it, it was your responsibility to report the incident to Mr Richardson or to another Company official.*

7. *This is particularly so if you did consider the road conditions to be unsafe as stated in your response. If you had reported this concern (even if only in an explanation to the Deputy at the time) this could have been investigated, and if the concern was confirmed following your report additional measures could have been taken to ensure additional warning of the conditions and to investigate whether a different protocol was required in relation to watering.*
8. *As I have said, however, I don't consider the conditions to have been unusual or dangerous as long as drivers adapt appropriately to them.*
9. *As you point out in your response, the initial event report stated the SMV you were operating made contact with the rib and a vehicle. This factored into the Company's reporting requirements and the assessment of the incident as a Level 4 incident.*
10. *Given the Company's investigations did not substantiate a finding that the SMV collided with the rib or another vehicle, the Company has not taken this issue further except to note that any loss of control in a confined area could easily result in a collision with rib or another vehicle. However, the fact that this finding is not substantiated does not alter the incident severity, particularly given the potential for the incident to have impacted workers in the area.*
11. *I have considered your assertion that you do not believe you breached the Company's policies and procedures, as stated in your response. However, in view of the evidence gathered during the investigation and the findings set out above, my conclusion is that in the course of the incident on 23 March 2023 you breached each of the policies and other sources of duty listed in the letter of 17 April 2023, set out again below for completeness:*
  - *The Personnel Transporter Operations (ICHTRN0057), section 4.7;*
  - *The Roads or Other Vehicle Operating Areas PHMP (APNMP0091), clause 4.2.2.1;*
  - *The Equipment No Go Zones, clause 4.3.2;*
  - *Your contract of employment;*
  - *The South32 Code of Business Conduct; and*
  - *The duties you owe under work health and safety legislation.*

### ***Disciplinary outcome***

*Having considered the matters raised by you in your response, **I have decided to accept that each of the preliminary investigation findings are confirmed.***

*Any preventable incident with potential to cause death or serious harm is a serious matter in itself likely to justify termination of employment. However I have also taken into account your past disciplinary history, and in particular the clear expectation set in the letter issued to you dated 7 March 2023.*

*(Emphasis added)*

### **Has the Applicant been dismissed?**

[148] A threshold issue to determine is whether the Applicant has been dismissed from their employment.

[149] Section 386(1) of the FW Act provides that the Applicant has been dismissed if:

- (a) the Applicant's employment with the Respondent has been terminated on the Respondent's initiative; or
- (b) the Applicant has resigned from their employment but was forced to do so because of conduct, or a course of conduct, engaged in by the Respondent.

[150] Section 386(2) of the FW Act sets out circumstances where an employee has not been dismissed, none of which are presently relevant.

[151] There was no dispute, and I find that the Applicant's employment with the Respondent was terminated at the initiative of the Respondent.

[152] I am therefore satisfied that the Applicant has been dismissed within the meaning of s.385 of the FW Act.

### **Initial matters**

[153] Section 396 of the FW Act requires the Commission to decide four initial matters before considering the merits of the application.

[154] There is no dispute between the parties, and I am satisfied on the evidence that:

- (a) the application was made within the period required in s.394(2);
- (b) the Applicant is a person protected from unfair dismissal;
- (c) the Small Business Fair Dismissal Code did not apply to the Applicant's dismissal; and
- (d) the Applicant's dismissal was not a case of genuine redundancy.

### **Was the dismissal harsh, unjust or unreasonable?**

[155] Section 387 of the FW Act provides that in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account:

- (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.

[156] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.<sup>219</sup>

[157] I set out my consideration of each below.

**Was there a valid reason for the dismissal related to the Applicant’s capacity or conduct?**

[158] In order for there to be a valid reason, the reason for the dismissal should be “sound, defensible or well founded”<sup>220</sup> and should not be “capricious, fanciful, spiteful or prejudiced.”<sup>221</sup> However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.<sup>222</sup>

[159] Where a dismissal relates to an employee’s conduct, the Commission must be satisfied that the conduct occurred and justified termination.<sup>223</sup> “The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination.”<sup>224</sup>

[160] Furthermore, and as a Full Bench of the Commission has said “[a] failure to comply with a lawful and reasonable policy is a breach of the fundamental term of the contract of employment that obliges employees to comply with the lawful and reasonable directions of the employer. A substantial and wilful breach of a policy will often, if not usually, constitute a valid reason for dismissal.”<sup>225</sup>

[161] The employer bears the evidentiary onus of proving that the conduct on which it relies took place.<sup>226</sup> Furthermore, where allegations of misconduct are made that have serious

consequences for an employee, the *Briginshaw* principles apply so that findings that an employee engaged in the misconduct are not made lightly.<sup>227</sup>

[162] In *Patrick Stevedores Holdings Pty Limited v Construction, Forestry, Maritime, Mining and Energy Union*<sup>228</sup>, Justice Lee made the following observations about the *Briginshaw* Principles:

***Fact Finding and the State of Satisfaction Required***

14. *It is trite that both Patricks and Qube are required to prove their case on this liability hearing to the civil standard having regard to the degree of satisfaction required by s 140 of the EA. This section requires the court, in a civil proceeding, to find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities. In deciding, in a civil case, whether it is satisfied that the case has been proved, the court is to take into account: (a) the nature of the cause of action or defence; (b) the nature of the subject-matter of the proceeding; and (c) the gravity of the matters alleged. Although the standard of proof remains the balance of probabilities, the degree of satisfaction varies according to the seriousness of the allegations made and the gravity of the consequences (if the allegations are found to be correct): see EA s 140.*
15. *Importantly, the factual allegations made by both Patricks and Qube are not only foundations for the nature of the relief dealt with at this liability hearing (that is, declarations of contraventions of the FW Act), but are also the foundations for the deferred relief, that is, the imposition of pecuniary penalties.*
16. *It is well-established that s 140 reflects the common law as explained seminally by Dixon J in *Briginshaw v Briginshaw*. As the Full Court noted in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Australian Competition and Consumer Commission**

*The mandatory considerations which s 140(2) specifies reflect a legislative intention that a court must be mindful of the forensic context in forming an opinion as to its satisfaction about matters in evidence. Ordinarily, the more serious the consequences of what is contested in the litigation, the more a court will have regard to the strength and weakness of evidence before it in coming to a conclusion.*

*Even though he spoke of the common law position, Dixon J's classic discussion in *Briginshaw*...at 361-363 of how the civil standard of proof operates appositely expresses the considerations which s 140(2) of the [EA] now requires a court to take into account. Dixon J emphasised that when the law requires proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. He pointed out that a mere mechanical comparison of probabilities independent of any belief in its reality, cannot justify the finding of a fact. But he recognised that (*Briginshaw* 60 CLR at 361-262):*

*'No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no*

*third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences...*

*Dixon J also pointed out that the standard of persuasion, whether one is applying the relevant standard of proof on the balance of probabilities or beyond reasonable doubt, is always whether the affirmative of the allegation has been made out to the reasonable satisfaction of the tribunal. He said that the nature of the issue necessarily affected the process by which reasonable satisfaction was attained. And, so, he concluded that in a civil proceeding, when a question arose whether a crime had been committed, the standard of persuasion was the same as upon other civil issues. But he added, weight must be given to the presumption of innocence and exactness of proof must be expected (Briginshaw 60 CLR at 362-363).*

17. It is also clear that so-called "Briginshaw principles" apply to civil penalty proceedings ...

[References omitted]

**[163]** It follows that for the Respondent to succeed in relation to its allegations of misconduct against the Applicant, I am required to reach a state of satisfaction or an actual persuasion that the Respondent has proved its allegations of misconduct, while taking into account the seriousness of the allegations and the gravity of the consequences for the Applicant that could follow if the allegations were to be accepted.

**[164]** As set out above, the Respondent relies on four instances of misconduct arising out of the incident on 23 March 2023:

- (i) That the Applicant drove the SMV through a shared zone and continued to accelerate the SMV, travelling at unsafe speeds in excess of 10km per hour;
- (ii) That the Applicant lost control of the SMV as it rounded a corner causing the vehicle to slide in an uncontrolled manner for a short period;
- (iii) That following the incident, the Applicant failed to adequately answer a Deputy's questions as to whether the Applicant was driving the SMV and about the Applicant's driving of the SMV; and
- (iv) That the Applicant failed to report the incident at any time after it occurred, before being informed by the Respondent that the incident would be subject to an investigation.



## Allegations 1 and 2

[165] It is convenient to deal with the first two allegations of misconduct together.

[166] I have observed and listened to each witness give evidence in these proceedings and have carefully considered that evidence. However, I have not reached a state of satisfaction or an actual persuasion that the Applicant drove the SMV through a shared zone and continued to accelerate the SMV, travelling at unsafe speeds in excess of 10km per hour. In relation to the second allegation, while I am satisfied and so find that the SMV “stepping out” was a loss of control, I have not reached a state of satisfaction or an actual persuasion that it was a result of the Applicant’s driving or operation of the SMV.

[167] My reasons for making these findings are as follows.

[168] First, there are significant inconsistencies between the evidence of Mr Richardson and the other witnesses including Mr Hudson. From his very first report of the incident, through to his evidence in the proceedings, Mr Richardson’s account of the incident has had a shape-shifting nature. In terms of what he reported that day, I find it implausible that a Deputy of Mr Richardson’s experience could observe what he says is, on his version, the most dangerous incident he has witnessed in his career and not mention that the SMV hit a wall/rib, another vehicle, or that he observed workers getting lifted off their seats. In re-examination, Mr Richardson suggested the arrows in the sketch in his initial event report indicate where the SMV struck the rib/wall. I do not accept that. Although the arrows go close to the rib/wall, there is no indication in the text or sketch of the initial event report to suggest the SMV hit the rib/wall, another SMV, or that workers got lifted off their seats.

[169] Mr Richardson is the only witness to the incident to say that the SMV hit the rib/wall and that workers got lifted off their seats. If that was the case, it would have been logical, if not necessary, to check whether any of the workers injured. While Mr Richardson stated that he did so in his evidence in chief, under cross examination he stated that he did not say that “are you alright”. He also confirmed that his evidence-in-chief that he *saw* the SMV hit another SMV “was wrong”.

[170] Mr Richardson’s evidence that the SMV was in a four-wheel slide and that he could see the driver’s side of the vehicle, is inconsistent with each of the Applicant’s witnesses who were consistent in describing the “step out” occurring at the rear and briefly or over about 1 second.

[171] Mr Richardson’s evidence that the SMV did not go so far around that he could see the passenger side is inconsistent with Mr Hudson’s evidence that the SMV did slide on four-wheels such that the front wheels could be seen from the passenger side.

[172] It was submitted by the Respondent that Mr Richardson was giving his “progressive recollection” and it does not matter that he said the SMV hit the rib/wall or another SMV because those matters are not relied on by the Respondent. I reject that submission. Mr Richardson gave evidence that he understood the importance to report incidents accurately and his evidence as to the totality of the incident is directly relevant to the determination of the issue before the Commission, including the resolution of competing evidence.

[173] Secondly, Mr Hudson's evidence that the speed of the SMV as it proceeded to the parking Lane/Go-Line was "fast" or "very fast" is at odds with the CCTV Footage and must be rejected. This casts significant doubt on Mr Hudson's evidence that the SMV came around the corner at approximately 35km per hour in a four-wheel slide.

[174] Having regard to the matters set out above, where Mr Richardson's and Mr Hudson's evidence conflicts with Applicant's witnesses, I prefer the evidence of the Applicant's witnesses.

[175] Thirdly, there was some dispute between the parties about whether the SMV "stepping out" was a loss of control. I accept that an unintended stepping out of the rear of the SMV, warranting the Applicant to take corrective action is a loss of control, even if momentary. However, I have not reached a state of satisfaction or an actual persuasion that it was a result of the Applicant's driving or operation of the SMV.

[176] I do not consider the Respondent sufficiently took into account the extent to which the corner/dirt road to concrete transition may have been slippery and as a result caused the vehicle to step out.

[177] The ICAM Investigation was initiated for the purpose of determining what factors other than human error could have caused or contributed to the incident. It is apparent from the ICAM Report that the ICAM Team made its findings based on the most recent watering of the roads at Appin West Pit Bottom occurring at the commencement of the previous night shift, rather than prior to 2:00pm on 23 March 2023.

[178] Having received information from Mr van der Merwe - verbally on 24 March 2023 and in writing on 6 April 2023 – that the roads were recently watered and there were reports that they were slippery, Mr Patten proceeded to accept the preliminary findings of the ICAM Team.

[179] The show cause letter included, as a "*preliminary finding*", that the road on which the incident occurred was watered at the commencement of the previous night shift, rather than prior to 2:00pm on 23 March 2023. That preliminary finding, which is based on an incorrect factual matter in the ICAM Report, was ultimately accepted by Mr Hyslop in his consideration to terminate the Applicant's employment.

[180] I accept that the Respondent's witnesses have challenged the degree to which the Loop Road and that corner may be 'notoriously' slippery and they maintain that Operators should drive to conditions.<sup>229</sup> However, in circumstances where the ICAM Investigation, preliminary findings, and decision to terminate the Applicant's employment is based on an incorrect factual matter that was directly relevant to an issue the Applicant raised throughout the investigation and show cause process, I cannot reach a state of satisfaction or an actual persuasion that the conditions did not cause the SMV to step out.

[181] I make one final observation on this point. Through its Qualitative Risk Assessments, the Respondent has identified loss of vehicle control as a risk arising from slippery road conditions. The Respondent has also identified as a preventative control, operator and driver awareness of the application and location of dust suppressant, and communication of slippery

areas via control. All operators of mobile plant are required to carry a radio and to be contactable by the control room. It is unclear why the Respondent having warned workers going underground at the 2:00pm briefing on 23 March 2023 that the roads had been watered and were slippery, did not use the radio to communicate that to drivers already underground who would be returning to Appin West Pit Bottom.

### Allegation 3

[182] I reject the allegation that the Applicant did not adequately answer a Deputy's questions "about his driving." The only question Mr Richardson asked was whether the Applicant *was* driving the SMV.

[183] It is clear on the evidence, and I so find, that Mr Richardson asked the Applicant *whether he was the driver of the SMV* and the Applicant did not adequately answer. However, I do not accept this constitutes a valid reason for dismissal.

[184] In my view, and when all of the circumstances are considered, both Mr Richardson and the Applicant contributed to the breakdown in any further communication following the incident on 23 March 2023.

[185] On Mr Richardson's evidence, he had just witnessed what he considered was the most dangerous incident in his career and was making a *beeline* for the SMV. The Applicant's witnesses gave evidence that when he arrived at the SMV, Mr Richardson was yelling (but not swearing) and displaying a firm or aggressive demeanour.

[186] After asking the Applicant whether he was driving, Mr Richardson says the Applicant did not respond. Whereas, the Applicant has frankly admitted that he replied "Casper", being a reference to Casper the Ghost. Mr Richardson said he did not hear the Applicant say Casper.

[187] It follows that the Applicant's response could not have been the trigger for Mr Richardson walking away. In my view Mr Richardson ended the discussion prematurely and should have attempted to obtain further information from the Applicant. After all, Mr Richardson stated he was "*focused on stopping what happened and getting to the bottom of it*", having been warned of slippery conditions at Appin West Pit Bottom some 90 minutes earlier.

[188] Having said that, the Applicant's response of "Casper" reflects poorly on him and he should have proffered more information to Mr Richardson.

### Allegation 4

[189] The Respondent has implemented clear policies and procedures relating to the reporting of accidents, incidents and hazards that are unable to be controlled.

[190] The Applicant has also undergone training in relation to the issue of reporting all accidents, incidents and near misses as soon as possible.<sup>230</sup>

[191] Having regard to the policies and procedures of the Respondent, and the incident of 23 March 2023, I am satisfied that the Applicant failed to comply with the Respondent's policies and procedures and that failure comprised a valid reason for his dismissal.

[192] I adopt the view taken by the Full Bench majority (Lawler VP and Cribb C) in *B, C and D v Australian Postal Corporation T/A Australia Post*<sup>231</sup> that the issue of whether a valid reason for the dismissal exists for the purpose of s.387(a) is to be determined from the employer's perspective, and that issues of substantive fairness from the employee's perspective are to be considered separately. Accordingly, I will deal with the mitigating circumstances as other relevant matters under s.387(h).

**Was the Applicant notified of the valid reason?**

[193] Proper consideration of s.387(b) requires a finding to be made as to whether the applicant "was notified of that reason". Contextually, the reference to "that reason" is the valid reason found to exist under s.387(a).<sup>232</sup>

[194] The Applicant was notified of the reason for his dismissal in the show cause letter dated 17 April 2023 and the letter of termination dated 1 May 2023.

**Was the Applicant given an opportunity to respond to any valid reason related to their capacity or conduct?**

[195] During the investigation process the Applicant was given opportunities to respond, and did respond, to the reason for his dismissal.

**Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal?**

[196] The Respondent did not refuse to allow the Applicant to have a support person. This factor weights neutrally in my consideration.

**Was the Applicant warned about unsatisfactory performance before the dismissal?**

[197] As the dismissal did not relate to unsatisfactory performance, this factor is not relevant to the present circumstances. This factor weights neutrally in my consideration.

**To what degree would the size of the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?**

[198] Neither party submitted that the size of the Respondent's enterprise was likely to impact on the procedures followed in effecting the dismissal and I find that the size of the Respondent's enterprise had no such impact. This factor weights neutrally in my consideration.

**To what degree would the absence of dedicated human resource management specialists or expertise in the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?**

[199] It is not in dispute, and I find that the Respondent's enterprise did not lack dedicated human resource management specialists and expertise. This factor weights neutrally in my consideration.

### **What other matters are relevant?**

[200] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant.

[201] There are three matters which I consider to be relevant to the question of whether the Applicant's dismissal was harsh, unjust or unreasonable: mitigating circumstances in relation to the failure to report the 23 March 2023 incident; the Applicant's disciplinary history; and the effect of the dismissal upon him and his family.

#### Mitigating Circumstances – Failure to Report Incident

[202] The importance of safety in inherently dangerous working environments cannot be overstated. As set out above, the Respondent has implemented a range of conditions, policies and procures to minimise the risk of hazards to works, including the reporting of all incidents and near misses. In *BHP Coal Pty Ltd v Schmidt; Schmidt v BHP Coal Pty Ltd*<sup>233</sup> a Full Bench of the Commission described the communication/reporting of an incident as at least as important as the incident itself.

[203] However, a mitigating factor in this matter is that the incident was witnessed and reported by Mr Richardson. It is a very different scenario from an incident that was not witnessed by anyone (other than those directly involved) and not reported. Furthermore, the letter of termination states that it was the Applicant's responsibility to report the matter to Mr Richardson, the very person who witnessed the incident, or another Company official. In my view, this places the Applicant's failure to report at the lower end of the scale and weighs in favour of the dismissal being harsh and unreasonable .

#### Disciplinary History

[204] The Applicant has an extensive disciplinary history. A person's disciplinary history is a relevant consideration in determining an application for an unfair dismissal remedy, particularly where it makes up part of the factual matrix as it does in this case.<sup>234</sup>

[205] The central elements of the misconduct relied by the Respondent have not been made out. The only allegation which I have made a positive finding in relation to is the Applicant's failure to report the incident, and that it was at the lower end of the scale.

[206] Having regard to all of the circumstances in this case, I consider the Applicant's disciplinary history to weigh marginally in favour that the dismissal was not harsh, unjust or unreasonable.

#### The effect of the dismissal upon him and his family.

[207] I have taken into account the effect of the dismissal upon the Applicant and his family.<sup>235</sup> This weighs in favour that the dismissal was harsh.

**Is the Commission satisfied that the dismissal of the Applicant was harsh, unjust or unreasonable?**

[208] After considering each of the matters specified in section 387 of the FW Act, my evaluative assessment is, on very fine balance, that the termination of the Applicant's employment was both harsh and unreasonable.

[209] In coming to this decision, I have taken into account all of the evidence and submissions of the parties. The fact that an issue is not mentioned in this decision does not mean that it has not been taken into account.

**Conclusion**

[210] I am satisfied that the Applicant was unfairly dismissed within the meaning of s.385 of the FW Act.

**Remedy**

[211] The Applicant seeks reinstatement and back-pay. The Respondent opposes reinstatement.

[212] The legislative provisions relevant to determining a remedy for unfair dismissal are set out in Division 4 of Part 3-2 of the FW Act as follows:

**390 When the FWC may order remedy for unfair dismissal**

- (1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:
  - (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
  - (b) the person has been unfairly dismissed (see Division 3).
- (2) The FWC may make the order only if the person has made an application under section 394.
- (3) The FWC must not order the payment of compensation to the person unless:
  - (a) the FWC is satisfied that reinstatement of the person is inappropriate; and
  - (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.

**391 Remedy—reinstatement etc.**

*Reinstatement*

- (1) An order for a person's reinstatement must be an order that the person's employer at the time of the dismissal reinstate the person by:
  - (a) reappointing the person to the position in which the person was employed immediately before the dismissal; or

- (b) appointing the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

(1) (1A) If:

- (a) the position in which the person was employed immediately before the dismissal is no longer a position with the person's employer at the time of the dismissal; and
- (b) that position, or an equivalent position, is a position with an associated entity of the employer; the order under subsection (1) may be an order to the associated entity to:
- (c) appoint the person to the position in which the person was employed immediately before the dismissal; or
- (d) appoint the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

*Order to maintain continuity*

- (2) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to maintain the following:
  - (a) the continuity of the person's employment;
  - (b) the period of the person's continuous service with the employer, or (if subsection (1A) applies) the associated entity.

*Order to restore lost pay*

- (3) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to cause the employer to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the dismissal.
- (4) In determining an amount for the purposes of an order under subsection (3), the FWC must take into account:
  - (a) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for reinstatement; and
  - (b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement.

### **392 Remedy—compensation**

*Compensation*

- (1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

*Criteria for deciding amounts*

- (2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:
  - (a) the effect of the order on the viability of the employer's enterprise; and
  - (b) the length of the person's service with the employer; and
  - (c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and

- (d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and
- (e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and
- (f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
- (g) any other matter that the FWC considers relevant.

*Misconduct reduces amount*

- (3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

*Shock, distress etc. disregarded*

- (4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

*Compensation cap*

- (5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:
  - (a) the amount worked out under subsection (6); and
  - (b) half the amount of the high income threshold immediately before the dismissal.
- (6) The amount is the total of the following amounts:
  - (a) the total amount of remuneration:
    - (i) received by the person; or
    - (iii) to which the person was entitled;
- (7) (whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and
  - (c) if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations.

### **393 Monetary orders may be in instalments**

To avoid doubt, an order by the FWC under subsection 391(3) or 392(1) may permit the employer concerned to pay the amount required in instalments specified in the order.

**[213]** In determining a remedy for unfair dismissal, it is only upon a finding that reinstatement is inappropriate that the Commission can proceed to consider the alternative remedy of compensation.<sup>236</sup>

**[214]** The Applicant submitted that reinstatement is not merely the primary remedy, it is the remedy unless and until the Commission is positively persuaded that it is inappropriate for the ordinary consequence to prevail.



[215] The Applicant submitted he has a long period of service, has not been warned for unsafe manner of driving and that any prior misconduct was of an entirely different character.

[216] The Applicant submitted that any suggestion that trust and confidence has been undermined as to render the re-establishment of a viable working relationship unlikely must be rejected.

[217] The Applicant also provided an undertaking that he would immediately resign from his position as President of the Appin Lodge if he was reinstated.

[218] The Respondent relied on evidence from Mr Patten and Mr Hyslop. Both gave similar evidence that they will be very concerned about the Applicant being reinstated given his attitude towards the incident and failure to follow the Respondent's policies and procedures.<sup>237</sup>

[219] The Respondent submitted that there is not a proper basis for reinstatement. The Respondent cited a breakdown in the relationship and a repeated and continuing disregard and unwillingness to properly engage with management.

[220] Notwithstanding the Applicant's extensive disciplinary history, Mr Hyslop wrote in the Expectations Letter that it was his strong preference to maintain the Applicant's employment. This undermines the Respondent's position that the Applicant's extensive disciplinary history has had the effect of undermining trust and confidence on an ongoing basis.

[221] Given my finding in relation to the allegations of misconduct and that reinstatement is the presumptive remedy,<sup>238</sup> I am not satisfied that reinstatement is inappropriate.

[222] I order that the Applicant be reinstated. Reinstatement of the Applicant shall be effected within 21 days of the date of this Decision or such earlier time as may be agreed by the parties.

[223] I will also make an order pursuant to s.391(3) of the FW Act that the Respondent pay to the Applicant lost remuneration for the period from his dismissal to the date of his reinstatement to be calculated as follows:

- a. the amount the Applicant would have received as ordinary time earnings but for the dismissal;
- b. MINUS the amount paid to the Applicant in lieu of notice;
- c. MINUS the amount of any remuneration earned by the Applicant from employment or other work since his dismissal.

[224] I also consider it appropriate to reduce the resulting figure by 50% on account of the Applicant's failure to report the incident. The financial loss which the Applicant has suffered from his dismissal will serve as an appropriate sanction for his conduct. It will also serve as a reminder to him and others of the necessity for strict compliance with the Respondent's policies and procedures in an inherently dangerous industry.

[225] Finally, I will make an order pursuant to s. 391(2) of the FW Act to maintain the continuity of the Applicant's employment, as if his dismissal had not occurred.

[226] Orders giving effect to my conclusions will be issued contemporaneously with this decision.



COMMISSIONER

*Appearances:*

Mr A Howell, of counsel for the Applicant.  
Mr B Rauf, of counsel for the Respondent.

*Hearing details:*

Sydney:

2023.

10, 11 and 25 October.

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<[PR773508](#)>

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<sup>1</sup> SMV CMG046.

<sup>2</sup> Exhibit R2 at [7].

<sup>3</sup> Ibid.

<sup>4</sup> Exhibit R2, Annexure BP49.

<sup>5</sup> Exhibit R2, Annexure BP45.

<sup>6</sup> Exhibit A1 at [1].

<sup>7</sup> Exhibit A1 at [12]-[13].

<sup>8</sup> Exhibit A1 at [4]-[10].

<sup>9</sup> Transcript at PN240; Respondent's Outline of Submissions at [10] (Hearing Book at p.86).

<sup>10</sup> Exhibit R2, Annexure BP45.

<sup>11</sup> Exhibit R2, Annexure BP52.

<sup>12</sup> Exhibit R2, Annexure BP44 at Section 5.

<sup>13</sup> Ibid.

<sup>14</sup> Exhibit R6 at [16]; Exhibit R2, Annexure BP2; Exhibit R3 at [3].

<sup>15</sup> Exhibit R6 at [17]-[18], [21]-[22], Annexure GC1.

<sup>16</sup> Exhibit R3 at [3], Annexure BP53.

<sup>17</sup> Exhibit A1 at [24]; Exhibit A5 at [9]-[10]; Exhibit A7 at [7].

<sup>18</sup> Exhibit R6 at [17].

<sup>19</sup> Exhibit R2, Annexure BP37.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Exhibit R2, Annexure BP37 at Sections 4.2, 6.1.

<sup>23</sup> Exhibit A1 at [48]; Transcript at PN236-PN237, PN2169-PN2174.

<sup>24</sup> Exhibit R2, Annexure BP43 at Section 6.

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- <sup>25</sup> Exhibit R2, Annexure BP43 at Sections, 1, 2 and 6.
- <sup>26</sup> Exhibit R3 at [7], Annexure BP57.
- <sup>27</sup> Exhibit R3 at [5]-[6], Annexures BP54, BP55 and BP56.
- <sup>28</sup> Exhibit R2 at [96], Annexure BP36.
- <sup>29</sup> Exhibit R2, Annexure BP43.
- <sup>30</sup> Exhibit R2, Annexure BP43.
- <sup>31</sup> Ibid at p.13.
- <sup>32</sup> Transcript at PN1177, PN1182-PN1183, PN1358-PN1361, PN1453-PN1454 and PN1462.
- <sup>33</sup> Transcript at PN684, PN695, PN708, PN748-PN749 and PN2149.
- <sup>34</sup> Exhibit A2 at [30]; Transcript at PN697, PN729-PN731 and PN864.
- <sup>35</sup> Transcript at PN729-PN732.
- <sup>36</sup> Exhibit R2 at [83], Annexure BP25; Transcript at PN651.
- <sup>37</sup> Exhibit R2 at [129]-[130], Annexure BP51; See also [54]-[59] below.
- <sup>38</sup> Exhibit R2, Annexure BP2.
- <sup>39</sup> Exhibit R2, Annexure BP36.
- <sup>40</sup> Exhibit R1 at [8]-[9].
- <sup>41</sup> Exhibit R1 at [10]-[15], Annexure BD1.
- <sup>42</sup> Exhibit R1 at [8]-[9].
- <sup>43</sup> Exhibit R2 at [98d), [114], Annexures BP38, BP46 and BP47.
- <sup>44</sup> Transcript at PN238-PN239.
- <sup>45</sup> Exhibit R6 at [19]-[20].
- <sup>46</sup> Exhibit A1 at [32]-[33]; Exhibit A2 at [21]; Exhibit A6 at [14]; and Exhibit A7 at [12]; Exhibit R2, Annexure BP51 (Hearing Book at p.404); Transcript at PN2660, PN2666 and PN2855.
- <sup>47</sup> Exhibit R2, Annexure BP51.
- <sup>48</sup> Ibid.
- <sup>49</sup> Exhibit R2 at [129]-[130], Annexure BP51.
- <sup>50</sup> Exhibit R2, Annexure BP51 (Hearing book at p.398).
- <sup>51</sup> Exhibit R2, Annexure BP51 (Hearing book at p.403).
- <sup>52</sup> Ibid.
- <sup>53</sup> Exhibit R5 at [35]-[36], [44].
- <sup>54</sup> Exhibit A3.
- <sup>55</sup> Exhibit A4.
- <sup>56</sup> Exhibit R5 at [39].
- <sup>57</sup> Exhibit R5 at [40]-[42], Annexure AH19.
- <sup>58</sup> Exhibit R5, Annexure AH19.
- <sup>59</sup> Exhibit R5 at [43].
- <sup>60</sup> Exhibit R6 at [30]; Transcript at PN2372-PN2376.
- <sup>61</sup> See for example Exhibit R5, Annexures AH7, AH8, and AH12.
- <sup>62</sup> Exhibit A9.
- <sup>63</sup> Ibid at [28].
- <sup>64</sup> Exhibit R5, Annexure AH19.
- <sup>65</sup> Exhibit A1 at [30].
- <sup>66</sup> Exhibit A1 at [31]-[32], [51].
- <sup>67</sup> Exhibit A1 at [34].

- <sup>68</sup> Exhibit A1 at [49]; Exhibit A2 at [9].
- <sup>69</sup> Exhibit A1 at [43], [45] and [47].
- <sup>70</sup> Exhibit A1, Annexure JS4 at [10], Exhibit A2 at [30].
- <sup>71</sup> Exhibit A1 at [44].
- <sup>72</sup> Exhibit A1 at [45].
- <sup>73</sup> Exhibit A1 at [48].
- <sup>74</sup> Exhibit A1 at [35], Annexure JS2.
- <sup>75</sup> Transcript at PN648-PN651.
- <sup>76</sup> Exhibit R2, Annexure BP25;
- <sup>77</sup> Transcript at PN685-PN686; PN1021-PN1022.
- <sup>78</sup> Transcript at PN678; PN737.
- <sup>79</sup> Transcript at PN738.
- <sup>80</sup> Transcript at PN679-PN681.
- <sup>81</sup> Transcript at PN680; PN756.
- <sup>82</sup> Transcript at PN652; PN659-PN660.
- <sup>83</sup> Transcript at PN934-PN935.
- <sup>84</sup> Transcript at PN659.
- <sup>85</sup> Transcript at PN652-PN666.
- <sup>86</sup> Transcript at PN658-PN659; PN943-PN946.
- <sup>87</sup> Transcript at PN868.
- <sup>88</sup> Transcript at PN854; PN1257.
- <sup>89</sup> Transcript at PN870; PN872.
- <sup>90</sup> Transcript at PN869; PN873.
- <sup>91</sup> Transcript at PN874.
- <sup>92</sup> Transcript at PN875.
- <sup>93</sup> Transcript at PN925-PN926.
- <sup>94</sup> Transcript at PN879.
- <sup>95</sup> Transcript at PN887-PN888; PN891-PN893.
- <sup>96</sup> Transcript at PN899-PN900; PN902.
- <sup>97</sup> Transcript at PN899; PN911.
- <sup>98</sup> Transcript at PN906-PN907.
- <sup>99</sup> Transcript at PN908-PN912; PN916-PN920; PN921-PN922.
- <sup>100</sup> Exhibit A5 at [19]; Exhibit A6 at [3].
- <sup>101</sup> Exhibit A5 at [19]; Exhibit A6 at [7].
- <sup>102</sup> Exhibit A5 at [21]; Exhibit A6 at [9].
- <sup>103</sup> Exhibit A6 at [7].
- <sup>104</sup> Exhibit A5 at [22].
- <sup>105</sup> Transcript at PN1171-PN1172.
- <sup>106</sup> Transcript at PN1174-PN1175.
- <sup>107</sup> Transcript at PN1173; PN1197-1200.
- <sup>108</sup> Transcript at PN1268.
- <sup>109</sup> Transcript at PN1201.
- <sup>110</sup> Transcript at PN1127; PN1130; PN1208-PN1212; PN1234.
- <sup>111</sup> Transcript at PN1234; PN1242.

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- <sup>112</sup> Transcript at PN1277-PN1278.
- <sup>113</sup> Transcript at PN1231.
- <sup>114</sup> Transcript at PN1231-PN1233.
- <sup>115</sup> Transcript at PN1214-PN1216.
- <sup>116</sup> Transcript at PN1255-PN1258.
- <sup>117</sup> Exhibit A7 at [10]-[13]; Exhibit A8 at [3].
- <sup>118</sup> Exhibit A8 at [4].
- <sup>119</sup> Exhibit A7 at [13]; Exhibit A8 at [5].
- <sup>120</sup> Exhibit A7 at [11]; Exhibit A8 at [9].
- <sup>121</sup> Exhibit A7 at [14]; Exhibit A8 at [6].
- <sup>122</sup> Transcript at PN1362.
- <sup>123</sup> Transcript at PN1363-PN1364.
- <sup>124</sup> Transcript at PN1367-PN1368.
- <sup>125</sup> Transcript at PN1377-PN1384.
- <sup>126</sup> Transcript at PN1330-!331.
- <sup>127</sup> Transcript at PN1386-PN1393.
- <sup>128</sup> Transcript at PN1423; PN1461.
- <sup>129</sup> Transcript at PN1406-PN1407.
- <sup>130</sup> Transcript at PN1385-PN1404.
- <sup>131</sup> Transcript at PN1409-PN1415; PN1419.
- <sup>132</sup> Transcript at PN1420.
- <sup>133</sup> Transcript at PN1425-PN1438.
- <sup>134</sup> Exhibit R9 at [8].
- <sup>135</sup> Exhibit R9 at [9].
- <sup>136</sup> Ibid at [9]; Transcript at PN2787-PN2791.
- <sup>137</sup> Ibid at [10].
- <sup>138</sup> Ibid at [12].
- <sup>139</sup> Ibid at [11],[13]-[14].
- <sup>140</sup> Ibid at [15]-[17].
- <sup>141</sup> Ibid at [20]-[25].
- <sup>142</sup> Exhibit R9, Annexure MR2.
- <sup>143</sup> Exhibit R9, Annexure MR2; Transcript at PN3068.
- <sup>144</sup> Exhibit R9 at [26]-[27].
- <sup>145</sup> Exhibit 9, Annexure MR3.
- <sup>146</sup> Exhibit R9 at [33]-[39], Annexure MR4.
- <sup>147</sup> Transcript at PN2792; PN2829-PN2840
- <sup>148</sup> Transcript at PN2868; PN2891.
- <sup>149</sup> Transcript at PN2877; PN2891.
- <sup>150</sup> Transcript at PN2886.
- <sup>151</sup> Transcript at PN2901-PN2903; PN2910; PN2912.
- <sup>152</sup> Transcript at PN2907-PN2908.
- <sup>153</sup> Transcript at PN2923.
- <sup>154</sup> Transcript at PN2929-PN2933.
- <sup>155</sup> Transcript at PN2932-PN2939.

- <sup>156</sup> Transcript at PN2949.
- <sup>157</sup> Transcript at PN2994-PN2997.
- <sup>158</sup> Transcript at PN2999.
- <sup>159</sup> Transcript at PN3031-PN3032.
- <sup>160</sup> Transcript at PN2852-PN2856.
- <sup>161</sup> Transcript at PN3049-PN3050.
- <sup>162</sup> Transcript at PN2969-PN2971.
- <sup>163</sup> Transcript at PN2972-PN2974; PN2977.
- <sup>164</sup> Transcript at PN2974-PN2975.
- <sup>165</sup> Transcript at PN3039-PN3043.
- <sup>166</sup> Transcript at PN3068-PN3070.
- <sup>167</sup> Transcript at PN3015-PN3017.
- <sup>168</sup> Transcript at PN2431.
- <sup>169</sup> Exhibit R7 at [5].
- <sup>170</sup> Exhibit R7 at [6], Annexure JH1.
- <sup>171</sup> Transcript at PN2486-PN2488.
- <sup>172</sup> Transcript at PN2428; PN2629-PN2634.
- <sup>173</sup> Transcript at PN2491-2503; PN2697.
- <sup>174</sup> Transcript at PN2641.
- <sup>175</sup> Transcript at PN2642-PN2644.
- <sup>176</sup> Transcript at PN2643-PN2648.
- <sup>177</sup> Transcript at PN2699.
- <sup>178</sup> Transcript at PN2608-PN2623; PN2730
- <sup>179</sup> Transcript at PN2637-PN2640.
- <sup>180</sup> Transcript at PN2573; PN2587-PN2591.
- <sup>181</sup> Transcript at PN2599-PN2600.
- <sup>182</sup> Transcript at PN2658-PN2661
- <sup>183</sup> Transcript at PN2731.
- <sup>184</sup> Exhibit R2 at [79]-[80]; [89]-[90], Annexures BP22, BP24, BP26, BP27 and BP28.
- <sup>185</sup> Transcript at PN3171.
- <sup>186</sup> Transcript at PN3652-PN3653.
- <sup>187</sup> Document MFI-2.
- <sup>188</sup> Exhibit R2 at [24]; Transcript at PN1851-PN1852; PN1855; PN2011.
- <sup>189</sup> Exhibit R2 at [8]-[12].
- <sup>190</sup> Exhibit R2 at [17]-[21], [26], [29]-[43].
- <sup>191</sup> Exhibit R2, Annexure BP4; Transcript at PN1905-PN1910
- <sup>192</sup> Exhibit R2 at [22]-[25], [44]-[45].
- <sup>193</sup> Exhibit R2 at [20], Annexure BP5.
- <sup>194</sup> Exhibit R2 at [20], [46]-[51].
- <sup>195</sup> Exhibit R2 at [52], Annexure BP15.
- <sup>196</sup> Exhibit R2 at [53]; Exhibit R5 at [11]-[12].
- <sup>197</sup> Exhibit R2 at [54], Annexures BP16, BP17.
- <sup>198</sup> Exhibit R2 at [60].
- <sup>199</sup> Exhibit R2 at [62], [106].

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- <sup>200</sup> Exhibit R2 at [63].
- <sup>201</sup> Exhibit R2 at [64]-[97].
- <sup>202</sup> Exhibit R2 at [92], Annexures BP29-BP35.
- <sup>203</sup> Exhibit R2 at [93].
- <sup>204</sup> Exhibit R2 at [98].
- <sup>205</sup> Exhibit R2 at [99].
- <sup>206</sup> Exhibit R2 at [100], Annexure BP39.
- <sup>207</sup> Exhibit R2 at
- <sup>208</sup> Transcript at PN2019-PN2023.
- <sup>209</sup> Exhibit R2 at [102]; Exhibit R4.
- <sup>210</sup> Exhibit R2 at [103]-[104].
- <sup>211</sup> Exhibit R5 at [105], Exhibit R4.
- <sup>212</sup> Exhibit R5 at [22]; Exhibit R2 at [109].
- <sup>213</sup> Exhibit R5 at [22]-[26]; Exhibit R2 at [109]-[110].
- <sup>214</sup> Exhibit R2 at [116], Annexure BP48; Exhibit A1 at [37]-[38], Annexure JS1.
- <sup>215</sup> Exhibit A2 at [40], Annexure [40]; Exhibit R5 at [28], Annexure AH3.
- <sup>216</sup> Exhibit R5 at [29]-[34].
- <sup>217</sup> Transcript at PN2244-Pn2245.
- <sup>218</sup> Exhibit R5 at [32], Annexure AH4; Exhibit A1 at [41], Annexure JS5.
- <sup>219</sup> *Sayer v Melsteel Pty Ltd* [\[2011\] FWAFB 7498](#) at [14]; *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRCFCB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002) at [69].
- <sup>220</sup> *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.
- <sup>221</sup> *Ibid.*
- <sup>222</sup> *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.
- <sup>223</sup> *Edwards v Justice Giudice* [1999] FCA 1836, [7]; *Sydney Trains v Hilder* [\[2020\] FWCFB 1373](#) at [26].
- <sup>224</sup> *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFCB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24]; *Sydney Trains v Hilder* [\[2020\] FWCFB 1373](#) at [26].
- <sup>225</sup> *B, C and D v Australian Postal Corporation t/a Australia Post* [\[2013\] FWCFB 6191](#) at [36].
- <sup>226</sup> *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFCB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].
- <sup>227</sup> *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 110 ALR 449 at 450; *Sodeman v The King* [1936] HCA 75; (1936) 55 CLR 192 at 216 per Dixon J
- <sup>228</sup> 2019 FCA 451 at [14]-[18].
- <sup>229</sup> Exhibit R6 at [24]; Exhibit R5, Annexure AH4 at [3].
- <sup>230</sup> Exhibit R2, Annexures BP49, BP50.
- <sup>231</sup> [\[2013\] FWCFB 6191](#).
- <sup>232</sup> *Bartlett v Ingleburn Bus Services Pty Ltd* [\[2020\] FWCFB 6429](#) at [19]; *Reseigh v Stegbar Pty Ltd* [\[2020\] FWCFB 533](#) at [55].
- <sup>233</sup> [\[2016\] FWCFB 1540](#) at [17].
- <sup>234</sup> *DeVania Blackburn v Virgin Australia Airlines T/A Virgin Australia* [\[2022\] FWCFB 3509](#) at [71]-[85].
- <sup>235</sup> Exhibit A1 at [64]-[68].
- <sup>236</sup> *Holcim (Australia) Pty Ltd v Serafini* [\[2011\] FWAFB 77904](#) at [24].
- <sup>237</sup> Exhibit R2 at [156]; R5 at [54].
- <sup>238</sup> *Ngyuen v Than Le* [\[2014\] FWCFB 7198](#) at [10].