DECISION

Fair Work Act 2009
s.536LU - Application for an unfair deactivation remedy

Mohammad Shareef Hotak
v
Rasier Pacific Pty Ltd
(UDE2025/53)

DEPUTY PRESIDENT SAUNDERS
DEPUTY PRESIDENT FAROUQUE
COMMISSIONER THORNTON

SYDNEY, 23 SEPTEMBER 2025

Application for an unfair deactivation remedy – applicant was deactivated and later voluntarily reactivated – available remedies – order for reactivation made – parties to confer on calculation of quantum of order to restore lost pay.

Introduction

[1] Mr Hotak worked for Rasier Pacific Pty Ltd (**Uber**) as an Uber driver from 18 November 2020 until he was deactivated by Uber on 8 April 2025.

[2] On 24 April 2025, Mr Hotak filed an application for an unfair deactivation remedy in the Fair Work **Commission**.

[3] On 19 May 2025, just prior to filing its response to Mr Hotak's application for an unfair deactivation remedy, Uber voluntarily reactivated Mr Hotak's access to its digital labour platform, being the Uber driver platform, and Mr Hotak recommenced performing work as an Uber driver.

[4] Uber contends that Mr Hotak's unfair deactivation application should be dismissed on the basis that it has reactivated Mr Hotak's account on the Uber driver platform and no further remedy is available to Mr Hotak. Mr Hotak, who is represented by the Transport Workers' Union, denies Uber's contention and submits that orders should be made under s 536LQ(1)&(3) of the *Fair Work **Act** 2009* (Cth).

Relevant facts

[5] Mr Hotak and Uber agreed on the following facts:

"1. The Applicant:

(a) is a natural person capable of suing in their own name;

(b) resides at … in the State of South Australia; and

(c) is an 'employee-like' worker, as that term is defined by section 15P of the *Fair Work Act 2009* (Cth) (FW Act).

2. The Respondent:

(a) is a corporation capable of being sued;

(b) has its registered office located at … in the State of New South Wales;

(c) is part of the Uber Group of Companies; and

(d) is a 'digital labour platform operator', as that term is defined by section 15M of the FW Act.

3. On 18 November 2020, the Applicant commenced performing work through or by means of the digital labour platform operated by the Respondent (Uber Driver Platform). The Applicant's performance of work was subject to the terms of a services agreement between the Applicant, the Respondent, and Uber B.V. (being an entity in the Uber Group of Companies registered in the Netherlands). Under this agreement the Applicant would be known as a "Driver Partner" of the Respondent.

4. It was a term of the services agreement that the Applicant:

(a) provide transport services safely and in a professional manner with due skill, care, courtesy and diligence; and

(b) comply with the Respondent's Community Guidelines, policies and all laws that regulate or apply to the Applicant providing point-to-point transport services via the Uber Driver Platform.

5. It was a term of the Respondent's Community Guidelines that: "Riders and their guests, as well as drivers and delivery people, are prohibited from carrying weapons while using the Uber Marketplace Platform, to the extent permitted by applicable law. In addition, you can learn more about our global Firearms Prohibition Policy here."

6. As a digital labour platform operator, the Respondent was also required by Division 1 of Part 4 of the Passenger Transport Act 1994 (SA) Act to meet prescribed standards of safety of passengers and the public as a condition of its accreditation of Driver Partners.

7. On 24 March 2025 at about 11.00pm, the Applicant picked up a rider and two of their guests (three passengers in total) from Hindley Street. The Respondent received reports via the Uber Driver Platform from the Applicant and rider with respect to an alleged physical altercation (Alleged Safety Incident).

8. The rider complained the Applicant threatened them with a baseball bat.

9. The Applicant complained they required the riders and their guests to stop using drugs in their vehicle and asked them to leave the vehicle. They assaulted the Applicant from behind and exited the vehicle.

10. The Applicant denied possession of a weapon or threatening the rider and their guests.

11. The Applicant immediately called triple zero and formally reported their version of the Alleged Safety Incident to the Hindley Street Police Station in Adelaide in the State of South Australia. The Applicant's police report was assigned number SAP2500079573.

12. On 27 March 2025, the Applicant provided the Respondent with further details regarding the Alleged Safety Incident over the phone.

13. On 29 March 2025, the Respondent issued to the Applicant a preliminary deactivation notice (as that term is defined under section 11 of the Fair Work (digital labour platform Deactivation Code) Instrument 2024) regarding the Alleged Safety Incident (Preliminary Deactivation Notice).

14. On 29 March 2025, the Applicant responded in writing to the Preliminary Deactivation Notice.

15. The Respondent received the Applicant's response to the Preliminary Deactivation Notice and, on 8 April 2025, issued a final deactivation notice notifying the Applicant of their deactivation from the Uber Driver Platform.

16. On 9 April 2025, the Applicant commenced proceedings UDE2025/38 in the Fair Work Commission to apply for an unfair deactivation remedy.

17. On 24 April 2025, the Applicant, via their representative, commenced new proceedings UDE2025/53 in the Fair Work Commission to apply for an unfair deactivation remedy (New Application).

18. On 28 April 2025, the Applicant discontinued matter UDE2025/38.

19. On 5 May 2025, the Fair Work Commission served the New Application on the Respondent.

20. On 19 May 2025, the Respondent reactivated the Applicant's access to the Uber Driver Platform and the Applicant recommenced performing work as a Driver Partner of the Respondent.

21. Since the Respondent reactivated the Applicant's account on the Uber Driver Platform, the Applicant has completed over 150 trips."

[6] The Transport Workers' Union also filed and served witness statements made by Mr Hotak on 18 June 2025 and 1 August 2025. Mr Hotak was not required for cross examination.

[7] Uber tendered various documents at the hearing on 11 September 2025, but did not call any witnesses in its evidentiary case. This is because, in summary, Uber:

(a) accepts that it cannot, on the specific facts of this case, discharge its evidential onus to show that Mr Hotak was not "unfairly deactivated" by reason of compliance with the Digital Labour Platform Deactivation **Code** or otherwise; but

(b) submits that no remedy can be granted given Uber has reactivated Mr Hotak's access to the Uber driver platform.

The statutory scheme

[8] Part 3A-3 of the Act governs the unfair deactivation or unfair termination of regulated workers. The objects of Part 3A-3 include establishing a framework for dealing with unfair deactivation of employee-like workers that balances the needs of regulated businesses and the needs of regulated workers, establishing procedures for dealing with unfair deactivation that are quick, flexible, informal and address the needs of regulated businesses and regulated workers, and provide remedies if a deactivation or termination is found to be unfair, with an emphasis on reactivation (s 536LC of the Act).

[9] A person who has been deactivated may apply to the Commission for an order under Division 4 of Part 3A-3 (s 536LU(1) of the Act). Any such application must be made within 21 days after the deactivation took effect (s 536LU(3)(a) of the Act). However, the Commission has a discretion to extend time for an unfair deactivation application to be made if the Commission is satisfied that there are exceptional circumstances, taking into account the matters specified in s 536LU(4)(a) to (g) of the Act.

[10] The Commission must decide three initial matters before considering the merits of an unfair deactivation application (s 536LW of the Act). First, whether the application was made within the period required in s 536LU(3). Secondly, whether the applicant was protected from unfair deactivation. Thirdly, whether the deactivation was consistent with the Code.

[11] Section 536LD of the Act governs when a person is protected from unfair deactivation. It provides:

> "**536LD When a person is protected from unfair deactivation**
>
> A person is ***protected from unfair deactivation*** at a time if, at that time:
>
> (a) the person is an employee-like worker; and
>
> (b) the person:
>
> (i) performs work through or by means of a digital labour platform operated by a digital labour platform operator; or
>
> (ii) performs work under a services contract arranged or facilitated through or by means of a digital labour platform operated by a digital labour platform operator; and
>
> (c) the person has been performing work through or by means of that digital labour platform, or under a contract, or a series of contracts, arranged or facilitated through or by means of the digital labour platform, on a regular basis for a period of at least 6 months."

[12] The expression "employee-like worker" is defined in s 15P of the Act. It provides:

> "**Meaning of employee-like worker**
>
> (1) A person is an ***employee-like worker*** if:
>
> (a) the person is:

(i) an individual who is a party to a services contract in their capacity as an individual (other than as a principal), and performs work under the contract; or

(ii) if a body corporate is a party to a services contract (other than as a principal)--an individual who is a director of the body corporate, or a member of the family of a director of a body corporate, and performs work under the contract; or

(iii) if a trustee of a trust is a party to a services contract in their capacity as a trustee (other than as a principal)--an individual who is a trustee of the same trust and performs work under the contract, whether or not the individual is a party to the contract; or

(iv) if a partner in a partnership is a party to a services contract in their capacity as a partner (other than as a principal)--an individual who is a partner in the same partnership and performs work under the contract, whether or not the individual is a party to the contract; and

(b) the person performs all, or a significant majority, of the work to be performed under the services contract; and

(c) the work that the person performs under the services contract is digital platform work; and

(d) the person does not perform any work under the services contract as an employee; and

(e) the person satisfies 2 or more of the following:

(i) the person has low bargaining power in negotiations in relation to the services contract under which the work is performed;

(ii) the person receives remuneration at or below the rate of an employee performing comparable work;

(iii) the person has a low degree of authority over the performance of the work;

(iv) the person has such other characteristics as are prescribed by the regulations.

(2) In this Part, a reference to an independent contractor includes a reference to an individual who is an employee-like worker within the meaning of subsection (1).

(3) Regulations made for the purposes of subparagraph (1)(e)(iv) may specify that a person must have all or only one or some of the characteristics prescribed.

(4) For the purposes of determining whether an individual satisfies the criteria specified in paragraph (1)(e), the effect of a minimum standards order, minimum standards guidelines or a collective agreement applying to, or covering, the individual is to be disregarded."

[13] A "services contract" is relevantly defined as follows in s 15H of the Act:

"**Meaning of services contract**

General meaning

(1) A services contract is a contract for services:

(a) that relates to the performance of work under the contract by an individual; and

(b) that has the requisite constitutional connection specified in subsection (2) or (3)…"

[14] The meaning of "deactivated" is governed by s 536LG of the Act. It provides:

"**Meaning of deactivated**

A person has been deactivated from a digital labour platform if:

(a) The person performed digital platform work through or by means of the digital labour platform; and

(b) The digital labour platform operator modified, suspended, or terminated the person's access to the digital labour platform; and

(c) The person is no longer able to perform work under an existing or prospective services contract, or the ability of the person to do so is so significantly altered that in effect the person is no longer able to perform such work."

[15] The expression "digital platform work" is defined in s 15N of the Act. It provides:

"**Meaning of digital platform work**

(1) ***Digital platform work*** means:

(a) work performed by an independent contractor, where:

(i) the work is performed under a services contract through or by means of a digital labour platform, or the services contract under which the work is performed was arranged or facilitated through or by means of a digital labour platform; and

(ii) payment is made for that work; or

(b) work prescribed by the regulations for the purposes of this subsection.

(2) ***Digital platform work*** does not include work prescribed by the regulations for the purposes of this subsection.

(3) For the purposes of paragraph (1)(b) and subsection (2), work may be specified by name or by inclusion in a specified class or specified classes."

[16] The expression "digital labour platform" is defined in s 15L of the Act. It provides:

"**Meaning of digital labour platform**

(1) A ***digital labour platform*** means an online enabled application, website or system operated to arrange, allocate or facilitate the provision of labour services, where:

(a) the operator of the application, website or system:

(i) engages independent contractors directly or indirectly through or by means of the application, website or system; or

(ii) acts as an intermediary for or on behalf of more than one distinct but interdependent sets of users who interact with the independent contractors or the operator via the application, website or system; and

(b) any of the following processes payments referable to the work performed by the independent contractors:

(i) the operator of the application, website or system;

(ii) an associated entity of the operator;

(iii) a person contracted, whether directly or through one or more interposed entities, by the operator or an associated entity of the operator to process the payments.

(2) A ***digital labour platform*** also means an online enabled application, website or system that is prescribed by the regulations for the purposes of this subsection.

(3) A ***digital labour platform*** does not include an online application, website or system prescribed by the regulations for the purposes of this subsection.

(4) For the purposes of this section:

(a) an online application, website or system may be specified by name or by inclusion in a specified class or specified classes;

(b) an online application, website or system may be specified in respect of all forms of digital platform work, or in respect of specified forms of digital platform work."

[17] The expression "digital labour platform operator" is defined in s 15M of the Act. It provides:

"**Meaning of digital labour platform operator**

A ***digital labour platform operator*** means the operator of a digital labour platform, being an operator that enters into or facilitates a services contract under which work is performed by employee-like workers."

[18] Section 536LH of the Act governs the criteria for considering whether a deactivation was unfair. It provides:

"**536LH Criteria for considering whether a deactivation was unfair etc.**

(1) [Criteria for considering whether deactivation was unfair]

In considering whether it is satisfied that a person's deactivation was unfair, the FWC must take into account:

(a) whether there was a valid reason for the deactivation related to the person's capacity or conduct; and

(b) whether any relevant processes specified in the Digital Labour Platform Deactivation Code were followed; and

(c) any other matters that the FWC considers relevant.

(2) [Serious misconduct of person]

Despite subsection (1) and any other provision of this Part, a deactivation that occurs because of serious misconduct of the person who was deactivated is not unfair.

(3) [Suspension of person's access to platform for not more than 7 business days]

Despite subsection (1) and any other provision of this Part, a deactivation of a person from a digital labour platform is not unfair if:

(a) the deactivation is constituted by the modification or suspension of the person's access to the digital labour platform for a period of not more than 7 business days; and

(b) the FWC is satisfied that the digital labour platform operator concerned believes on reasonable grounds that one or more of the matters in subsection (4) is applicable.

(4) [Matters which digital labour platform operator may believe under subsection (3)]

For the purposes of subsection (3), the matters are as follows:

(a) that the deactivation of the person is necessary to protect the health and safety of a user of the digital labour platform or member of the community;

(b) that the person has engaged in fraudulent or dishonest conduct including, but not limited to, by misrepresenting or falsifying information provided to the digital labour platform operator;

(c) that the person has not complied with licensing and accreditation requirements imposed by or under a law of the Commonwealth, a State or a Territory, whether:

(i) the requirements relate to the licensing or accreditation of the person; or

(ii) the requirements relate to the licensing or accreditation of the digital labour platform operator, and the person's conduct causes, or may cause, the digital labour platform operator to breach the requirements;

(d) that the deactivation of the person is necessary to enable the digital labour platform operator to do one or more of the following in relation to a matter specified in paragraph (a), (b) or (c):

(i) conduct an investigation;

(ii) refer the matter to a law enforcement agency (however described) for the purposes of conducting an investigation."

[19] The Commission may order a remedy for unfair deactivation if it is satisfied that the person was protected from unfair deactivation at the time of being deactivated, the person has been unfairly deactivated, and the person has made an application under s 536LU of the Act (s 536LP(1)-(2) of the Act). The Commission must not order the payment of compensation to an applicant in an unfair deactivation matter (s 536LP(3) of the Act).

[20] Section 536LQ of the Act governs the available remedies in relation to an application for unfair deactivation. It provides:

"**536LQ Remedy-reactivation etc.**

Reactivation

(1) An order for a person's reactivation must be an order that the digital labour platform operator who operated the digital labour platform at the time of the deactivation take measures to restore the person to the position they would have been in but for the deactivation, including as follows:

(a) if the person's access to the digital labour platform was suspended--by removing the suspension;

(b) if the person's access to the digital labour platform was terminated--by reinstating the person's access to the digital labour platform;

(c) by modifying the person's access to the digital labour platform so that the access is as it was before the person's access to the digital labour platform was terminated or suspended.

(2) [If original digital labour platform no longer exists]

If:

(a) the digital labour platform (the ***original digital labour platform***) from which the person was deactivated no longer exists; and

(b) a similar digital labour platform (the ***second digital labour platform***) is operated by an associated entity of the operator of the original digital labour platform

the order under subsection (1) may be an order to the associated entity to provide access to the second digital labour platform on terms and conditions no less favourable than those immediately before the person's access to the original digital labour platform was terminated or suspended.

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 digital

labour platform operator or the associated entity to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the deactivation.

(4) [Determining amount]

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 work of any kind during the period between the deactivation and the making of the order for reactivation; 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 reactivation and the actual reactivation."

[21] The manner of deciding on and working out remedies under Part 3A-3 of the Act are intended to ensure that a "fair go all round" is accorded to both the regulated business and the regulated workers concerned (s 536LC(2) of the Act).

Submissions

Mr Hotak's submissions

[22] As to Uber's argument under s 536LG(c) of the Act that Mr Hotak ceased to be a worker who "has been" deactivated from a digital labour platform, Mr Hotak relies on the text and context of the relevant provisions of the Act. In particular, s 536LD of the Act details when a person is protected from unfair deactivation by requiring what the Commission has identified to be a "point in time inquiry" focused on the point the worker was deactivated.[1] This is clear from the terms of s 536LD(c) which, as Colman DP has pointed out, uses the present perfect continuous tense in the collocation "has been performing work".[2] The point in time assessment required by s 536LD is carried out by reference to when the worker was "deactivated". When a worker has been deactivated is the subject of definition in s 536LG which sets out three preconditions, each of which are directed to the state of affairs extant at the time of the deactivation. This is also the time the Commission is required to undertake the assessment about whether the worker is protected from unfair deactivation.

[23] Mr Hotak submits that the notion of when a person "has been deactivated from a digital labour platform" in s 536LG needs also to be understood in the context of s 536LF, which is substantive in nature and sets out the circumstances when a person has been unfairly deactivated. The use of the past participle "been" in the chapeau to s 536LF indicates that the focus of the Commission is on a historical point in time. This is reinforced by the use of the past tense in each of the three integers set out in s 536LF: "has been" in s 536LF(a); the past indicative "was" in s 536LF(b); and the phrase "was not" in (c). The past focus of s 536LF supports that s 536LG contemplates a point-in-time inquiry directed to a past state of affairs.

[24] Section 536LG is definitional in nature. Its chapeau conveys, by use of the phrase "has been", that whether a worker has been deactivated is focused on a past point in time. The first integer in s 536LG(a) uses the word "performed", being the past tense and past participle of "perform". This precondition is focused on what the person did – specifically whether they carried out work through or by means of a digital labour platform. The second integer in s 536LG(b) uses the past participles "modified, suspended or terminated", which focus on a past

act by the digital labour platform operator. The last integer in s 536LG(c) uses the word "is", which may be the singular present indicative. The use of the present indicative appears to be the sole basis for Uber's contention that Mr Hotak has not been deactivated because he is presently able to perform work. However, it is submitted that the final integer must be read in the context of s 536LG as a whole. Section 536LG(c) directs attention to the result or consequence of the action referred to in s 536LG(b), which disturbs the state of affairs referred to in s 536LG(a). Read in the scheme of s 536LG as a whole, Mr Hotak submits that s 536LG(c) is directed to the consequence of a past act on a past state of affairs.

[25] Also important is s 536LH, which enumerates the criteria for determining whether a deactivation was unfair. The chapeau to s 536LH(1) sets out that in considering whether "a person's deactivation was unfair", the Commission is to take into account various matters. The verb "was" again uses the past tense, indicating, so Mr Hotak contends, that the focus of the Commission is on an evaluation of a past state of affairs. This is further reinforced by the criteria in ss 536LH(a)-(b), the first of which focuses on whether there "was" a valid reason for the deactivation and the second on whether particular processes that led to the deactivation "were" followed.

[26] Mr Hotak submits that the exception in s 536LH(3)(a) is significant. It details a circumstance where a deactivation will not be unfair where access to a digital labour platform is restricted for a period of not more than 7 business days. In other words, it expressly contemplates that a person who loses access to a digital labour platform by modification or suspension of their access for a period of greater than 7 business days can maintain an application for an unfair deactivation remedy. It envisages that a person who has been "deactivated" will be able to maintain an application for an unfair deactivation remedy after "reactivation". This exception poses an insuperable obstacle to Uber's argument. If Uber's argument were correct, Mr Hotak contends that this exception in s 536LH(3)(a) would be otiose. This would be contrary to basic principles of construction.

[27] Mr Hotak submits that the following contextual matters also point squarely against the construction favoured by Uber:

(a) First, the use of the expression "unfair deactivation" in Part 3A-3 is itself significant. The noun "deactivation" refers to an act of causing something to be no longer active or effective. The concept of an "unfair deactivation" captures a deactivation that has occurred at some past point, and which had the quality or character of being "unfair". Relief from "unfair deactivation" is relief from the effects or implications a past unfair act. This supports the notion that in order to be "deactivated" and able to seek a remedy from the Commission, a person need not, at the time their application comes to be determined, be unable to work under an existing or prospective services contract.

(b) Second, the function of s 536LG is not, when read in the context of Part 3A-3 as a whole, to determine when a person is protected from unfair deactivation. That is the function allocated to Division 2. Section 536LG's singular focus is to give content to the defined term "deactivated", which is the first ingredient in s 536LF of an "unfair deactivation".

(c) Third, the exception in s 536LH(3)(a) to whether a deactivation is unfair is significant. It evidences a clear legislative intent that a worker be able to maintain an application for relief from unfair deactivation even if they have been reactivated.

(d) Fourth, s 536LU permits a person who "has been" deactivated to apply to the Commission for a remedy. There is no dispute that Mr Hotak's application was a valid one within the meaning of s 536LU. The Commission's jurisdiction to deal with the application was properly and regularly invoked. It is presumed that the legislature does not intend to withdraw or limit a conferral of jurisdiction, unless the implication arises clearly and unmistakably. Uber do not identify any clear and unmistakable legislative intent. That is unsurprising as none exists.

(e) Fifth, s 536LW performs the function of requiring the Commission to determine particular matters as threshold jurisdictional questions before turning to consider the merits of an application. One of these is whether the person was protected from unfair deactivation. This militates in favour of a legislative intent that the Commission's jurisdiction to consider an application is premised on the person being protected from unfair deactivation at the time they make their application, not on whether or not, at some later point in time before that application is determined, they remain "deactivated".

(f) Sixth, an order for reactivation in s 536LQ(1) is directed to restoring the person to the position they would have been in but for the deactivation. The relief the Commission is able to grant is directed to remedying the effects of the deactivation. The use of the definite article makes clear that the provision is directed to a particular past deactivation. This evinces that: (i) deactivation is conceived to be a singular act that occurs at a point in time; and (ii) the focus of the Commission's remedial power is to remedy the effects of that act.

(g) Seventh, the prerequisites to an order remedying a deactivation in s 536LP are that the person was protected from deactivation at the time of being deactivated and that the person has been unfairly deactivated. Both these preconditions reinforce that the focus of the Commission is on a past instance of reactivation and that whether a person has subsequently been reactivated is not a barrier to the ordering of a remedy.

[28] Mr Hotak submits that the following purposive matters point resoundingly against Uber's construction:

(a) First, the purpose of s 536LG is, as apparent from its place in Division 3, to give content to when a person will have been unfairly deactivated. It is not, as Uber presumes, to limit or otherwise restrict the Commission's jurisdiction to consider the merits of an application relating to an unfair deactivation.

(b) Second, one of the express objects of Part 3A-3 in s 536LF(c) is to provide remedies if an unfair deactivation occurs. Uber's contention that the Commission's jurisdiction evaporates if, at some point prior to the determination of an application for an unfair deactivation remedy, the digital labour platform re-commences providing access to the worker, grates with that object.

(c) Third, it is also apparent that the purpose of Part 3A-3 is to confer jurisdiction on the Commission to provide a remedy to a worker where the worker has been the subject of an unfair deactivation. That is plain from the Minister's second reading speech and the object set out in s 536LC(c). Uber's construction is incongruent with that purpose and should not be preferred.

(d) Finally, Uber's construction leads to arbitrary and absurd practical outcomes, including:

(i) a worker could make an application for a remedy for unfair deactivation in April, have the matter heard some months later, with the Commission having reserved its decision. At this point, the worker will have spent a significant amount of time and expense preparing and running the matter to a hearing. The worker may also have suffered significant economic and financial detriment as a result of being unfairly deprived of access to platform-based work. At any time prior to the Commission delivering its decision, an operator could reactivate the worker's access, and the Commission's jurisdiction would vanish. This would lead to the consequence that a worker who has been unfairly deprived of work via a digital labour platform for many months will have no capacity to obtain any remedial order from the Commission. Uber incongruously implies in its submissions that this is consistent with the objective of the provisions of Part 3A-3. That submission is fanciful; and

(ii) as the Commission observed in *Panwar v Portier Pacific*,[3] whether a worker is protected from unfair deactivation for the purposes of s 536LD requires the Commission to consider whether, at the point when a worker was deactivated, they had been performing work via the platform for a continuous period of at least 6 months. Uber's unfair deactivation of Mr Hotak's access to the Uber driver app for over a month means that he would now no longer qualify for protection from unfair deactivation if Uber determined tomorrow to deactivate his account. Uber's construction would lead to an anomalous and unfair circumstance that a worker such as Mr Hotak would drop in and out of the protection of Part 3A-3.

[29] As to Uber's argument that Mr Hotak cannot seek an order under s 536LQ(3) of the Act, Mr Hotak contends that the premise of this argument is that the remedy of reactivation under s 536LQ(1) is limited, in the case of a worker whose access has been terminated, to reinstating access. That literal understanding of "reactivation" which appears to undergird this argument is wrong. Uber assumes that an order for "reactivation" is one that is limited to "reactivating" the worker's access to the digital labour platform. That ignores the words of s 536LQ(1). An "order for reactivation" is one that involves restoring the person to the position they would have been in but for the deactivation. The conferral of power is cast in broad terms and permits the Commission to make orders that achieve restoration. It is not limited to an order that the worker be "reactivated". In addition, Mr Hotak submits that Uber overlooks the phrase "including as follows" in s 536LQ(1). The word "including" or "includes" is generally used in a statute by way of enlargement or clarification. The matters set out in s 536LQ(1)(a)-(c) are intended to be illustrative rather than exhaustive or conclusive of the types of orders the Commission can make in order to restore the person to the position they would have been in but for the deactivation.

Flowing from this faulty argument is Uber's assertion that Mr Hotak cannot now obtain any relief at all from the Commission under s 536LQ(1). That is erroneous. Mr Hotak seeks to be restored to the position he would have been in but for the deactivation. As a result of Mr Hotak's deactivation:

(a) he was deactivated for a substantial period and was not able to perform any work for Uber. As a result, he is not presently a person who is protected from unfair deactivation for the purposes of s 536LD;

(b) Mr Hotak's services contract with Uber was terminated. It is not clear on what terms (if any) Mr Hotak is currently engaged by Uber. There is nothing indicating that he is now engaged on the same terms as he was at the time of deactivation and termination of the services contract by Uber;

(c) he is the subject of negative reviews arising from the incident on 24 March 2025; and

(d) he appears to be the subject of allegations of serious misconduct, which Uber has not rejected nor resolved.

[30] Mr Hotak contends that he is plainly not in the same position he would have been in but for the de-activation. In order to restore Mr Hotak to the position he would have been in but for the deactivation, Mr Hotak seeks orders for his reactivation under s 536LQ(1) on the basis that:

(a) his performance of work for Uber be continuous from 8 April 2025;

(b) his current engagement by Uber be on the same terms and conditions as at 8 April 2025; and

(c) Uber remove the negative reviews arising from the incident on 24 March 2025 and otherwise treat the allegations of serious misconduct in relation to 24 March 2025 against Mr Hotak as false.

[31] It is submitted that an order on these terms is imperative to ensure Mr Hotak is restored to the position he would have been in but for the deactivation.

[32] Given that Mr Hotak seeks an order under s 536LQ(1), he submits that he is entitled to maintain his application for an order to restore lost pay under s 536LQ(3) of the Act. Mr Hotak contends that he is not merely seeking a compensatory remedy as asserted by Uber.

Uber's submissions

[33] In summary, Uber argues that Mr Hotak's unfair deactivation claim should be dismissed because:

(a) *Reactivation of account:* Mr Hotak's account was reactivated on 19 May 2025, allowing him to resume work. Therefore, he is no longer "deactivated" within the meaning of 536LG(c) of the Act. As a result, the Commission cannot find that Mr Hotak "has been deactivated" under section 536LF(a) of the Act, which is a prerequisite for determining unfairness and granting relief. It follows, so Uber contends, that the application must be dismissed.

(b) *Limited remedies under the Act:* The Act provides only one remedy for unfair deactivation: reactivation (ss 536LP and 536LQ of the Act). Only after an order for reactivation is made can the Commission consider ordering lost remuneration (s 536LQ(3) of the Act). The Act explicitly prohibits the Commission from ordering the payment of compensation to an applicant in unfair deactivation proceedings (s 536LP(3) of the Act). As a matter of construction, an order under section 536LQ(1) is only available to reverse or remedy the effect of a "deactivation". If a worker's access to a digital labour platform has already been restored, they are no longer "deactivated" in any way that section 536LQ(1) can address. Uber submits that there is no further basis – or jurisdiction – for the making of an order.

[34] Uber contends that the meaning of "deactivated" used in s 536LG refers not to the past event of a person being deactivated but also to an ongoing state of affairs of continuing to be deactivated at the time of the order being made. Several matters are said to support this contention.

[35] First, the tense is often used in legislation to identify things or to impose obligations and can be used by courts in interpreting legislation. For the reasons that follow, Uber contends that the careful and deliberate use of tense in the relevant provisions in Pt 3A-3 is critical to ascertaining their meaning and the operation of the jurisdictional requirements and the Commission's limited powers in granting the specified remedies in s 536LQ.

[36] Second, the meaning of deactivated is based on the premise that a person "has been deactivated from a digital labour platform". Contrary to Mr Hotak's submissions, the words "has been" are not in the past tense but a form of the present perfect continuous tense; a verb phrase indicating an action that has started in the past and is still ongoing or relevant in the present. In the context of its use in Pt 3A-3 of the Act dealing with unfair deactivation of regulated workers, the Commission has found that the use of the same words in s 546LD(c) "connotes a connection between the past and the present".[4] This indicates that not only must the act of a person being deactivated from a digital labour platform have occurred in the past but continues to be an ongoing state of affairs in the present as at the time of remedial orders being made.

[37] Third, the meaning of deactivated in s 536LG uses two different tenses in regard to different elements of the definition. Each of the paragraphs (a) to (c) in s 536LG must be met for a person to have been deactivated. The tenses used in the different paragraphs need to be carefully identified and distinguished. In paragraphs (a) and (b), the verbs used describe actions in the past tense. The use of the past tense indicates that the actions must have already occurred; namely, the person must have *performed* digital platform work through or by means of a digital platform (s 536LG(a)) and the digital labour platform operator must have *modified, suspended* or *terminated* a person's access to the digital labour platform (s 536LG(b)). The tense used in

paragraphs (a) and (b) of s 536LG stands in contrast to paragraph (c), which provides that the person "*is no longer able* to perform under an existing or prospective services contract" or "the ability of the person *is* so significantly altered that in effect the person *is no longer able* to perform such work". The use of the word "is" in the present tense can be used either descriptively (sometimes referred to as the timeless present tense), which is used to describe facts that are always the same, or can be used to signify contemporaneity (the present continuous tense or the present progressive tense).

[38] The phrase "is no longer able to perform work…" in s 536LG(c) indicates that the person's inability is current and ongoing even though it resulted from a past event; it is therefore expressed in the present continuous tense or present progressive tense. The requirement in paragraph (c) indicates that the relevant state of affairs, that is, the status of being "deactivated", must be ongoing at the time of the Commission's determination of the application, including the making of any orders for relief.

[39] In Uber's submission, s 536LG(c) does more than direct attention to the consequence of the past act of the person's access having been modified, suspended, or terminated as listed in s 536LG(b), but rather makes plain that the consequence must be one that is continuing. If Mr Hotak's submission were to be accepted that s 536LG(c) merely identifies the immediate outcome of the past act rather than an ongoing state of affairs, then the grammatically correct manner of expressing the condition in paragraph (c) would have been to use the past tense such as along the following lines:

> As a result of the actions in paragraph (b), the person was not able to perform work under an existing or prospective services contract or the ability of the person to do so was so significantly altered that in effect the person was not able to perform such work.

[40] Alternatively, s 536LG(c) would not be required at all.

[41] Thus, contrary to Mr Hotak's submission, Uber submits that the use of tense and grammar in s 536LG(c) strongly supports its construction that the status of a person having been "deactivated" must be a continuing state of affairs at the time of the hearing and any orders being made.

[42] Fourth, the specific and nuanced use of tense in s 536LG is illuminated when compared to the use of tense in the definition of "terminated" contained in s 536LL which deals with unfair termination of road transport service contracts. Each of the limbs set out in paragraphs (a) to (c) of s 536LL are expressed in the past tense. Relevantly, in relation to s 536LL(c), the relevant state of affairs that must exist is that the services contract "*was* terminated by, or *as a result of* the conduct of, the road transport business". In contrast to the equivalent limb in s 536LG(c), the effect of termination does not have to be ongoing but is cast as a historical event. This suggests that the use of the present continuous tense, as opposed to the past tense in s 536LG(c), was deliberate and intended to refer to a state of affairs continuing to be in existence at the time orders are made.

[43] Fifth, contrary to Mr Hotak's submissions, the definition of "unfairly deactivated" in s 536LF and the criteria for determining whether a deactivation was unfair under s 536LH(1) do not support Mr Hotak's interpretation that a person's status of being deactivated; it refers only to a past event rather than an ongoing status. It may be accepted that the determination of

whether a deactivation *was* unfair is a backward-looking assessment. The use of the phrases "*was* unfair" and "*was* not consistent with the Digital Labour Platform Deactivation Code" in ss 536LF(b) and (c) and 536LH(1) supports that position. Nonetheless, the nature of the evaluation of unfairness is a separate and distinct question from whether a person's status is and continues to be "deactivated". Mr Hotak impermissibly conflates the two different strands of inquiry.

[44] Sixth, Mr Hotak asserts that the terms of s 536LH provide an "insuperable obstacle" to Uber's argument by demonstrating that it is only where the deactivation is effective for less than seven business days that the relevant exception to determining unfairness applies, which must then mean that those deactivated for seven business days or longer will be able to maintain an application for a deactivation remedy after "reactivation". Mr Hotak also argues that this provision would be otiose if Uber's construction of s 536LG(c) is correct. Contrary to Mr Hotak's contention, Uber submits that the use of the present tense in the exceptions referred to in ss 536LH(2) and 536LH(3) support its preferred interpretation. In contrast to the language used in ss 536LF(b) and (c) and 536LH(1) which refers to determining whether a person's deactivation "*was* unfair", both ss 536LH(2) and (3) refer to circumstances where a person's deactivation "*is* not unfair" (rather than *was* not unfair). This change in tense indicates that deactivation is not unfair, and therefore not protected from "unfair deactivation", based on events or a state of affairs which may exist *after* the deactivation has already taken place. This supports the interpretation that deactivation is not a static point-in-time concept.

[45] Further, s 536LH(3) provides that a deactivation by *modifying* or *suspending* a person's access to the digital labour platform for a period of not more than seven business days is not unfair if the Commission is satisfied that the digital labour platform operator "believes on reasonable grounds that one or more of the matters" in s 536LH(4) is applicable. This enables, for example, a digital labour platform operator to deactivate a person and then take action on an urgent basis to address an ongoing state of affairs where immediate deactivation may have been necessary, such as taking steps to protect the health and safety of a user of the digital labour platform or member of the community (s 536LH(4)(a)) or conducting an investigation or referring a matter to a law enforcement agency for the purposes of conducting an investigation in relation to one of the specified serious matters identified in ss 536LH(4)(a) to (c) (s 536LH(4)(d)). It also envisages that a digital labour platform operator may need more than 7 business days to deal with an ongoing matter to address these immediate issues requiring deactivating a person from the digital labour platform, but then, having had sufficient time to address these issues, will reactivate the person's access to the digital labour platform. This factor also supports Uber's preferred construction.

[46] Seventh, Uber submits that the nature and purpose of the unfair deactivation provisions in Part 3A-3 of the Act in the context of digital platform work also support its preferred construction. The notion of unfair deactivation should not be viewed through the more orthodox prism of 'unfair dismissal' in Part 3-2 of the Act or 'unlawful termination' in contravention of the general protections in Part 3-1, the additional protections in Part 6-4 of the Act or 'unfair termination' in Part 3A-3. A fundamental premise underpinning unfair or unlawful termination is the existence of a direct contractual relationship between the employer and employee, or principal and independent contractor, which has been severed permanently. By contrast, the unfair deactivation provisions are directed to protecting a person performing 'digital platform work' *through* or *by means of* the digital labour platform. This different mode of arranging

work is reflected in the definitions used to describe digital platform work, its relevant components and its participants (ss 15L, 15M and 15N of the Act). A common thread in these definitions is that the digital labour platform arranges, allocates or facilitates access to digital platform work. Thus, the characteristics of digital platform work differ from the conventional paradigm of mutual and direct exchange between an employer and employee, or other principals and independent contractors not engaged in digital platform work. Rather, digital platform work is a *means of organising* work which is based on *facilitating* the connection between individual workers and the opportunity to perform short-term task-based assignments through an electronic web or app-based tool. To participate in the marketplace established on the digital labour platform, an individual must be activated to have access to that platform. Deactivation is an act which restricts or prevents a person's *access* to the digital labour platform such that the person is no longer able to perform work (s 536LG). Consequently, the central focus of the unfair deactivation provisions in Part 3A-3 is to ensure that an individual's *access* to the digital labour platform is not prevented, hindered or restricted *unfairly* in order to provide them with the opportunity to generate income. The primary remedy is therefore the restoration of access to the digital labour platform in a timely manner (ss 536LC(b) and (c) and 536LQ(1)).

[47] Relatedly, the Commission's power to order backpay under s 536LQ(3) is necessarily based on proving that the applicant has suffered a *loss of opportunity* to earn income by accessing the digital labour platform to participate in the marketplace and accept opportunities to undertake work. The method of valuing such a loss of opportunity requires estimating what the applicant was reasonably likely to have earned between the time of deactivation and the order for reactivation (s 536LQ(4)). The Commission has a discretion to determine when an order for reactivation takes effect. It also may be impacted by the fact that employee-like workers have the ability to accept other opportunities to perform work elsewhere at any time including on other digital labour platforms. It is conceivable that an applicant will have suffered no loss as employee-like workers may not lose other available concurrent opportunities to earn income by being able to access other digital work platforms and other marketplaces for short-term work. Thus, the calculation of backpay for employee-like workers will inevitably be different to the method of calculating backpay for employees as a result of a successful unfair dismissal claim, the latter being ordinarily based on the counterfactual that, but for the unfair dismissal, an applicant would have continued employment with the employer receiving a regular fixed salary and therefore is an amount which more readily capable of being ascertained. This fundamental difference in calculating backpay may help explain why the Commission's power to order backpay is specifically linked to the Commission's task of determining that an applicant's reactivation was unfair and determining that the applicant is entitled to the primary remedy of reactivation under s 536LQ(1). It also elucidates why compensation is not available as a remedy (s 536LP(3)).

[48] Further, while Uber's construction is consistent with status of the regulated worker provisions as being relatively new, a survey of the historical origins of Federal and State industrial relations legislation indicates that a tribunal's power to grant reinstatement without a corresponding power to order compensation was not unusual and the power to order compensation only became clear after legislative amendment. It may be recalled that the Commonwealth and State industrial relations legislation dealing with unfair dismissal provided the Tribunal with no, or very limited, power to grant backpay and compensation. Until the late 1980s, the reinstatement jurisdiction of Federal and State industrial tribunals did not expressly and specifically provide for making orders for compensation even where reinstatement was

granted. The power to grant such orders evolved over time. In light of this historical context, there is nothing inherently unjust in the Commission's power to order backpay being specifically linked to its power to order reinstatement, or in this case reactivation.

[49] Having regard to the special characteristics of digital labour platform work and the purpose of the provisions, it becomes apparent that it is not arbitrary or capricious for a person to no longer be entitled to relief if that person has been "reactivated" to the digital labour platform. To the contrary, the statutory scheme is aimed at ensuring that reactivation is the primary remedy, and any order for backpay is merely ancillary to access being re-established by Commission order. To the extent that a digital labour platform operator may have acted unreasonably by reactivating a person's access to the platform only after the worker has incurred time and costs in preparing and running the matter to hearing, the Commission has the power to exercise its discretion in appropriate cases to award costs to remedy that issue.

[50] As to the question of remedy, Uber submits that the construction of section 536LQ(1) begins, but does not end, with a consideration of its words. Context is relevant at every stage in interpretation and may lead to a result differing from a literal reading. In interpreting the provision, an interpretation which best advances the purpose or object of the Act is to be preferred to every other interpretation. This includes the specific objects of the unfair deactivation regime set out in section 536LC, including: (a) establishing an unfair deactivation framework that balances the needs of digital labour platform operators and workers; (b) establishing quick, flexible and informal procedures for dealing with unfair deactivation that addresses the needs of digital labour platform operators and workers; and (c) providing remedies with an emphasis on reactivation, all in a manner intended to ensure a "fair go all round" to digital labour platform operators and workers.

[51] According to the ordinary words of section 536LQ(1), the order in question is one which is directed to reversing the "unfair deactivation". The context of section 536LQ(3), which provides for the making of an additional order for the payment of lost remuneration, confirms the limited scope of sub-section (1). Sub-section (1) does not carry a power to remedy the effect of an unfair deactivation by ordering payment for lost remuneration; if it did, sub-section (3) would be unnecessary. Rather, the effect of the order under section 536LQ(1) is to practically reverse the "deactivation".

[52] The language of s 536LQ(1) indicates that the power to be exercised is limited to reactivation. The words in the chapeau "an order for a person's reactivation" and its use in the heading indicate that the order made under s 536LQ(1) is directed to achieving the purpose of "reactivation". The use of the prefix 're' denotes repetition, or doing something again. Logically the purpose of an order to reactivate is necessarily to reverse an earlier deactivation. Reactivation, on its ordinary meaning, therefore, requires taking steps or measures to activate a person's access to the digital labour platform on another occasion.

[53] The content of an order for reactivation requiring that the digital labour platform operator "take measures to restore the person to the position they would have been in but for the deactivation" denotes that the measures must place the applicant in the *status quo ante* prior to the deactivation taking place. The phrase "measures to restore" suggests that practical steps may be required to be taken to achieve the outcome of restoration. The words "but for the deactivation" draw a causal linkage between the measures that must be taken to reverse the

deactivation and the outcome of achieving "reactivation". Such measures may include, for example, providing the applicant with a username and password, and access to any software such as an application, to enable the applicant to have functional access to the platform in the same way that the person had been able to have access previously.

[54] This meaning of "reactivation" being directed to restoring access to the digital labour platform is supported by the Commission's power of determining the amount of the "lost pay" which can be ordered to compensate the applicant caused by the deactivation. The calculation of backpay under s 536LQ(4) is based on the premise that there is a single point in time for when the actual reactivation will take place pursuant to an order to enable the calculation of the amount of the remuneration based on the period between the time of deactivation and time of reactivation. This suggests that reactivation is directed to restoring a person's access to the digital labour platform only.

[55] The phrase "including as follows" in the chapeau to s 536LQ(1) is exhaustive in nature rather than by way of enlargement or clarification. It is well accepted that the word "including" can be used to extend the ordinary meaning of the particular word or concept to bring within the scope of the meaning of that word or concept something that otherwise would not be encompassed by it; or to avoid possible uncertainty as to whether something may come within the definition by expressly providing for its inclusion; or to provide an exhaustive explanation of the meanings to be attached to the word or concept if the context in which the word or concept appears reveals that intention.

[56] The Act has used the method of drafting elsewhere by using the word "including" to create an exhaustive list of the range of meanings. For example, the Full Bench of the Commission found the use of the phrase "includes any of the following" in the definition of "significant effects" in the model consultation term for modern awards suggested that the list of identified effects was exhaustive.[5]

[57] The collocation of words "includes as follows" is not used elsewhere in the Act to describe a non-exhaustive list. The words "as follows" is a phrase used to set out a series of items, actions, by way of elaboration or clarification, providing details or specifics about a preceding statement. The deployment of that phrase after the word "includes" has a constraining operation. It indicates that the inclusion of the restorative measures available is complete. This is supported by the measures listed in s 536LQ(1) covering the universe of possibilities to reactivate a person's access to a digital labour platform to remediate the different means by which a person may have been deactivated set out in s 536LG(b); that is, if access was suspended, by removing suspension (s 536LQ(1)(a)); if access was terminated, by reinstating access (s 536LQ(1)(b)); and if access was modified such that access was terminated or suspended, by modifying access to restore access to what it was previously (s 536(1)(c)).

[58] Conversely, where the word "include" is intended to mean a non-exhaustive list, it has often been followed by the expression "but not limited to" or similar words: see e.g. ss 15A(2)(c), 458(5), Note 2 to s 333E(1), 536KMA(1)(a), 536KM(1)(d), 536PR(1)(c), 582(4D), 789DB(1), 789DE(4), 789GZD(2) of the Act. Likewise, in the context of the exercise of remedial powers or functions, where the Act seeks not to limit the scope of the relief or matters to be addressed, it often uses words such as "without limiting subsection (x)" or similar language: see e.g. ss 303(1), 333M(3), 536LJ(2), 536LN(2), 545(2), 587(1), 590(2) of the Act.

This suggests that where the words "but not limited to", "without limiting" or cognate phrases are deployed, the drafters have used a drafting technique to make clear that the list following is non-exhaustive. The absence of the use of similar language or concepts in s 536LQ(1) but the use of words "as follows" suggests that Parliament intended to create an exhaustive list.

[59] Section 536LQ(1) is not directed to remedying the "effects" of unfair deactivation but merely to carry out the measures to effectuate "reactivation". Mr Hotak's contentions seek to insert words into s 536LQ(1) which do not exist. The Commission does not have a specific power to grant appropriate relief as it considers fit to achieve restoration in a broader sense beyond "reactivation". Section 536LQ(1) provides the Commission with powers to restore a person's position by taking measures to effect "reactivation", and nothing more.

[60] The limited scope for relief that can be ordered under s 536LQ can be contrasted with the remedial powers under s 545(1) which permits the Federal Court or the Federal Circuit and Family Court (Division 2) to grant an order it "considers appropriate" in relation to a contravention or proposed contravention of a civil remedy provision. Section 545(1) has a restorative purpose, conferring a broad power to craft the nature and form of the relief to achieve that purpose. The examples in s 545(2) suggest that s 545(1) is preventative or remedial in nature, including by relief preventing, stopping or remedying the effects of a contravention by injunctive relief and by compensating victims for the effects of a contravention.

[61] On the other hand, s 536LQ(1) has a much more limited purpose and operation which is directed to restoring the *status quo ante* related to activation to grant access to the digital labour platform. In this sense, s 536LQ(1) is similar to the express power to order reinstatement of a former employee to their former position. The Commission's power of reinstatement has the purpose of re-establishing the parties' practical working relationship by giving the employee back their job. However, the power does not extend to additional matters connected to the dismissal; for example, by changing an employee's record, such as removing a written warning, altering an employee's performance ranking or changing the outcome of an internal investigation and any adverse findings made. These are matters left to the employer and cannot be altered by the Commission.

[62] Relevantly, the Commission's analogue power for remedying the unfair termination of a services contract by a road transport business is to order that the parties entered into a new services contract in the same terms as the services contract at the time of termination with any such variations as it considers appropriate (s 536LS(1)). There is no express power conferred on the Commission to grant broader restorative relief in an unfair termination. Given that the unfair deactivation and unfair termination schemes have a similar scope and operation aimed at employee-like workers, it seems highly improbable that Parliament intended to confer a 'reinstatement' power which was broader than the unfair dismissal and unfair termination provisions.

[63] To the extent that s 536LQ(1) is a power granting the Commission authority to make other orders outside the orders specified in paragraphs (a) to (c), then the *ejusdem generis* maxim applies, and the species of orders capable of being made should be understood as being confined to order of the same kind. The kind of orders that the Commission may, for example, be dealing with are other measures, not covered by s 536LQ(1)(a) to (c), to reactivate a person's access to the platform. An example may be where there are technological restrictions placed on

a person's access to the digital labour platform which do not fall within the categories of removing the suspension, reinstatement or modifying access listed in s 536LQ(1)(a) to (c). The power does not, however, extend to dealing with matters which are merely connected with the deactivation, causally, consequentially or otherwise, such as the orders sought by Mr Hotak in this case to modify his ratings.

[64] In broader context, section 536LQ is plainly patterned on section 391, which provides for the making of reinstatement orders following a finding that an employee has been unfairly dismissed. The similarity in the provisions is obvious from a comparison of their terms.

[65] To the extent there is any ambiguity about the relationship between the provisions, or to confirm their relationship, recourse may be had to extrinsic materials. The extrinsic materials confirm the obvious that the law creates "an unfair deactivation regime for [workers] similar to the [Fair Work Act's] existing unfair dismissal regime". It is thus clear that the Parliament adopted essentially the same framework for the Commission to handle an unfair deactivation application as already pertained to unfair dismissal. Section 536LQ is a "legislative adoption" of the concepts already present in section 391. The structure adopted from an established to a new cause of action includes that: (a) the principal order is to reverse the effect of the unfair dismissal or deactivation, by reinstatement or reactivation respectively; (b) only having made such an order does the Commission have discretion to make a further order to remedy the loss of pay or remuneration between the unfair dismissal or deactivation and the order for reinstatement or reactivation; and (c) thus, payment for lost remuneration is conditional on the "reactivation" of the worker, in the same way "reinstatement" of the employee enlivens a power to make an order for payment of lost wages.

[66] The nature of reinstatement orders under a predecessor to section 391 was considered by the High Court in *Blackadder v Ramsey Butchering Services Pty Ltd*.[6] The Court was unanimous in the view that an employer had failed to "reinstate" an employee to whom it paid the relevant wage but failed to provide the employee with duties: (a) McHugh J said that to "reinstate" means "to put back in place. In this context, it means that the employment situation, as it existed immediately before the termination, must be restored"; (b) Kirby J said that by the relevant statutory provisions and order, "reinstatement of the appellant was meant to be real and practical, not illusory and theoretical"; (c) Hayne J said that "reinstatement by reappointing to a former position requires the recreation of the circumstances of employment that preceded the termination. The contractual nexus between the parties must be re-established. The terms and conditions of that contract must be the same. The employer must provide work to be done by the employee of the same kind and volume as was being done before termination"; and (d) Callinan and Heydon JJ said that the word "reinstate" "literally means to put back in place. To pay the appellant but not to put him back in his usual situation in the workplace would not be to reinstate him".

[67] Based on the reasoning of the High Court, a Full Bench of the Commission in *Cartisano v Sportsmed SA Hospitals Pty Ltd*[7] has held that under section 391(1), "any reinstatement order must be one which effects a real and practical return to work and the performance of work duties". This prevents the making of a reinstatement order conditional on, e.g., a satisfactory outcome of a medical assessment.

[68] Uber submits that similar considerations plainly apply to an order under section 536LQ(1) of the Act. Like the provisions at issue in *Blackadder*, the different approaches that may be taken under that section, taken together with the anti-avoidance provision in sub-section (2), indicate that the section is concerned with the practical outcome of placing the employee-like worker back in the situation they were in before they were unfairly deactivated. Uber contends that the section is concerned with practical outcomes, not legal form.

[69] Uber submits that there are no measures the Commission could order it to take to "restore" Mr Hotak to "the position he would have been in but for the deactivation" when Uber has already done that and Mr Hotak has completed over 150 trips subsequently. It follows, so Uber submits, that Mr Hotak is no longer seeking what the Parliament has prescribed as the only remedy for unfair deactivation. Instead, this is a proceeding solely directed to attaining an order for lost remuneration under s 536LQ(3). Uber submits that is not available because, first, an order under s 536LQ(3) can only be issued if the Commission first makes an order under s 536LQ(1) and there is nothing the Commission could order in this case under s 536LQ(1). Secondly, Uber contends that continuing with proceedings purportedly seeking reactivation in these circumstances is in truth an attempt to obtain an order for compensation. That is in the teeth of s 536LP(3), which provides that the Commission must not order the payment of compensation to the person. As distinct from unfair dismissal or unfair termination, reactivation within the terms of s 536LQ is the only remedy for an unfair deactivation.

[70] Uber submits that the provisions inserted as Part 3A–3 of the Act were thoughtfully and intentionally drafted to take into account the unique nature of platform work. The legislature clearly determined the remedies it considers appropriate in this jurisdiction, to strike the "balance" that is an express objective of the Part. It is plain from the architecture and content of the provisions enacted to provide a remedy from unfair deactivation, that the remedy for such deactivation is an order of practical steps to achieve reactivation. The Parliament did not, as it did in the case of the unfair dismissal or termination regimes, provide for the possibility of restoring lost pay separately and in addition to reinstatement or, in the language of Part 3A–3, reactivation.

[71] To the extent that the structure of the legislative provisions encourages digital labour operators to re-visit potentially unfair deactivations rather than requiring the expense and delay of a hearing and determination, Uber submits that is consistent with the objective of the provisions. The contrary approach would, so Uber contends, permit applicants to seek an entirely ineffectual "reactivation" order solely to obtain orders for payment. It is submitted that this would upset the balance devised by the Parliament and provide employee like workers a specific right that the legislature, in striking a "balance" between different interests, expressly denied to them.

Consideration

Principles of statutory construction

[72] The plurality in ***SZTAL*** *v Minister for Immigration and Border Protection*[8] succinctly described the contemporary approach to statutory construction:

> "The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be

> regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected."[9](footnotes omitted)

[73] The observations of Gageler J in *SZTAL* are also important:

> "The task of construction begins, as it ends, with the statutory text. But the statutory text from beginning to end is construed in context, and an understanding of context has utility "if, and in so far as, it assists in fixing the meaning of the statutory text".
>
> The constructional choice presented by a statutory text read in context is sometimes between one meaning which can be characterised as the ordinary or grammatical meaning and another meaning which cannot be so characterised. More commonly, the choice is from "a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural", in which case the choice "turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies".
>
> Integral to making such a choice is discernment of statutory purpose. The unqualified statutory instruction that, in interpreting a provision of a Commonwealth Act, "the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation" "is in that respect a particular statutory reflection of a general systemic principle"."[10] (footnotes omitted)

[74] Taking a purposive approach to construction is also required by s 15AA of the *Acts Interpretation Act 1901* (Cth). It requires that a construction that would promote the purpose or object of the Act is to be preferred to one that would not promote that purpose or object. The purpose or object of the Act is to be taken into account even if the meaning of a provision is clear. When the purpose or object is brought into account an alternative interpretation may become apparent. If one interpretation does not promote the object or purpose of the Act, and another does, the latter interpretation is to be preferred.[11] Of course, s 15AA requires one to construe the legislation in the light of its purpose, not to rewrite it.[12]

[75] The following principles of construction are also relevant to the present case:

(a) a construction which appears irrational or unjust is to be avoided where the statutory text does not require that construction;[13] and

(b) a law of the Commonwealth is not to be construed as withdrawing or limiting a conferral of jurisdiction, unless the implication arises clearly and unmistakably.[14]

Jurisdiction and meaning of "deactivated"

[76] There will be a valid application for an unfair deactivation remedy before the Commission if:

(a) a person "who has been deactivated" applies to the Commission for an order under Division 4 of Part 3A-3 (s 536LU(1) of the Act);

(b) the applicant's earnings were less than the contractor high income threshold (s 536LU(2) of the Act);

(c) the application was made within 21 days after the deactivation took effect or within such further period as the Commission may allow (s 536LU(3)-(4) of the Act); and

(d) the application was accompanied by the requisite fee, or the fee is waived (s 536LV of the Act).

[77] In the present case, there is no dispute, and we are satisfied based on the evidence before the Commission, that:

(a) On 24 April 2025, Mr Hotak applied to the Commission for an order under Division 4 of Part 3A-3. At the time of his application, he was a person "who has been deactivated" within the meaning of s 536LG of the Act. Specifically, Mr Hotak was deactivated on 8 April 2025, when his access to the Uber driver platform was terminated. From that time, he was no longer able to perform work under his services contract with Uber;

(b) Mr Hotak's earnings from Uber were less than the contractor high income threshold;

(c) Mr Hotak's application was made within 21 days of his deactivation taking effect on 8 April 2025; and

(d) Mr Hotak's application was accompanied by the requisite fee.

[78] It follows that the Commission had jurisdiction to deal with Mr Hotak's unfair deactivation application at the time it was filed in the Commission on 24 April 2025. Uber contends that such jurisdiction disappeared when it acted voluntarily to reactivate Mr Hotak's access to the Uber driver platform on 19 May 2025. We disagree for the reasons set out below.

[79] In *Bandameeda v Amazon Commercial Services*,[15] a Full Bench of the Commission considered the meaning of "deactivated" in s 536LG of the Act:

> "**[39]** The first element of the definition of "deactivated" in s 536LG(a) addresses whether the employee-like worker "performed digital platform work through or by means of the digital labour platform." This element directs attention to both the nature of the work undertaken and the method by which the employee-like worker accessed or was engaged to perform that work.
>
> **[40]** The second element of the definition of "deactivated" in s 536LG(b) considers whether the digital platform operator has taken action to modify, suspend, or terminate the employee-like worker's access to the digital labour platform. As defined in s 15L of the Act, a digital labour platform is an online enabled application, website, or system that employee-like workers use to discover and, where suitable, accept offers of work.
>
> **[41]** The third limb of the definition of "deactivated" in s 536LG(c) centres on whether the employee-like worker retains the ability to perform work under a services contract. When read in context, it is evident that the "work" referred to in s 536LG(c) is the "digital platform work

> [undertaken] through or by means of the digital labour platform" mentioned in s 536LG(a) of the Act. Ordinarily, when an employee-like worker's access to the digital labour platform is suspended or terminated, they will no longer be able to perform work under their services contract. This is because the platform typically serves as the sole conduit through which the worker becomes aware of, and accepts, offers of digital platform work. However, exceptions may arise. For instance, a delivery worker may have the capacity to perform work finalising deliveries of goods which were offered to and accepted by the worker prior to the suspension or termination of access to the digital labour platform.
>
> **[42]** Where the modification, suspension, or termination of access to the digital labour platform does not render the worker unable to perform work under the services contract, a broader inquiry is required. Invariably, a worker will be unable to perform such work if a termination of a services contract has come into effect. Alternatively, even if the contract remains on foot, the worker may be prevented from performing work within the meaning of paragraph (c) due to the exercise of a contractual right or other action by the digital labour platform operator that substantially alters the worker's ability to perform work under the contract. Examples may include:
>
> > (a) The exercise of a contractual right to suspend performance, potentially following notice of termination, even before the termination takes effect.
> >
> > (b) A direction from the digital labour platform operator prohibiting the worker from performing work.
> >
> > (c) A specific instruction from the digital labour platform operator barring the worker from doing something which effectively means they cannot perform work under their services contract. For instance, a direction from an operator to a delivery worker barring the worker from collecting goods from operator's distribution facilities, thereby effectively preventing the performance of work via the platform.
>
> **[43]** Because a deactivation may result from a modification, suspension, or termination of an employee-like worker's access to a digital labour platform, it is possible for a worker to be deactivated on multiple occasions by the same platform operator. For example, the operator may initially modify the worker's access, later suspend it during an investigation, and ultimately terminate access altogether. If each of these actions leads to the worker being unable to perform work under their services contract, then each may constitute a separate instance of deactivation under s 536LG of the Act."

[80] For the definition of "deactivated" in s 536LG of the Act to be satisfied in a particular case, the conduct of the digital labour platform operator—whether by modifying, suspending, or terminating a worker's access to the platform—must result in the worker no longer being able to perform work under an existing or prospective services contract, or must significantly alter the worker's ability to do so.

[81] Different tenses are used in s 536LG. The expression "has been" in the chapeau to s 536LG, as well as the words "performed" in paragraph 536LG(a) and "modified, suspended or terminated" in paragraph 536LG(b), ordinarily direct attention to past events, albeit "has been" may be used in the present perfect continuous tense, which denotes an action that has already commenced and is ongoing.[16] Paragraph 536LG(c) uses the word "is" several times. The use of the word "is" in the present tense may be used descriptively or it may be used to signify contemporaneity.[17]

[82] Section 536LU of the Act permits a person who "has been deactivated" to apply for an unfair deactivation remedy, provided the application is lodged within 21 days after the deactivation "took effect" or within such further period as the Commission allows (s 536LU(3) of the Act). Section 536LF defines a person as having been "unfairly deactivated" if the Commission is satisfied that: (a) the person has been deactivated; (b) the deactivation was unfair; and (c) the deactivation was not consistent with the Code. In assessing whether a deactivation was unfair, the Commission must consider whether there was a valid reason for the deactivation and whether any relevant processes specified in the Code were followed (s 536LH(1) of the Act). These provisions suggest that the determination of whether a person has been deactivated involves an evaluation of a past state of affairs.

[83] Further, s 536LP(1) of the Act requires the Commission to be satisfied that the person was protected from unfair deactivation "at the time of being deactivated". Section 536LD of the Act details when a person is protected from unfair deactivation by imposing a "point in time inquiry" focused on the point the worker was deactivated.[18] These provisions suggest that deactivation occurs at a specific point in time, rather than—as Uber contends—representing an ongoing state of affairs that must persist at the time remedial orders are made.

[84] The use of the present tense—"is"—in paragraph 536LG(c) is best understood in light of the provision's dual temporal focus. It encompasses both situations where a person is currently unable to perform work under an existing services contract and where a person is unable to perform work under a prospective contract. Using the past tense to describe a circumstance involving a contract that has not yet come into existence would be linguistically awkward. This distinction is particularly relevant in the context of digital labour platforms, where some workers may be engaged, like casual employees, under discrete contracts for each task, while others—such as Uber drivers—operate under a single overarching services contract covering all work performed via the platform. This contractual structure sets platform work apart from that of road transport contractors, who may seek a remedy under Part 3A-3 of the Act if they have been "terminated" within the meaning of s 536LL.

[85] The present tense—"is"—also appears in subsections 536LH(3) and (4) of the Act, which address short-term suspensions or modifications of a worker's access to a digital labour platform for no more than seven business days. These provisions ask whether "the deactivation is constituted by the modification or suspension" (s 536LH(3)(a)), whether the Commission "is satisfied" that the operator "believes on reasonable grounds" that one or more matters in subsection (4) apply (s 536LH(3)(b)), and whether "the deactivation of the person is necessary" to protect health and safety (s 536LH(4)(a)). Unlike a termination, a suspension or modification is often temporary. Where the relationship between the platform operator and the worker remains ongoing, and the action taken is limited to a short-term restriction, the use of the present tense is both logical and linguistically appropriate.

[86] Section 536LH(3) of the Act presents a significant obstacle to Uber's construction of s 536LG. Uber contends that a worker is no longer "deactivated" once they have been reactivated and are again able to perform work under a services contract. This interpretation would lead to the conclusion that a person whose access to a digital labour platform was suspended for a short period—such as five business days—and later reinstated, was no longer "deactivated" for the purposes of the Act. The consequence of this would be that the Commission lacks jurisdiction to determine an unfair deactivation application in such cases. If Uber's interpretation were

correct, s 536LH(3) would be rendered redundant, as it would have no work to do. This would be contrary to basic principles of statutory construction.[19] This strongly suggests that the concept of "deactivation" must be assessed by reference to a past event, rather than an ongoing state of affairs.

[87] One of the express objects of Part 3A-3 of the Act is to "provide remedies if a deactivation … is found to be unfair" (s 536LC(1)(c)). Uber's contention—that the Commission's jurisdiction to grant a remedy ceases if the digital labour platform operator restores access to the worker prior to the determination of the application—sits uneasily with that statutory object. Such an interpretation would undermine the remedial purpose of the provision and risk incentivising tactical reinstatements to avoid scrutiny or accountability.

[88] Relatedly, Uber's construction would produce unjust consequences. For example, an employee-like worker who was unfairly deactivated from a digital labour platform may suffer significant financial loss due to the interruption in access. Under Uber's interpretation, the platform operator could voluntarily reactivate the worker at any time prior to the Commission's decision, thereby, so Uber contends, extinguishing the Commission's jurisdiction and depriving the worker of any entitlement to a remedial order. Such a result would frustrate the statutory purpose and deny meaningful redress for unfair deactivation. This construction should be rejected, particularly where, as here, the statutory text does not compel it.[20]

[89] We reject Uber's submission that the Commission may award costs to remedy any unreasonable conduct on the part of a digital labour platform operator by reactivating a worker's access to the platform only after the worker has incurred time and costs in preparing and running the matter to hearing. Most applicants in unfair deactivation applications before the Commission are self-represented. Even where legal representation is involved, a costs order would typically cover only part or all of the applicant's legal expenses. It would not remedy the broader unfairness arising from the worker's financial loss during the period between their unfair deactivation and the operator's voluntary reactivation. Uber's construction unduly narrows the remedial scope of the Commission's powers and fails to account for the practical realities faced by affected workers.

[90] In circumstances where, as with Mr Hotak, the Commission's jurisdiction to deal with an unfair deactivation application has been properly and regularly invoked, it is presumed that Parliament does not intend to withdraw or limit that jurisdiction unless such an implication arises clearly and unmistakably.[21] In our view, there is no such clear and unmistakable legislative intent to extinguish the Commission's jurisdiction merely because a digital labour platform operator subsequently reactivates an employee-like worker. To the contrary, the statutory scheme supports the continued exercise of jurisdiction to ensure that appropriate remedies are available for unfair deactivation, within the limits imposed by ss 536LP and 536LQ of the Act.

Compliance with the Code

[91] If the deactivation of an employee-like worker was consistent with the Code, the worker will not have been unfairly deactivated (s 536LF(c) of the Act). A person's deactivation will be consistent with the Code if, at the time of the deactivation, the digital labour platform operator complied with the Code in relation to the deactivation (s 536LJ(3) of the Act).

[92] We are satisfied on the evidence before the Commission that Mr Hotak's deactivation from the Uber driver platform was not consistent with the Code. We accept Uber's concession that it cannot discharge its evidential burden to demonstrate compliance with the Code, and specifically section 13(5) of the Code, which requires a digital labour platform operator to make a representative available for a discussion with a worker within a reasonable time if the worker requests such a discussion.

Other initial matters

[93] We are also satisfied, based on the evidence before the Commission, that Mr Hotak was protected from unfair deactivation at the time he filed his application in the Commission. Uber made an appropriate concession on this point. This is the third initial matter about which we must be satisfied before considering the merits of the application (s 536LW of the Act).

Merits

[94] Turning now to the merits of the application. We must take into account each of the matters specified in s 536LH of the Act. As to whether there was a valid reason for the deactivation related to the person's capacity or conduct (s 536LH(1)(a)), the same language is found is s 387(a) of the Act. For that reason, we consider that the same principles should apply in determining whether there was a valid reason within the meaning of s 536LH(1)(a) of the Act. They may be summarised as follows:

(a) In cases relating to alleged conduct, the Commission must make a finding, on the evidence provided, whether, on the balance of probabilities, the conduct occurred.[22]

(b) It is not enough for a digital labour platform operator to establish that it had a reasonable belief that the worker engaged in particular conduct.[23]

(c) The digital labour platform operator bears the evidentiary onus of proving that the conduct on which it relies took place.[24]

(d) In cases where allegations of serious misconduct are made, the *Briginshaw* standard applies so that findings that a worker engaged in the misconduct alleged are not made lightly.[25]

(e) It is necessary to consider whether the digital labour platform operator had a valid reason for the deactivation of the employee-like worker, although it need not be the reason given to the worker at the time of the deactivation.[26]

(f) A "valid" reason for deactivation is one that is "sound, defensible or well founded"[27] and not "capricious, fanciful, spiteful or prejudiced."[28]. A reason that is "valid" will involve something more than a minor failing or trivial misdemeanour, and must be of sufficient gravity or seriousness to justify deactivation.[29]

[95] It is clear from s 536LH(2) of the Act that a deactivation that occurs because of serious misconduct of the person who was deactivated is not unfair. In cases involving allegations of

serious misconduct against an employee-like worker, it is not enough for the digital labour platform operator to hold a reasonable belief that the worker engaged in the conduct. The requirement for the deactivation to have occurred "because of serious misconduct of the person who was deactivated" in s 536LH(2) means that the digital labour platform operator has the evidentiary burden to prove that the alleged conduct occurred and that it meets the definition of serious misconduct in the regulations.[30]

[96] Uber does not contend that it has proven that Mr Hotak's deactivation occurred because of serious misconduct on his part, or that s 536LH(3) of the Act applies to it. These concessions are appropriate in the circumstances of this case.

[97] Mr Hotak gave direct evidence denying the conduct alleged against him. That evidence was not challenged in cross-examination, and there is no reason to doubt its reliability. We accept Mr Hotak's evidence on these matters.

[98] It follows that we are satisfied that there was not a valid reason for Mr Hotak's deactivation related to his capacity or conduct and his deactivation did not occur because of any serious misconduct on his part (s 536LH(1)(a) and (2)).

[99] We are further satisfied that relevant processes specified in the Code were not followed (s 536LH(1)(b)). As stated above, Uber accepts that it did not comply with its obligation under section 13(5) of the Code to make a representative available for a discussion with a worker within a reasonable time if the worker requests such a discussion.

[100] As to any other relevant matters (s 536LH(1)(c)), the length and quality of Mr Hotak's work with Uber on its digital labour platform weighs in support of his argument that he was unfairly deactivated. Mr Hotak worked for Uber for about 4.5 years before his deactivation on 8 April 2025, usually driving about 40 to 60 hours per week. Prior to his deactivation, Mr Hotak had never had any disciplinary action taken against him by Uber, held Diamond status with Uber, and had a rating of 4.99 out of 5 from his more than 6,000 trips.[31] The experience of being deactivated left Mr Hotak feeling extremely stressed, anxious and unsupported.[32] Mr Hotak suffered a significant loss of income and financial hardship in the period between his deactivation on 8 April 2025 and his reactivation on 19 May 2025.[33]

Conclusion re whether Mr Hotak's deactivation was unfair

[101] Mr Hotak's deactivation on 8 April 2025 was plainly unfair. Uber failed to comply with the processes specified in the Code, and the evidence before the Commission does not support the serious allegations made against him. Mr Hotak had performed work to a consistently high standard over a reasonably lengthy period—approximately 4.5 years prior to his deactivation. There was no valid reason for the deactivation, and its impact on Mr Hotak has been significant, both personally and economically.

Remedy

[102] In light of our earlier findings—that Mr Hotak lodged an application under s 536LU of the Act, that he was protected from unfair deactivation at the time of his deactivation, and that his deactivation was indeed unfair—the preconditions set out in s 536LP of the Act for the Commission to exercise its discretion to make an order for his reactivation have been satisfied.

[103] The word "reactivation" is not defined in the Act. As a remedy, it is clearly intended to reverse the effect of a deactivation, which is informed by the meaning of "deactivated" in s 536LG of the Act.

[104] To be within power, an order for reactivation must be an order that the digital labour platform operator take measures to restore the person to the position they would have been in but for the deactivation (s 536LQ(1) of the Act).

[105] We do not accept Uber's submission that the phrase "including as follows" in the chapeau to s 536LQ(1) is exhaustive in nature. The word "including" can be used to extend the ordinary meaning of the particular word or concept to bring within the scope of the meaning of that word or concept something that otherwise would not be encompassed by it; or to avoid possible uncertainty as to whether something may come within the definition by expressly providing for its inclusion; or to provide an exhaustive explanation of the meanings to be attached to the word or concept if the context in which the word or concept appears reveals that intention.[34]

[106] Having regard to the text, context, and purpose of Part 3A-3 of the Act—and s 536LQ(1) in particular—we consider that the word "including" in the chapeau to s 536LQ(1) serves to introduce a non-exhaustive list of examples of the types of measures a digital labour platform operator may be ordered to take in order to restore a person to the position they would have occupied but for the deactivation.

[107] First, the broad language used in the chapeau to s 536LQ(1) supports this construction. Specifically, the phrase "take measures to restore the person to the position they would have been in but for the deactivation" contemplates a range of actions that may be necessary to achieve meaningful restoration for a worker who has been unfairly deactivated.

[108] Secondly, the definition of "deactivated" in s 536LG of the Act makes clear that deactivation encompasses more than just the modification, suspension, or termination of a worker's access to a digital labour platform (s 536LG(b)). It also requires that the worker is no longer able to perform work under an existing or prospective services contract, or where their ability to perform such work is significantly altered (s 536LG(c)). While paragraphs 536LQ(1)(a), (b), and (c) address the restoration of access under s 536LG(b), they do not deal with the worker's ability to perform work under a services contract as contemplated by s 536LG(c). If the phrase "including as follows" in the chapeau to s 536LQ(1) were interpreted as exhaustive, the Commission would be precluded from making orders that address this aspect of deactivation—despite its relevance to restoring the worker's position. For example, reinstating access to the platform may not be sufficient if the worker lacks a contract to perform work on the platform, whether with the operator or a third party.

[109] Thirdly, paragraph 536LQ(1)(c) of the Act permits an order requiring a digital labour platform operator to modify a worker's access to the platform so that it reflects the status quo prior to termination or suspension. However, this provision only addresses a circumstance in which the worker's access to the platform was terminated or suspended and does not extend to modifications that result in deactivation, as contemplated by s 536LG(b). Neither paragraph 536LQ(1)(a) nor (b) addresses this gap. This supports the conclusion that the phrase "including

as follows" in the chapeau to s 536LQ(1) was intended to be illustrative rather than exhaustive, thereby allowing the Commission to make broader orders necessary to fully restore a worker's position.

[110] Fourthly, the engagement of employee-like workers through digital labour platforms is a relatively recent development, underpinned by rapidly evolving technology. In this context, it is unlikely that Parliament intended to confine the Commission's powers to a narrow set of prescribed orders under s 536LQ(1) of the Act. Rather, we consider that the use of the word *"including"* in the chapeau to s 536LQ(1) reflects a deliberate choice to allow flexibility in the types of measures that may be ordered—recognising the dynamic nature of platform work and the need to ensure that workers can be meaningfully restored to their pre-deactivation position.

[111] Fifthly, we consider that the High Court's decision in *Blackadder v Ramsey Butchering Services Pty Ltd*[35] is distinguishable. That case concerned the meaning of "reinstatement" under section 391 of the Act, which provides:

> "**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.
>
> (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."

[112] Under s 391(1) of the Act, an order for reinstatement following an unfair dismissal is limited to restoring the employee to the position they held immediately before the dismissal, or appointing them to another position on terms and conditions no less favourable than those previously held. By contrast, the chapeau to s 536LQ(1) of the Act provides that an order for the reactivation of an employee-like worker must require the platform operator to "take measures to restore the person to the position they would have been in but for the deactivation." This language confers a significantly broader power on the Commission, enabling it to craft orders that go beyond mere reinstatement and encompass a wider range of remedial measures necessary to fully restore the worker's position.

[113] Sixthly, Uber submits that to the extent that s 536LQ(1) of the Act is a power permitting the Commission to grant other orders outside those specified in paragraphs 536LQ(1)(a), (b) and (c), then the *ejusdem generis* maxim applies, and the species of orders capable of being made should be understood as being confined to orders of the same kind, being orders to restore a worker's access to the platform. We do not accept this submission. In *Deputy Commissioner of Taxation v Clark,*[36] *Spigelman CJ* made the following observations in relation to the *ejusdem generis* rule:

> "The process of reading down general words in a statute is a frequently recurring issue in statutory interpretation. (See, for example, the authorities I referred to in *R v Young* (1999) 46 NSWLR 681 at 689 [23]–[29].) Application of the ejusdem generis rule is a specific example of this process. The application of this rule, in substance, gives the immediate verbal context determinative weight in the process of construing general words. In my opinion, this is rarely justified. Whether or not general words ought be read down is to be determined by the whole of the relevant context, including other provisions of the statute and the scope and purpose of the statute."

[114] Having regard to the relevant aspects of the text, context, and purpose of s 536LQ(1) to which we have already referred, we do not consider that the general words in the chapeau to s 536LQ(1) should be read down so as to confine the Commission's power to making orders limited solely to restoring a worker's access to the digital labour platform. Such a narrow construction would be inconsistent with the broader remedial purpose of the provision and the flexible language Parliament has employed.

[115] We consider it appropriate, having regard to all the circumstances of this case—including our finding that Mr Hotak was unfairly deactivated—to exercise our discretion to order his reactivation. Although Uber *voluntarily* restored Mr Hotak's access to its driver platform on 19 May 2025, our formal order will *require* Uber to reinstate his access to its driver platform. Such an order will satisfy the requirement in s 536LQ(1) of the Act that "an order for a person's reactivation must be an order that the digital labour platform operator … take measures to restore the person to the position they would have been in but for the deactivation." The making of a formal order also serves a clear and practical purpose: it provides certainty for the parties and ensures enforceability. In the event of non-compliance, s 536MG of the Act applies. That provision prohibits contravention of an order made under Part 3A-3 and is a civil remedy provision. A breach may attract a maximum penalty of 60 penalty units.[37]

[116] The order we will make for Mr Hotak's reactivation will also ensure that his access to the Uber driver app is restored on terms that place him in the position he would have been in but for the deactivation. The order will be in the following terms:

1. Pursuant to s 536LP(1) of the *Fair Work **Act** 2009* (Cth), the Fair Work Commission orders that Rasier Pacific Pty Ltd (**Uber**) must reinstate Mr Hotak's access to the digital labour platform operated by Uber on the basis that:

   (a) for the purpose of s 536LD(c) of the Act, Mr Hotak is deemed to have performed work through or by means of Uber's digital labour platform on a regular basis during the period from 24 March 2025 (being the date of his suspension) to 19 May 2025 (being the date of his reactivation); and

   (b) Uber offers to Mr Hotak that he be engaged on the same terms and conditions as those on which he was engaged by Uber immediately before his deactivation on 8 April 2025.

2. This order commences operation on 26 September 2025.

[117] We consider that the requirement in paragraph 1(a) above is necessary to restore Mr Hotak to the position he would have occupied but for his deactivation on 8 April 2025. At that time, Mr Hotak was protected from unfair deactivation under s 536LD of the Act, as he met the statutory criteria: he was an employee-like worker, had performed work through Uber's digital labour platform, and had done so on a regular basis for at least six months. Absent the inclusion of this requirement in our reactivation order, Uber could deactivate Mr Hotak shortly after he was reactivated in accordance with our order, at a time when he would not yet have reacquired the statutory protection under s 536LD.[38] Such an outcome would undermine the remedial purpose of the order and the protections afforded by the Act.

[118] We are also satisfied that the requirement in paragraph 1(b) above is necessary to restore Mr Hotak to the position he would have been in but for his deactivation. On 19 May 2025, Mr Hotak received a message via the Uber driver app indicating that he could resume work.

However, unlike the situation prior to his deactivation, he was not offered, nor notified of, the terms and conditions governing his engagement from that date. While it is clear that Mr Hotak has performed work and received payment from Uber since 19 May 2025, and a contract may therefore be inferred, the evidence before the Commission does not establish that the terms of the current contract are the same as those under which he was previously engaged. In these circumstances, the requirement in paragraph 1(b) is necessary to ensure that Mr Hotak's contractual position is properly restored.

[119] We do not accept Uber's submission that the Driver Partner **Services Agreement** entered into between Uber and Mr Hotak in August 2024[39] remains in existence and continues to govern his work through the Uber driver app. The Services Agreement includes the following relevant terms:[40]

> "…**2. TERM OF THE AGREEMENT**
>
> This Agreement starts on the date that you accept the terms and will continue until terminated in accordance with section 15.
>
> **3. REQUESTS AND LICENCES**
>
> (a) If you satisfy the requirements to gain access to the Uber Driver App in section 6:
>
> (i) Uber will grant you a licence to use the Uber Driver App during the term of this Agreement; and
>
> (ii) for a Service Fee and payment of any other fee under this Agreement, Rasier Pacific will provide the Uber Services to you.
>
> **4. RELATIONSHIP BETWEEN THE PARTIES**
>
> …
>
> (c) There is no obligation of exclusivity under this Agreement. That means you:
>
> (i) retain the complete right to use other applications that connect you with on-demand work and/or to engage in any other occupation or business (including with competitor businesses) at any time, including while logged into the Uber Driver App or while providing Transportation Services; and
>
> (ii) are under no obligation to use the Uber Driver App or provide Transportation Services.
>
> **5. YOUR OBLIGATIONS AND RIGHTS**
>
> **5.1 Provisions of Transportation Services**
>
> (a) You can log into the Uber Driver App if, when, where, and for how long, you choose.
>
> …
>
> **8.2 Your right to use the Uber Driver App**
>
> Subject to you complying with your obligations under this Agreement, Uber grants you a non-exclusive, non-transferable, non-sublicensable, non-assignable licence to use the Uber Driver

App for no fee during the term of this Agreement. You may only install and use the Uber Driver App on your mobile device to provide Transportation Services and to track Transportation Fees.
…

11.2 General disclaimer

…

(b) You acknowledge and agree that Rasier Pacific makes no guarantee that you will receive Requests via the Uber Driver App.

15. TERMINATION

15.1 Termination by you

You are under no obligation to use the Uber Driver App or to accept Requests while using the Uber Driver App. If you choose to stop using the Uber Driver App, you may do so without giving Uber or Rasier Pacific any notice, or you may terminate this Agreement and cease receiving the Uber Services without notice.

15.2 Termination by Rasier Pacific and Uber

(a) Subject to any requirements under applicable Law, Uber or Rasier Pacific may, acting reasonably, terminate this Agreement in its entirety by giving you 30 days' prior written notice of termination, for any legitimate business, legal or regulatory reason.

(b) Uber may also immediately restrict or remove your access to the Uber Driver App, and provide you with written notice of the restriction or removal, if:

(i) you commit a material breach of this Agreement; or

(iii) an act or omission by you, in Uber's reasonable judgment, is: (a) in breach of applicable Laws; (b) in violation of the Community Guidelines or any other Policy; or (c) creates a risk to health and safety of yourself or others, including in relation to fatigue.

(c) Uber may temporarily restrict your access to the Uber Driver App if it or an Affiliate is investigating an alleged breach referred to under section 15.2(b) (including in response to complaints from Riders about your conduct in connection with a Trip). There may be circumstances in which Uber is unable to provide you with information about the alleged breach whilst an investigation is ongoing (either by Uber and/or a third party such as the police).

(d) Uber may, but is not obliged to, reinstate your access to the Uber Driver App where conduct contrary to section 15.2(b) is capable of remedy and is remedied by you and documentation is provided to Uber to confirm this.

…

17. DEFINITIONS AND INTERPRETATION

17.1 Definitions

…

> **Request** means any request for Transportation Services you receive from Riders via the Uber Driver App.
> …
>
> **Uber Services** means the procurement and facilitation of lead generation services, being intermediary and related services (such as payment processing services) rendered via the Uber Driver App to enable you to seek, receive and fulfil Requests…"

[120] On 24 March 2025, after reporting the incident through the Uber driver app, Mr Hotak was told that his access to the Uber driver app was being suspended.[41]

[121] On 29 March 2025, Uber sent Mr Hotak an email to inform him that it was "considering terminating … [his] access to the Uber Driver app".[42] Mr Hotak was invited to provide a response within seven days, which he did.

[122] On 8 April 2025, Uber sent an email to Mr Hotak in the following terms:[43]

> "**Your response has been reviewed and your account has been deactivated**
>
> Hello Mohammad,
>
> After carefully reviewing your account and the information you submitted as part of your response, we've decided to terminate your access to the Uber Driver app for the reasons outlined in the preliminary deactivation notice previously sent to you. This decision is final.
> …
>
> This deactivation will take effect immediately upon receipt of this email.
>
> Your final payment will be deposited into your account during the next payment cycle."

[123] On 9 April 2025, Mr Hotak requested that Uber review its decision to deactivate his account.[44] Uber responded to that request as follows:[45]

> "Hi Mohammed,
>
> Thank you for letting us know you want to have your deactivation reviewed.
>
> We've looked into this, and unfortunately have decided to not proceed with your request.
>
> Based on our review, we see that you have not provided any further information since your last review request, where the decision was to uphold your deactivation.
>
> We appreciate your time using Uber, and wish you the best in your future endeavours."

[124] In light of Mr Hotak's rights under clauses 3, 5.1 and 8.2 of the Services Agreement, we consider Uber's communications to Mr Hotak on 8 and 9 April 2025 to clearly evince an intention no longer to be bound by the Services Agreement, thereby amounting to repudiation.[46] We are satisfied that Mr Hotak accepted Uber's repudiation by filing his unfair deactivation application in the Commission.[47] His conduct in doing so unequivocally indicated that the Services Agreement had come to an end, for the following reasons:

(a) In his application, Mr Hotak asserted that he had been deactivated on 8 April 2025.[48] Section 536LG of the Act defines "deactivation" as involving both the modification, suspension or termination of a worker's access to the digital labour platform and the inability to perform work under a services contract. Accordingly, Mr Hotak's contention was that he no longer had the capacity to perform work under the Services Agreement.

(b) Mr Hotak sought an order under s 536LQ(1) of the Act for reactivation, requiring Uber to take steps to restore him to the position he would have occupied but for the deactivation, including reinstatement of his access to Uber's digital labour platform.[49] This relief indicated that the Services Agreement was at an end.

[125] We reject Uber's contention that clause 15.2(b)(ii) of the Services Agreement entitled it to remove Mr Hotak's access to the Uber driver app. Properly construed, Uber's right under that clause may only be exercised where Mr Hotak has engaged in an "act or omission" which, in Uber's reasonable judgment, breaches one of the normative standards identified in the remainder of the clause.

[126] Uber submits that the phrase "Uber's reasonable judgment" applies both to the existence of the "act or omission" and to the determination that it constitutes a breach of a relevant standard. We do not accept that submission. The clause is structured such that the existence of an "act or omission" is a prerequisite to the formation of a reasonable judgment. Further contextual support for this interpretation is found in clause 15.2(c), which permits Uber to temporarily restrict a worker's access to the Uber driver app while investigating an alleged breach of the standards in clause 15.2(b). This suggests that the "act or omission" must be established—likely following an investigation—before Uber can reasonably determine whether a breach has occurred.

[127] As set out above, we have found that Mr Hotak did not engage in any of the conduct alleged. Accordingly, there was no "act or omission" upon which Uber could have formed a reasonable judgment that Mr Hotak failed to comply with a relevant obligation.

[128] Mr Hotak also seeks an order under s 536LQ(1) of the Act that:

> "Uber remove the negative reviews arising from the incident on 24 March 2025 and otherwise treat the allegations of serious misconduct in relation to 24 March 2025 against Mr Hotak as false."

[129] We do not consider that we have the power to make such an order under s 536LQ(1) of the Act. That provision confers a power to direct a digital labour platform operator to take measures to restore a person to the position they would have occupied but for the deactivation. Had Mr Hotak not been deactivated on 8 April 2025, he would have continued undertaking work via the Uber driver app. However, he would still have been subject to the negative reviews arising from the incident on 24 March 2025. The restoration contemplated by s 536LQ(1) does not extend to reversing the consequences of events that occurred prior to the deactivation, even if those events informed Uber's decision to deactivate Mr Hotak.

[130] Mr Hotak seeks an order to restore lost pay under s 536LQ(3) of the Act. Such an order can only be made if the Commission makes an order under s 536LQ(1) and considers it

appropriate to do so. For the reasons explained above, we will make an order under s 536LQ(1) of the Act. Given that Mr Hotak has suffered a financial loss as a consequence of being unfairly deactivated,[50] we consider it appropriate to make an order to require Uber to pay Mr Hotak an amount for the remuneration lost because of the deactivation.

[131] The purpose of an order to restore lost pay under s 536LQ(3)-(4) of the Act is to place an employee-like worker in the financial position they would have occupied had they not been unfairly deactivated. This will generally involve the following steps:

(a) **Assessing lost earnings**: Determine the amount of remuneration the worker would have earned from the digital labour platform operator during the period between deactivation and reactivation. In many cases, calculating the average of the worker's weekly earnings from the digital labour platform in the period leading up to the deactivation will provide a reasonable estimate of the earnings they would likely have received had they continued working.

(b) **Deducting substitute earnings**: Subtract any earnings the worker received from other employment or working arrangements during the period between deactivation and reactivation, but only to the extent that such work would not have been undertaken had the worker remained active on the platform. That is, if the worker had a second job and would, in the counterfactual scenario, have continued working in that job to the same extent, those earnings do not replace remuneration lost because of the deactivation.

There will need to be a slight adjustment to this calculation if the worker's actual reactivation takes place *after* an order for reactivation is made. In such circumstances, s 536LQ(4) of the Act requires that the Commission take into account:

(i) the amount of any remuneration earned by the person from work of any kind during the period between the deactivation and the making of the order for reactivation; and

(ii) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reactivation and the actual reactivation.

(c) **Deducting avoided expenses**: Subtract any expenses the worker would have incurred had they continued working through or by means of the platform during the period between deactivation and reactivation. This ensures that any order to restore lost pay under s 536LQ(3) of the Act is confined to "remuneration lost, or likely to have been lost, because of the deactivation".

[132] Applying this methodology to Mr Hotak's case:

(a) **Assessing lost earnings**: We consider that an average of Mr Hotak's weekly earnings from Uber in the period leading up to his deactivation on 8 April 2025 (but not including the period from his suspension on 24 March 2025 to his deactivation on 8 April 2025) will provide a proper basis to calculate the earnings Mr Hotak would likely have

received had he continued to work on the Uber driver app in the period between 8 April 2025 and 19 May 2025.

(b) **Deducting substitute earnings:** There are no earnings to deduct in Mr Hotak's case. The work Mr Hotak performed as a security guard in the period between his deactivation and his reactivation was work Mr Hotak would have performed had he not been deactivated by Uber.

(c) **Deducting avoided expenses:** Had Mr Hotak continued working on the Uber driver app during the period between his deactivation and his reactivation, he would have incurred expenses in operating his car (primarily fuel expenses) and paying fees to Uber[51] and to third parties such as tolls, airports and government.[52]

[133] The parties suggested that they be given an opportunity to confer for the purpose of seeking to reach agreement on the quantum of an order to restore lost pay for Mr Hotak. That is a suitable course to adopt, provided the methodology set out in the previous paragraph is used to calculate the quantum. We direct the parties to inform the Associate to Deputy President Saunders, in writing, by 4pm on 8 October 2025 whether such an agreement has been reached.

[134] After the parties have been given an opportunity to confer in relation to the quantum of an order to restore lost pay for Mr Hotak, we will make such an order under s 536LQ(3) of the Act. Such an order will not constitute the payment of compensation to Mr Hotak, which is prohibited by s 536LP of the Act.

Conclusion

[135] For the reasons given, Mr Hotak was protected from unfair deactivation at the time he filed his unfair deactivation in the Commission on 24 April 2025. Mr Hotak has been deactivated from Uber's digital labour platform. His deactivation was unfair. We consider it appropriate to exercise our discretion to make an order for Mr Hotak's reactivation in following terms, together with an order to restore lost pay:

1. Pursuant to s 536LP(1) of the *Fair Work **Act** 2009* (Cth), the Fair Work Commission orders that Rasier Pacific Pty Ltd (**Uber**) must reinstate Mr Hotak's access to the digital labour platform operated by Uber on the basis that:

   (a) for the purpose of s 536LD(c) of the Act, Mr Hotak is deemed to have performed work through or by means of Uber's digital labour platform on a regular basis during the period from 24 March 2025 (being the date of his suspension) to 19 May 2025 (being the date of his reactivation); and

   (b) Uber offers to Mr Hotak that he be engaged on the same terms and conditions as those on which he was engaged by Uber immediately before his deactivation on 8 April 2025.

2. This order commences operation on 26 September 2025.

[136] An order for Mr Hotak's reactivation will be issued concurrently with this decision [PR792023]. An order to restore lost pay will be made after the parties have been given an opportunity to confer in relation to the quantum of the order.

DEPUTY PRESIDENT

Appearances:

Mr P. Boncardo, of counsel, for the Applicant
Mr M. Seck, of counsel, for the Respondent

Hearing details:

11 September 2025.
Sydney

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[1] *Panwar v Portier Pacific Pty Ltd* [2025] FWC 1578 at [10].

[2] *Jibril* [2025] FWC 1289 at [5].

[3] [2025] FWC 1578.

[4] *Jibril* [2025] FWC 1289 at [5].

[5] *Re Model terms for enterprise agreements and copied State instruments* [2025] FWCFB 39 at [122].

[6] (2005) 221 CLR 539.

[7] [2015] FWCFB 1523.

[8] [2017] HCA 34 (Kiefel CJ, Nettle and Gordon JJ).

[9] Ibid at [14]; also see *Australian Mines and Metals Association Inc v CFMMEU* [2018] FCAFC 223 at [76] – [86].

[10] Ibid at [37]-[39].

[11] *Huntsman Chemical Company Australia Pty Limited* [2019] FWCFB at [12].

[12] *Mills v Meeking* (1990) 169 CLR 214 at [235].

[13] *Ingham v Hie Lee* (1912) 15 CLR 267 at 270 (Griffiths CJ); and *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203 at [45] (French CJ, Kiefel, Bell and Keane JJ); and *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 at 509 [48].

[14] *Shergold v Tanner* (2002) 209 CLR 126 at 136 at [34]; and *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 at [29] (French CJ, Kiefel, Bell, Gageler and Gordon JJ).

[15] [2025] FWCFB 182.

[16] *Khan v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 463 at [66] and [70]; *Tatana v Director of Housing* [2016] VSC 73 at [54]-[55]; *Opoku-Ware v Minister for Immigration and Border Protection*

[2015] FCCA 1638; 297 FLR 416 at [61] and [66].

[17] *Re Dingjan* (1995) 183 CLR 323 at 362; *Qube Ports Pty Ltd v Construction, Forestry and Maritime Employees Union* [2024] FCAFC 132; 305 FCR 554 at [69]-[77]; *Application by Sydney Trains and NSW Trains* [2025] FWCFB 46 at [9].

[18] *Panwar v Portier Pacific Pty Ltd* [2025] FWC 1578 at [10].

[19] *Commonwealth v Baume* (1905) 2 CLR 405 at 414; *Beckwith v The Queen* (1976) 135 CLR 569 at 574.

[20] *Ingham v Hie Lee* (1912) 15 CLR 267 at 270 (Griffiths CJ); and *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203 at [45] (French CJ, Kiefel, Bell and Keane JJ); and *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 at 509 [48].

[21] *Shergold v Tanner* (2002) 209 CLR 126 at 136 at [34]; and *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 at [29] (French CJ, Kiefel, Bell, Gageler and Gordon JJ).

[22] *King v Freshmore (Vic) Pty Ltd* (unreported, AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000) Print S4213 [24].

[23] Ibid.

[24] Ibid.

[25] *Sodeman v The King* [1936] HCA 75; (1936) 55 CLR 192 at 216 per Dixon J.

[26] *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 373, 377-8.

[27] *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 at 373.

[28] Ibid.

[29] *Rabbi Pinchas Ash v Chabad Institutions of Victoria Limited* [2020] FWCFB 44 at [18].

[30] See definition of "serious misconduct" in s 12 of the Act.

[31] Hearing Book at pp 65[3], 68[19] and 206[2].

[32] Hearing Book at p 208[18].

[33] Hearing Book at pp 208-209[19]-[26].

[34] *YZ Finance Co Pty Ltd v Cummings* (1964) 109 CLR 395 at 399 (McTiernan J), 401 (Kitto J) and 405 (Menzies J); *Caltex Australia Petroleum Pty Ltd v Federal Commissioner of Taxation* [2019] FCA 1849 at [27]; *Dilworth v Commissioner of Stamps* [1899] AC 99 at 105; *Victims Compensation Fund v Brown* [2002] NSWCA 155; 54 NSWLR 668 at 674 at [30].

[35] (2005) 221 CLR 539.

[36] (2003) 57 NSWLR 113 at [127].

[37] Section 539 (item 29AC) of the Act.

[38] *Panwar v Portier Pacific Pty Ltd* [2025] FWC 1578 at [10]; *Jibril* [2025] FWC 1289 at [5].

[39] Hearing Book at pp 65-66[7]-[8].

[40] Hearing Book at pp 69-82.

[41] Hearing Book at p 66[11]-[12].

[42] Hearing Book at p 103.

[43] Hearing Book at p 106.

[44] Hearing Book at pp 107-109.

[45] Hearing Book at p 110.

[46] *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited* [2007] HCA 61 at [44].

[47] *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 at 570.

[48] Hearing Book at p 12[1.3].

[49] Hearing Book at p 17[2.1].

[50] Hearing Book at pp 208-9[19]-[24].

[51] See, for example, "Uber service fee (transportation leads)" on page 254 of the Hearing Book.

[52] See, for example, "Charges from 3rd parties (tolls/airports/government)" on page 254 of the Hearing Book.