DECISION

Fair Work Act 2009
s.536ND—Application for an unfair contract term remedy

Somphong (Em) Thongkhamchanh
v
Rasier Pacific Pty Ltd
(UC2025/1)

JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT SAUNDERS

SYDNEY, 31 OCTOBER 2025

Application under s 536ND of the Fair Work Act 2009 (Cth) for an order granting a remedy on the basis that a services contract contains a term that is unfair – Driver entered services contract to perform work through the Uber Driver app – Questions referred to the Full Bench – Whether application made in accordance with the Act – Whether the Commission has jurisdiction in relation to an application contending that a services contract is unfair because it does not include terms providing for particular matters – Whether the unfair contract terms contended for by Mr Thongkhamchanh would, in an employment relationship, relate to workplace relations matters – Question 1 answered, but question 2 unable to be resolved at this stage.

Introduction

[1] This decision deals with two questions referred to the Full Bench in relation to the jurisdiction recently conferred on the Fair Work Commission (**Commission**) to review a contract for services on the grounds that the contract contains one or more unfair contract terms.

[2] The questions arose in the following way. The respondent, Rasier Pacific Pty Ltd (**Rasier Pacific**) operates the well-known Uber Rides platform. The applicant, Somphong Thongkhamchanh, is a driver and entered into an agreement with Rasier Pacific entitled 'Driver Partner Services Agreement (Australia)' on 1 September 2024 (the **Services Agreement**). Mr Thongkhamchanh provides services under the Services Agreement, which remains on foot. The provision of services by Mr Thongkhamchanh is facilitated through the Uber Driver app. On 9 January 2025, Mr Thongkhamchanh filed an application under s 536ND of the *Fair Work Act 2009* (Cth) (the **FW Act**) described as seeking an order granting a remedy on the basis that the Services Agreement contains a term that is unfair.

[3] On 23 January 2025, Rasier Pacific filed a response to the application in which it objected to the application on the basis of want of jurisdiction. It did so on two bases. Rasier Pacific contended that, first, the application does not identify any specific clause that is 'unfair' and, second, there is no term of the Services Agreement that Mr Thongkhamchanh claims is unfair that, in an employment relationship, relates to 'workplace relations matters' within the

meaning of s 536JQ of the FW Act. Rasier Pacific sought orders that the application be dismissed for want of jurisdiction or, in the alternative, because the application was not made in accordance with the FW Act or has no reasonable prospects of success for the purposes of s 587(1)(a) and (c).

[4] On 3 February 2025, directions were issued by Deputy President Saunders requesting that particulars be provided by Mr Thongkhamchanh and, on 9 February 2025, Mr Thongkhamchanh provided particulars of his application. Deputy President Saunders then proposed that certain preliminary questions be determined by a Full Bench of the Commission. The President subsequently constituted the present Full Bench to consider the following questions:

(a) **Question 1:** To the extent that Somphong Thongkhamchanh (applicant) contends that his services contract with the respondent is unfair because it does not include terms providing for particular matters, is the application within the jurisdiction of the Fair Work Commission under Part 3A-5 of the FW Act?

(b) **Question 2:** As to the unfair contract terms contended for by the applicant, would they, in an employment relationship, relate to workplace relations matters within the meaning of s 536JQ of the FW Act?

[5] Rasier Pacific filed submissions in relation to those two questions on 1 August 2025. It contends that both questions should be answered in the negative and that Mr Thongkhamchanh's application should be dismissed for want to jurisdiction or because it is not made in accordance with the Act and/or has no reasonable prospects of success. Mr Thongkhamchanh filed submissions in relation to the questions on 7 August and 22 August 2025. The Transport Workers' Union of Australia (the **TWU**) intervened in the proceedings and filed submissions on 25 August 2025.

[6] The material before the Full Bench is a short statement of agreed facts and an agreed tender bundle. The tender bundle contained a copy of the Services Agreement entered into by Mr Thongkhamchanh and Rasier Pacific on 1 September 2024 and Mr Thongkhamchanh's response to the request for particulars of his application provided on 9 February 2025. The TWU also tendered a copy of the current version of the 'Uber Community Guidelines' which are recorded as being last modified on 17 January 2022. Mr Thongkhamchanh provided some additional documents which the Full Bench did not consider to be relevant to the preliminary questions and, accordingly, were not received as evidence.

The application

[7] Mr Thongkhamchanh's application was filed on 9 January 2025 and used Form F91 – Application for an unfair contract term remedy. At question 2.1, the form asks an applicant to indicate '[w]hich terms of the services contract are unfair contract terms, what workplace relations matters do they relate to and why are they unfair?'. In answer to that question, Mr Thongkhamchanh set out the following:

The unfair contract term	The workplace relations matter that the term relates to	Why the term is unfair
Unfair Contract Term 1: Term: The contract does not hold Uber accountable for ensuring that its platform functions properly, which is essential for fulfilling my role as a contractor.	The provision of adequate tools or facilities necessary to perform the services under the contract (e.g., the Uber app functioning correctly).	The app's persistent malfunctions (e.g., 'Searching for GPS' errors, non-functional destination filters, and diagnostic test disruptions) directly impact my ability to complete rides and earn income. By not addressing platform malfunctions, Uber shifts the burden of troubleshooting and lost income entirely onto contractors.
Unfair Contract Term 2: Term: The contract permits Uber to penalize contractors through metrics such as cancellation rates, even when cancellations are due to app malfunctions beyond the contractor's control.	Performance-based metrics and their effect on platform access and earnings potential.	App malfunctions force cancellations, negatively affecting my cancellation rate and potentially leading to penalties, such as restricted platform access or reduced ride offers. The term does not consider technical failures as valid grounds for mitigating the penalties imposed.
Unfair Contract Term 3: Term: Uber's contract allows the company to impose restrictions on platform access based on accusations (e.g., failing to report a lost item), even when such accusations are unsubstantiated or incorrect.	The fairness and transparency of disciplinary actions and access to work.	Threats of platform restrictions based on false accusations undermine my ability to operate effectively and create an unfair power imbalance. There is no clear process in the contract for challenging or appealing such decisions, leaving contractors vulnerable to arbitrary actions.

[8] The particulars subsequently provided by Mr Thongkhamchanh addressed the three unfair contract terms referred to in the application. With respect to the first unfair contract term ('Lack of accountability for platform failures'), Mr Thongkhamchanh indicated that no explicit clause in the Services Agreement covers Uber's responsibility for app failures and that '[t]he contract is unfair as it lacks a clause requiring Uber to ensure its platform functions properly' and '[t]his creates a significant imbalance in obligations, as drivers depend entirely on Uber's platform to generate income'. With respect to the second unfair contract term, Mr Thongkhamchanh identified the relevant terms of the Services Agreement as being clauses 5.4 and 7.4 and stated that 'Uber enforces penalties based on performance metrics that do not account for app malfunctions or extenuating circumstances, disproportionately disadvantaging contractors'. With respect to the third unfair contract term, Mr Thongkhamchanh identified the relevant terms of the Services Agreement as being clauses 15.2 and 15.3 and stated that 'Uber

can restrict or terminate platform access based on unverified claims, leaving contractors without recourse or due process'.

Statutory provisions

[9] Part 3A-5 of the FW Act is entitled 'Unfair contract terms of services contracts' and was inserted into the Act by the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) (the **Amendment Act**). The provisions commenced on 26 August 2024.

[10] The central provision is s 536NA which permits the Commission to make an order in relation to a services contract if satisfied that it contains one or more unfair contract terms. The section provides:

> **536NA When the FWC may make an order in relation to an unfair contract term of a services contract**
>
> (1) The FWC may make an order under this Part in relation to a services contract if the FWC is satisfied that the services contract includes one or more unfair contract terms which, in an employment relationship, would relate to workplace relations matters.
>
> (2) The FWC may make the order only if a person has made an application under section 536ND in relation to the services contract.
>
> (3) The FWC must take into account fairness between the parties concerned in deciding whether to make an order under this Division, and the kind of order to make.

[11] The key requirements for an order to be made are those set out in s 536NA(1). It is appropriate to make some general observations about the circumstances in which the Commission is able to make an order under the section and the types of orders which may be made. *First*, the order able to be made by the Commission must relate to a 'services contract'. The term 'services contract' is defined in s 15H of the FW Act in the following terms:

> **15H 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).
>
> Note: Conditions or collateral arrangements relating to a services contract may be taken to be part of the services contract: see subsection (4).
> …

[12] There is no issue in this matter that the Services Agreement is a contract for services that 'relates to the performance of work under the contract by an individual' for the purposes of s 15H(1)(a). The Services Agreement contains various provisions with respect to the provision of 'Transportation Services' by Mr Thongkhamchanh, which is defined to mean 'on-demand passenger transportation services'.[1] The Services Agreement at least 'relates to' the performance of work under the Services Agreement by Mr Thongkhamchanh. The relevant constitutional connection is provided, for the purposes of s 15H(1)(b), by the fact that Rasier

Pacific is a party to the contract and is a 'constitutional corporation' by reason of engaging in trading activities.[2]

[13] *Second*, the Commission must be satisfied that the services contract includes one or more 'unfair contract terms'. The expression 'unfair contract terms' is not itself defined in the FW Act. As we will come to, Rasier Pacific contends that the fact the Commission must be satisfied that the relevant services contract includes 'one or more unfair contract terms' supports the conclusion that the Commission's jurisdiction is limited to specific terms of a service contract that are unfair, rather than to review the fairness of a services contract more broadly. In that respect, Rasier Pacific refers to the object of Part 3A-5 in s 536N which is as follows:

> **536N Object of Part**
>
> (1) The object of this Part is:
> (a) to establish a framework for dealing with unfair contract terms of services contracts that:
> (i) balances the needs of principals and the needs of independent contractors; and
> (ii) addresses the need for a level playing field between independent contractors and principals by creating disincentives to the inclusion of unfair contract terms in services contracts; and
> (iii) recognises and protects the freedom of independent contractors to enter into services contracts; and
> (b) to establish procedures for dealing with unfair contract terms that:
> (i) are quick, flexible and informal; and
> (ii) address the needs of principals and independent contractors; and
> (c) to provide appropriate remedies if a term of a services contract is found to be unfair.
>
> (2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a 'fair go all round' is accorded to both the principals and independent contractors concerned.
>
> Note: The expression 'fair go all round' was used by Sheldon J in *re Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95.

[14] Rasier Pacific refers specifically to the object of establishing a 'framework for dealing with unfair contract terms' in s 536N(1)(a) and of 'creating disincentives to the inclusion of unfair contract terms in services contracts' in s 536N(1)(a)(ii).

[15] *Third*, the unfair contract term or terms must be terms which, in an employment relationship, would relate to 'workplace relations matters'. The expression 'employment relationship' is not itself defined in the FW Act, although it is clear that it refers to the legal relationship between an individual who is an employee with a person who is their employer.[3] Section 536NA(1) requires a hypothetical exercise to be undertaken. This is because the section does not operate upon a contract between the parties to an employment relationship but rather is concerned with a services contract, so that the assessment required is whether the unfair contract terms 'would relate to' workplace relations matters *if* they were terms applying to an employment relationship.

[16] The expression 'workplace relations matters' is defined in s 536JQ in the following terms:

> **536JQ What are *workplace relations matters***
>
> (1) Subject to subsection (2), for the purposes of this Chapter, ***workplace relations matter*** means any of the following matters:
> (a) remuneration, allowances or other amounts payable to employees;
> (b) leave entitlements of employees;
> (c) hours of work of employees;
> (d) enforcing or terminating contracts of employment;
> (e) making, enforcing or terminating agreements (not being contracts of employment) determining terms and conditions of employment;
> (f) disputes between employees and employers, or the resolution of such disputes;
> (g) industrial action by employees or employers;
> (h) any other matter that is substantially the same as a matter that relates to employees or employers and that is dealt with by or under:
> (i) this Act; or
> (ii) the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*; or
> (iii) a State or Territory industrial law;
> unless the matter is specified in regulations made for the purposes of this paragraph;
> (i) any other matter specified in regulations made for the purposes of this paragraph.
>
> (2) For the purposes of subsection (1), none of the following is a ***workplace relations matter***:
> (a) prevention of discrimination or promotion of equal employment opportunity, but only if the State or Territory law concerned is neither a State or Territory industrial law nor contained in such a law;
> (b) superannuation;
> (c) workers' compensation;
> (d) occupational health and safety;
> (e) child labour;
> (f) the observance of a public holiday, except the rate of payment of an employee for the public holiday;
> (g) deductions from wages or salaries;
> (h) industrial action affecting essential services;
> (i) attendance for service on a jury;
> (j) professional or trade regulation;
> (k) consumer protection;
> (l) taxation;
> (m) any other matter specified in regulations made for the purposes of this paragraph.

[17] The application of the definition in s 536JQ in the context of s 536NA(1) is not without difficulty. The definition in s 536JQ is primarily utilised in the FW Act to determine the extent to which certain State or Territory laws are excluded from affecting the rights, entitlements, obligations and liabilities of a regulated worker, a regulated business or a party to a services contract for the purposes of s 536JP(1). There is, nonetheless, no dispute that the definition in s 536JQ is to be applied in the context of s 536NA(1). That view is supported by the Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth)[4] (the **Amendment Bill**), although, unlike in relation to other parts of the FW Act, the definition is not expressly applied in Part 3A-5.[5]

[18] *Fourth*, s 536NB sets out matters that the Commission may take into account in determining whether a term of a services contract is an unfair contract term. The section provides as follows:

> **536NB Matters to be considered in deciding whether a term of a services contract is an unfair contract term**
>
> (1) In determining whether a term of a services contract is an unfair contract term, the FWC may take into account the following matters:
> (a) the relative bargaining power of the parties to the services contract;
> (b) whether the services contract as a whole displays a significant imbalance between the rights and obligations of the parties;
> (c) whether the contract term under consideration is reasonably necessary to protect the legitimate interests of a party to the contract;
> (d) whether the contract term under consideration imposes a harsh, unjust or unreasonable requirement on a party to the contract;
> (e) whether the services contract as a whole provides for a total remuneration for performing work that is:
> (i) less than regulated workers performing the same or similar work would receive under a minimum standards order or minimum standards guidelines; or
> (ii) less than employees performing the same or similar work would receive;
> (f) any other matter the FWC considers relevant.
>
> (2) The matters in paragraphs (1)(b) to (f) are to be assessed as at the time the FWC considers the application.

[19] Section 536NB(1) contemplates that a determination must be made as to whether a term of the services contract is an unfair contract term. The matters the Commission is able to take into account in undertaking that assessment are plainly broad and extend to any matter the Commission considers relevant. As we will elaborate upon below, the assessment may include consideration of matters beyond the terms of the services contract itself, such as the relative bargaining power of the parties (s 536NB(1)(a)) as well as consideration of the services contract 'as a whole' (s 536NB(1)(b) and (e)).

[20] *Fifth*, the orders the Commission is able to make if it is satisfied that the services contract includes one or more unfair contract terms are set out in s 536NC, which provides:

> **536NC Remedy—order to set aside etc. contract**
>
> The FWC may make an order under this section:
> (a) setting aside all or part of a services contract which, in an employment relationship, would relate to a workplace relations matter; or
> (b) amending or varying all or part of a services contract which, in an employment relationship, would relate to a workplace relations matter.

[21] If a services contract is found to include an unfair contract term, the orders the Commission can make are not limited to orders directed at a particular term or terms. The Commission may set aside all or part of the services contract which, in an employment relationship, would relate to a workplace relations matter or amend or vary all or part of the

services contract which, in an employment relationship, would relate to a workplace relations matter. Although the capacity to make an order is dependent on the Commission being satisfied that a services contract includes one or more unfair contract terms, the remedial orders available to the Commission are potentially broader in their operation.

[22] *Sixth*, s 536NA(2) provides that the Commission may only make an order if a person has made an application 'under s 536ND' in relation to the services contract. Section 536ND(1) provides that a person who is party to a services contract (or an organisation that represents the industrial interests of a person who is party to a services contract) may apply for an order granting a remedy on the basis that the services contract contains a term that is unfair. Section 536ND(2) limits the capacity to make such an application to a person whose annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the contractor high income threshold. The amount of the 'contractor high income threshold' is prescribed by regulation and is adjusted annually.[6] The contractor high income threshold is presently $183,100.00.

[23] The new provisions in Part 3A-5 of the FW Act do not represent the first occasion in which Commonwealth law has made provision for proceedings to be brought alleging that a contract involving an independent contractor is unfair. The *Industrial Relations Amendment Act 1992* (Cth) introduced ss 127A–127C into the *Industrial Relations Act 1988* (Cth). Section 127A(2) initially provided for an application to be made to the Australian Industrial Relations Commission to review a contract for services relating to the performance of work by an independent contractor on grounds the contract was unfair, harsh or against the public interest.[7] Section 127A was amended by the *Industrial Relations Reform Act 1993* (Cth) to confer this jurisdiction on the Industrial Relations Court of Australia. The provisions continued in the same form in the *Workplace Relations Act 1996* (Cth), although the jurisdiction was transferred to the Federal Court. Sections 127A–127C were renumbered by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) and became ss 832–834 of the *Workplace Relations Act 1996* (Cth).

[24] Sections 832–834 of the *Workplace Relations Act 1996* (Cth) were then repealed by the *Independent Contractors Act 2006* (Cth) (the **IC Act**) with effect from 1 March 2007. Section 12(1) of the IC Act now permits an application to be made to the Federal Court or the Federal Circuit and Family Court of Australia (Division 2) to review a services contract on grounds that the contract is unfair and/or harsh. Section 12(2A) of the IC Act was inserted by the Amendment Act. It provides that an application must not be made in relation to a services contract unless the sum of the independent contractor's annual rate of earnings, and any other relevant amounts, is more than the contractor high income threshold.

[25] In the second reading speech for the Amendment Bill, the Minister expressed the view that the existing provisions under the IC Act were inadequate. The Minister said:[8]

> And we need better protections against unfair contract terms for independent contractors.
>
> Existing protections against unfair contract terms under the Independent Contractors Act have not worked.

> This bill creates a new, low-cost and efficient jurisdiction at the Fair Work Commission for resolving disputes about unfair contract terms in services contracts, for independent contractors below a high-income threshold.

[26] The consequence of s 536ND(2) of the FW Act and s 12(2A) of the IC Act is that an independent contractor whose annual rate of earnings is below the contractor high income threshold is able to apply to the Commission under Part 3A-5 of the FW Act, whereas an independent contractor whose annual rate of earnings is above the contractor high income threshold remains able to apply to review the relevant services contract under the IC Act.[9] There are, however, some differences between the jurisdiction exercised by the Commission under Part 3A-5 of the FW Act and by the Federal Court or Federal Circuit Court under the IC Act to which it is necessary to refer below.

[27] An important historical precursor to the provisions now in the IC Act, and in Part 3A-5 of the FW Act, is found in New South Wales legislation. Section 106 of the *Industrial Relations Act 1996* (NSW) permits the Industrial Court of New South Wales to make an order declaring wholly or partly void, or varying, any contract whereby a person performs work in any industry if it 'finds the contract is an unfair contract'. Section 106(2) contemplates that the Court may find that a contract was an unfair contract at the time it was entered into or that it subsequently became an unfair contract because of any conduct of the parties, any variation of the contract or for any other reason. The term 'unfair contract' is defined in s 105(1) to mean a contract that is unfair, harsh or unconscionable, against the public interest, provides a total remuneration that is less than a person performing the work would receive as an employee performing the work, or that is designed to, or does, avoid the provisions of an industrial instrument.

[28] The jurisdiction now found in s 106 of the *Industrial Relations Act 1996* (NSW) was first enacted in 1959 as s 88F of the *Industrial Arbitration Act 1940* (NSW).[10] The enactment of the provision was motivated by a desire to prevent the award system being defeated by the practice of engaging contract labour. As the majority of the High Court observed in *Fish v Solution 6 Holdings Pty Ltd*,[11] '[c]ontract labour, especially of milk vendors, bread carters and in the building trades, had emerged as a means of sidestepping, and defeating, the prescription of employment conditions by awards made in arbitration of industrial disputes'.[12] The intention was to confer a comprehensive power upon the Commission to go to the substance of an arrangement made for a person to perform work in an industry 'in order to put such a worker in no worse a position than if he had been working under a contract of employment protected by award conditions'.[13]

[29] Those provisions were, however, broader in their application than those subsequently enacted in federal legislation. The New South Wales provisions were capable of applying to contracts and arrangements involving persons who perform work as employees and to at least some commercial arrangements whereby work is performed in addition to work being undertaken by an independent contractor.[14] At least in relation to a national system employee or national system employer, the FW Act now operates to the exclusion of s 106 of the *Industrial Relations Act 1996* (NSW).[15] The IC Act also excludes s 106 of the *Industrial Relations Act 1996* (NSW) in relation to a services contract that relates to the performance of work by an independent contractor.[16]

[30] With that introduction to Part 3A-5 of the FW Act and comparable legislation, it is appropriate to address the two questions referred to the Full Bench.

Question 1 — Failure of a services contract to include provisions so as to make it fair

[31] The first question is whether an application is within the jurisdiction of the Commission under Part 3A-5 to the extent that the application contends that a services contract is unfair because it does not include terms providing for particular matters. There was ultimately no dispute as between Mr Thongkhamchanh, Rasier Pacific and the TWU that the Commission cannot make an order under s 536NA(1) unless it is satisfied that the relevant services contract includes one or more unfair contract terms. No party contends that the Commission can make an order under s 536NA(1) purely on the basis that a services contract is found to be unfair because it lacks particular identified provisions.

[32] However, it is important to distinguish between the jurisdiction of the Commission to consider an application made to it and the power of the Commission to make an order in relation to a services contract under s 536NA(1). We consider that the correct understanding of the provisions is as follows. Section 536ND(1) permits a party to a services contract (or a relevant organisation) to apply for an order granting a remedy 'on the basis that the services contract contains a term that is unfair'. So long as an application is made which seeks an order on the basis that the applicant is a party to a services contract which contains an unfair term or terms, the Commission has jurisdiction to consider and determine the application.

[33] If an application is made under s 536ND(1), the power of the Commission to then make an order under s 536NA(1) is dependent upon the Commission ultimately being satisfied that the services contract contains one or more unfair contract terms. That requires the identification of a particular term or terms that the Commission finds are unfair. It is not sufficient that the Commission forms a general view that the services contract is unfair or that, absent identification of any unfair contract term, the services contract is unfair because it fails to contain particular provisions. Nor, obviously enough, would it be sufficient to point to unfair conduct by a party to the services contract.

[34] The language in Part 3A-5 is clear. Section 536NA(1) permits the Commission to make an order if it is satisfied that the services contract 'includes one or more unfair contract terms'. Section 536NB(1) sets out matters that the Commission may take into account '[i]n determining whether a term of a services contract is an unfair contract term'. Section 536ND(1) enables an application to be made on the basis that a services contract 'contains a term that is unfair'. The object in ss 536N(1)(a) and (b) refers to establishing a framework for 'dealing with unfair contract terms of services contracts' and procedures for 'dealing with unfair contract terms'. The consistent reference to a 'term' or 'terms' of a services contract indicates a clear intention that the Commission's jurisdiction is directed at ascertaining whether or not there are any terms of a services contract that are unfair.

[35] In this respect, the provisions of Part 3A-5 can be contrasted with comparable provisions in the IC Act. As we have recorded, s 12(1) of the IC Act provides that an application 'may be made to the Court to review a services contract on either or both of the following grounds: (a) the contract is unfair; (b) the contract is harsh'. Section 15(1) sets out matters to which the Court may have regard '[i]n reviewing a services contract' and s 15(3) requires the Court to record its opinion that 'a ground referred to in subsection 12(1) is established in relation to the whole or a part of the services contract'. These provisions contemplate the relevant court

reviewing the fairness of a contract in whole or in part. There is little doubt that a contract could be found to be unfair or harsh for the purposes of s 12(1) of the IC Act by reason of the failure of the contract to include specified provisions.[17]

[36] The jurisdiction of the Industrial Court of New South Wales under s 106 of the *Industrial Relations Act 1996* (NSW) similarly involves a consideration of whether the relevant contract is an 'unfair contract'. That jurisdiction permits consideration to be given as to whether the contract is unfair because it of its failure to include specified provisions. In *Sydney Water Corporation Ltd v Industrial Relations Commission of NSW*,[18] Mason P said:

> [25] Section 106(2) states in the plainest of terms that a contract may become unfair, so as to attract the jurisdiction of the Commission, because of post-contract conduct of the parties. But it is the 'contract' that is to be held unfair, and not the conduct, in the final analysis. Unfairness may of course stem from what the contract fails to provide, for example as regards termination procedures.

[37] For example, a common complaint in that jurisdiction was that a contract was unfair because it failed to provide adequate protection against arbitrary termination.[19]

[38] Part 3A-5 requires a potentially narrower inquiry as to whether a services contract includes one or more contract terms that are unfair. However, the fact that the focus of s 536NA(1) is on the identification of unfair contract terms does not suggest that the inquiry is confined to the examination of particular terms of a services contract in isolation. Rasier Pacific accepts, correctly in our view, that whether a particular term or terms are unfair must be determined having regard to the terms of the services contract as a whole. The matters that the Commission may take into account in determining whether a term of a services contract is an unfair term in s 536NB(1) include whether the services contract 'as a whole' displays a significant imbalance between the rights and obligations of the parties (s 536NB(1)(b)) and whether the services contract 'as a whole' provides for a total remuneration that is less than what regulated workers or employees performing the same or similar work would receive (s 536NB(1)(e)). It is also difficult to envisage how one could assess whether a contract term is 'reasonably necessary to protect the legitimate interests of a party to the contract' (s 536NB(1)(c)) or imposes a 'harsh, unjust or unreasonable requirement on a party to the contract' (s 536NB(1)(d)) without consideration of the other terms of the services contract and, indeed, the circumstances in which it was made and is performed. In that respect, s 536NB(2) requires that the matters in ss 536NB(1)(b) to (f) be assessed as at the time the Commission considers the application, rather than only when the contract was made.[20]

[39] Although it is necessary to carefully have regard to the statutory context in which the provisions appear, some guidance may be derived from other legislation providing relief with respect to unfair contract terms. For example, s 23(1) of the *Australian Consumer Law*[21] (the **ACL**) provides that term of a consumer contract or small business contract is void if: (a) the term is unfair; and (b) the contract is a standard form contract. Sections 24(1) and (2) define when a consumer contract or small business contract is 'unfair' in the following terms:

> **24 Meaning of *unfair***
>
> (1) A term of a consumer contract or small business contract is ***unfair*** if:

(a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
(c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

(2) In determining whether a term of a contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:
(a) the extent to which the term is transparent;
(b) the contract as a whole. …

[40] Similarly, s 12BF(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**) provides that a term of a consumer contract or small business contract is void if: (a) the term is unfair; (b) the contract is a standard form contract; and (c) the contract is a financial product or a contract for the supply, or possible supply, of services that are financial services. Sections 12BG(1) and (2) define when a contract is 'unfair' in the same manner as ss 24(1) and (2) of the ACL.

[41] These provisions operate in a manner that is distinguishable from Part 3A-5. In particular, under s 24(1) of the ACL and s 12BG(1) of the ASIC Act, a term of a contract is only unfair if all of the elements in subsections (a), (b) and (c) are satisfied.[22] In contrast, s 536NB(1) lists matters that the Commission may take into account in determining whether a term of a services contract is an unfair contract term. Section 536NB(1) does not set out conditions which must be satisfied before a term of a services contract can be found to be unfair. Nonetheless, the provisions of the ACL and the ASIC Act share some common elements with Part 3A-5 such as the reference to whether there is a significant imbalance in the parties' rights and obligations and whether an impugned term is reasonably necessary in order to protect the legitimate interests of a party in s 536NB(1)(b) and (c) of the FW Act, s 24(1)(a) and (b) of the ACL and s 12B(1)(a) and (b) of the ASIC Act. So long as appropriate regard is given to the differing statutory context, authorities dealing with those provisions of the ACL and the ASIC Act may provide some assistance in applying Part 3A-5 of the FW Act.[23]

[42] Relevantly for present purposes, s 24(2)(b) of the ACL and s 12BG(2)(c) of the ASIC Act require that, in determining whether a term of a contract is unfair, the court must take into account 'the contract as a whole'. That suggests a recognition that the fairness of an individual term of a contract can only be evaluated having regard to the contract as a whole. Given the express references to consideration of the contract 'as a whole' in ss 536NB(1)(b) and (e), the same approach is appropriate in the context of Part 3A-5. Consideration of the contract as a whole is inherent to an assessment of the fairness of a term of the contract.[24] In considering 'the contract as a whole', each and every term of the contract will not necessarily be equally relevant, or perhaps relevant at all. It has been said that the main requirement is to consider terms that might reasonably be seen as tending to counterbalance the term in question.[25] For our part, in the context of Part 3A-5, we consider that whether a particular term of a services contract is unfair is likely to require consideration of the other rights and obligations created by the services contract.

[43] It follows that whether a particular term or terms of a services contract are unfair for the purposes of s 536NA(1) must be assessed having regard to the terms of the contract as a whole, including what the contract otherwise provides or does not provide. It remains necessary to identify a particular term or terms that are unfair. It is not sufficient for the Commission to simply find that a services contract is unfair because it fails to contain a provision of a particular description. Having said that, a complaint that a services contract is unfair because it does not include a particular provision will frequently be able to be characterised as a contention that one or more relevant express terms of the contract are unfair contract terms because of something for which the contract does not provide. A term of a services contract might, in an appropriate case, be an unfair contract term because that term, and the services contract generally, fails to include elements which are necessary to render a particular term fair in its operation or effect.

[44] In light of this analysis of Part 3A-5 of the FW Act, we are satisfied that Mr Thongkhamchanh's application, read together with the particulars he has provided, may be characterised as one that seeks an order granting a remedy on the basis that the Services Agreement contains unfair terms. In his particulars, Mr Thongkhamchanh has identified specific clauses of the Services Agreement he says are unfair at least in relation to the second and third unfair contract terms identified in his initial application.

[45] With respect to the first unfair contract term, Mr Thongkhamchanh contends that the Services Agreement 'does not hold Uber accountable for ensuring that its platform functions properly'. The particulars provided by Mr Thongkhamchanh do not identify a particular clause that is the subject of that complaint and simply contends that '[t]he contract is unfair as it lacks a clause requiring Uber to ensure its platform functions properly'. The TWU also does not identify a particular clause which is relevant to that complaint. As framed, the particulars would not be sufficient to sustain a finding that the Services Agreement includes one or more unfair contract terms for the purposes of s 536NA(1). However, as submitted by the TWU, the contention could possibly be reframed as a complaint that clause 3(a) of the Services Agreement requires payment of the Services Fee in order to obtain access to the Uber Driver app without ensuring that Rasier Pacific has an obligation to ensure the app operates adequately. Whether such a contention would have merit is not a matter which must now be considered. It is at least conceivably a claim which could be considered under Part 3A-5.

[46] With respect to the second unfair contract term, Mr Thongkhamchanh contends that the Services Agreement permits Rasier Pacific to penalise contractors through metrics such as cancellation rates, even when cancellations occur due to app malfunctions beyond the contractor's control. Mr Thongkhamchanh identifies clauses 5.4 and 7.4 as relevant terms of the Services Agreement. Clause 5.4 provides for 'ratings' in the following terms:

> **5.4 How do ratings work?**
>
> (a) After receiving Transportation Services from you, a Rider will be prompted by the Uber app to rate such Transportation Services, and you will be prompted to rate your Rider. This can also include comments or feedback, which, along with the rating, you agree to provide in good faith. Feedback and ratings are Uber Data.

(b) Uber, Rasier and their Affiliates are not required to verify any feedback or ratings. Uber may edit or remove comments if they include obscenities, objectionable content or Personal Data, or if they violate Law or the Community Guidelines.

[47] Clause 7.4 deals with adjustments to the transportation fee:

7.4 Adjustments to the Transportation Fee

(a) Rasier Pacific is permitted to withhold payment of the Transportation Fee (or if the Transportation Fee has already been paid, require reimbursement of the Transportation Fee from you to the Rider) for a particular Transportation Service you provide to a Rider if:

(i) the applicable Transportation Services were not completed;
(ii) a Rider has made a complaint related to your acts or omissions and Rasier Pacific has taken reasonable steps to verify the veracity of the complaint; or
(iii) suspected fraudulent activity or misuse of the Uber Driver App has been detected.

(b) Rasier Pacific's decision to withhold payment or require reimbursement of a Transportation Fee under section 7.4(a) must be exercised in a reasonable manner.

[48] Rasier Pacific contends that clauses 5.4 and 7.4 do not have the effect complained of by Mr Thongkhamchanh and that the complaint is not, in truth, that those clauses are themselves unfair. That submission appears to us to contest the merits of the application rather than to involve a contention that the application does not seek a remedy on the basis that the Services Agreement includes a term that is said to be unfair. Rasier Pacific did not ask the Full Bench to dismiss the application on the basis that it lacks reasonable prospects of success other than as a consequence of its jurisdictional argument. In any event, it could be contended at least that clause 7.4(a)(i), in permitting Rasier Pacific to withhold payment if the applicable Transportation Services are not completed, allows withholding of payment when a service is not completed even where that occurs as a result of app malfunction. We are satisfied that the complaint is capable of being characterised as including an allegation that the Services Agreement contains specific unfair contract terms.

[49] With respect to the third unfair contract term, Mr Thongkhamchanh contends that the Services Agreement allows Rasier Pacific to impose restrictions on platform access based on accusations even when the accusations are unsubstantiated or incorrect. The particulars provided by Mr Thongkhamchanh identify clauses 15.2 and 15.3 as relevant terms. Clauses 15.2 and 15.3 provide:

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

(ii) 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.

15.3 Effect of termination

Outstanding payment obligations and sections 1 ('Entering into an agreement'), 5.3(b) ('Your account'), 7.4 ('Adjustments to the Transportation Fee'), 7.7(d) ('Payment processing'), 7.9 ('GST and other Taxes'), 8.1 ('Ownership of intellectual property rights'), 8.3 ('Restrictions on the use of the Uber Driver App or Uber Data'), 8.4 ('Uber Names, Marks or Works'), 9 ('Privacy'), 11.2 ('General disclaimer'), 12 ('Indemnification'), 13 ('Limitation of liability'), 14 ('Insurance') (to the extent that insurances are required to be maintained after the term), this section 15.3, 16 ('General provisions') and 17 ('Definitions and interpretation') shall survive the termination of this Agreement

[50] In his particulars, Mr Thongkhamchanh complains that 'Uber can restrict or terminate platform access on unverified claims, leaving contractors without recourse or due process'. Clauses 15.2(b) and (c) permit restriction or removal of access to the Uber Driver app. Although clause 15.3 may be irrelevant, it is tolerably clear that Mr Thongkhamchanh wishes to contend that clause 15.2 is unfair because it permits Rasier Pacific to restrict access to the platform based on unverified claims. Leaving aside the merits of that contention, we are satisfied that is the type of claim contemplated by Part 3A-5. In making that complaint, Mr Thongkhamchanh seeks a remedy on the basis that the Services Agreement contains a term that is unfair.

Question 2 — Workplace relations matters

[51] The second question is whether the unfair contract terms contended for by Mr Thongkhamchanh would, in an employment relationship, relate to workplace relations matters within the meaning of s 536JQ of the FW Act. As earlier discussed, s 536NA(1) permits the Commission to make an order in relation to a services contract only if it is satisfied it includes one or more unfair contract terms which, in an employment relationship, would relate to workplace relations matters.

[52] The requirement in s 536NA(1) that the unfair contract term or terms would 'relate to' workplace relations matters directs attention to the connection or association between the unfair contract term or terms and a workplace relations matter. The phrase 'relating to' is commonly understood to be one of wide import.[26] It can refer to a direct or indirect connection between two subject matters, and one subject matter can 'relate to' another subject matter even though the first subject matter also relates to other things. However, the degree of connection required

between two subject matters joined by the words 'relating to' is to be determined by reference to the text, context, legislative purpose and history of the provision.[27]

[53] Rasier Pacific submits that, in the context of Chapter 3A of the FW Act, the phrase 'which, in an employment relationship, would relate to workplace relations matters' is directed at terms which have the same content and effect as a type of term which would be found in a 'standard contract of employment' or regulated by a State or Territory industrial law. There are a number of difficulties with the submission. It is, with respect, unclear what is meant by the reference to a 'standard contract of employment'. We infer that Rasier Pacific submits that the expression 'workplace relations matters' should be understood to be limited to terms which are commonly found in employment contracts. If that is the case, the FW Act does so not by imposing an implicit constraint on what can constitute a 'workplace relations matter', but by identifying specific subject-matters in s 536JQ(1).

[54] To the extent that Rasier Pacific submits that an unfair contract term must itself have the same content and effect as a term of an employment relationship that *is* a workplace relations matter, we do not consider the submission can be reconciled with the language used in ss 536NA and 536JQ or the context of those provisions. For the power to make an order under s 536NA(1) to arise, it is not necessary that the unfair contract term itself directly provides for a 'workplace relations matter'. The language of s 536NA(1) indicates that it is sufficient that the Commission is satisfied that the services contract contains an unfair contract term that 'relates to' a subject matter that falls within the definition of a 'workplace relations matter'. The hypothetical exercise contemplated by s 536NA(1) is not consistent with understanding the subsection to require that the relevant term of a services contract have precisely the same content and effect as a term of an employment contract. Rather, the subsection requires an assessment of whether a term of a services contract would, in an employment context, relate to a subject matter identified in s 536JQ(1). By definition, a term of a services contract will not have precisely the same content and effect as a term of an employment contract.

[55] Furthermore, s 536JQ(1)(h) extends the definition of a 'workplace relations matter' to any matter that is 'substantially the same as a matter that relates to employees and employers and that is dealt with by or under… this Act'. That must at least extend to the subjects dealt with in the National Employment Standards in Part 2-2 and the matters about which terms may be included in modern awards under s 139. It may also extend to the method or frequency of payment (being matters dealt with under s 323), the fixed-term nature of a contract (Division 5 of Part 2-9), pay secrecy (Division 4 of Part 2-9), disconnection from work (Division 6 of Part 2-9), protection for engagement in industrial activities (Division 4 of Part 3-1), or protection from sexual harassment (Part 3-5A), amongst others. The reference in s 536JQ(1)(h) to a matter being 'substantially the same' as a matter that relates to employees and employers and is dealt with by or under the FW Act acknowledges the matter need not be identical.

[56] It is not entirely correct to say, as Rasier Pacific does, that the purpose of Chapter 3A is to confer on independent contractors who have similar characteristics to employees a range of similar protections conferred on employees under the FW Act. The purpose of Chapter 3A is, in a broad sense, to 'ensure that certain independent contractors are entitled to greater workplace protections than they are currently'.[28] Many of the protections in Chapter 3A apply to independent contractors who are either 'employee-like workers' or engaged in the road transport industry. The phrase 'employee-like worker' is perhaps somewhat misleading. It

refers to a category of independent contractor that performs digital platform work, rather than to persons who, in all respects at least, have characteristics similar to those of employees.[29] Part 3A-5, however, is not limited to 'employee-like workers' and extends in its operation to any contract for services that relates to the performance of work under the contract by an individual and has a relevant constitutional connection.[30]

[57] Rasier Pacific submitted that question 2 can be answered in the negative because Mr Thongkhamchanh's application does not identify specific terms he alleges are unfair. That is, it submits that the failure to specify terms said to be unfair means that the Commission cannot be satisfied that the Services Agreement includes one or more unfair contract terms 'which, in an employment relationship, would relate to workplace relations matters'. If, contrary to its submissions, Mr Thongkhamchanh has alleged that the Services Agreement includes one or more unfair contract terms, Rasier Pacific submits that it is premature for the Full Bench to determine whether the matters raised in the application can be said to relate to workplace relations matters. Rasier Pacific submits that the characterisation of any term alleged to be unfair and whether, in an employment relationship, the term would relate to a workplace relations matter might be affected by evidence and should be considered together with consideration of whether the Services Agreement contains any unfair contract terms.

[58] For the reasons given above, Mr Thongkhamchanh has identified terms of the Services Agreement which he alleges are unfair. In the circumstances, the Full Bench should not express a concluded view as to whether the terms of the Services Agreement identified by Mr Thongkhamchanh are terms which, in an employment relationship, would relate to workplace relations matters. We agree with Rasier Pacific that this question might be influenced by evidence. However, given that Rasier Pacific seeks orders that Mr Thongkhamchanh's application be dismissed for want of jurisdiction, or because the application was not made in accordance with the FW Act or has no reasonable prospects of success, it is appropriate to consider whether it is at least arguable that the terms identified by Mr Thongkhamchanh relate to workplace relations matters.

[59] The first unfair contract term referred to in the application alleges that the Services Agreement does not hold Rasier Pacific 'accountable for ensuring that its platform functions properly, which is essential for fulfilling my role as a contractor'. Mr Thongkhamchanh did not identify a particular term that has this effect, although we have explained that the complaint might be reframed to allege unfairness in clause 3(a) of the Services Agreement. Such a complaint is the most distant from being, in an employment relationship, related to a workplace relations matter. However, it is possible that unfairness alleged by Mr Thongkhamchanh might be described as related to 'remuneration, allowances or other payments payable to employees' for the purposes of s 536JQ(1)(a) because interruptions in platform functioning affect Mr Thongkhamchanh's capacity to earn monies through the performance of work. The answer to that question is likely to be affected by evidence. It is not possible for us to form a view about that matter now, but it is conceivably arguable.

[60] The second unfair contract term referred to in the application complains that the Services Agreement permits penalisation of contractors through metrics such as cancellation rates even where cancellations are the result of malfunctions in the platform. After the provision of particulars, Mr Thongkhamchanh identified clauses 5.4 and 7.4 as being the relevant terms. Leaving aside the merits of the contention, we are satisfied that Mr Thongkhamchanh at least

raises an arguable basis upon which the Commission might be satisfied that the terms would, in an employment relationship, relate to a workplace relations matter. Clause 7.4 specifically permits Rasier Pacific to withhold payment of the Transportation Fee in certain circumstances. It is strongly arguable that this provision, in an employment relationship, would relate to 'remuneration, allowances or other amounts payable to employees' for the purposes of s 536JQ(1)(a). To the extent Rasier Pacific submits that the reference 'remuneration, allowances or other amounts payable to employees' is limited to time-based payments to employees, we do not accept the submission. In ordinary parlance, the word 'remuneration' means recompense or reward for services rendered by an employee and is sufficiently broadly to include any consideration benefiting an employee under an employment contract including both cash and non-cash benefits.[31] No different meaning is to be adopted in the context of the FW Act.[32] A term of a services contract dealing with payments associated with the performance of work by an individual under the contract is likely to be a term that would, in an employment relationship, relate to 'remuneration'.

[61] The third unfair contract term referred to in the application alleges that the Services Agreement allows Rasier Pacific 'to impose restrictions on platform access based on accusations… even where such accusations are unsubstantiated or incorrect'. Mr Thongkhamchanh identified clauses 15.2 and 15.3 as the relevant terms. Rasier Pacific submits that restriction of access to the Uber Driver app is not a matter which relates to workplace relations matters because the mode of organising work through a digital platform differs from the conventional paradigm of mutual and direct exchange between an employer and an employee. In our view, this submission ignores that s 536NA(1) requires consideration of whether a term of a services contract would relate to a workplace relations matter *in an employment relationship*. Clause 15.2 permits Rasier Pacific to terminate the Services Agreement 'for any legitimate business, legal or regulatory reason' or to restrict or remove access to the Uber Driver app if there has been a material breach of the Services Agreement, breach of applicable laws, violation of the Community Guidelines or a risk to health and safety or while investigating an alleged breach. It is at least arguable that this provision, in an employment relationship, would relate to 'enforcing or terminating contracts of employment' for the purposes of s 536JQ(1)(d).

Conclusion

[62] The answers to the questions referred to the Full Bench are as follows:

(a) **Question 1:** An application under s 536ND(1) is within the jurisdiction of the Commission under Part 3A-5 if the applicant seeks an order granting a remedy 'on the basis that the services contract contains a term that is unfair'. The Commission cannot make an order under s 536NA(1) purely on the basis that a services contract is unfair because it does not include a particular provision. It is necessary for the Commission to identify a term or terms which are unfair contract terms. However, whether a particular term is unfair must be assessed by reference to the whole of the services contract, including what it otherwise provides or does not provide for.

(b) **Question 2:** Question 2 cannot not be answered at this stage.

[63] For the reasons given above, Mr Thongkhamchanh's application seeks an order granting a remedy on the basis that the Services Agreement contains unfair contract terms and potentially enlivens the jurisdiction of the Commission to make an order under s 536NA(1). Although it is not possible to give a definitive answer to the second question referred to the Full Bench, Mr Thongkhamchanh has raised an arguable case that the Services Agreement includes one or more terms that, if found to be unfair, would relate to workplace relations matters in an employment relationship for the purposes of s 536NA(1).

[64] At this stage, there is no basis upon which Mr Thongkhamchanh's application should be dismissed for want of jurisdiction or because the application was not made in accordance with the FW Act or has no reasonable prospects of success. The application will be listed for further programming in due course.

PRESIDENT

Appearances:

S Thongkhamchanh appeared for himself.
D Roche SC, *M Seck* and *P Bristow*, of counsel, instructed by Ashurst Australia for Rasier Pacific Pty Ltd.
P Boncardo, of counsel, for the Transport Workers' Union of Australia, intervening.

Hearing details:

2025.

Sydney (in person):
1 September.

Printed by authority of the Commonwealth Government Printer

<PR793223>

---

[1] See for example cls 5.1–5.4 (Provision of Transportation Services), 6.1 (Your licences and visas/work permits) and 7.1-7.9 (Fees and Payments).

[2] *Fair Work Act 2009* (Cth) ('FW Act') s 15H(2)(a)(i) (when read with the definition of 'constitutional corporation' in s 12).

[3] FW Act s 15AA. See also *Commonwealth Bank of Australia v Barker* [2014] HCA 32, 253 CLR 169 [16] (French CJ, Bell and Keane JJ).

[4] Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) [1568].

[5] Cf. FW Act s 536NX (which falls within Chapter 3B to the Act).

[6] FW Act s 15C; *Fair Work Regulations 2009* (Cth) reg 1.08AA.

[7] Considered by the High Court in *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323.

[8] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 September 2023, 6238 (Tony Burke, Minister for Employment and Workplace Relations).

[9] As explained in the Revised Explanatory Memorandum to the *Fair Work Legislation Amendment Closing Loopholes) Bill 2023* (Cth) [1700]–[1701].

[10] Enacted by the *Industrial Arbitration (Amendment) Act 1959* (NSW). The key provision was later found in s 275 of the *Industrial Relations Act 1991* (NSW).

[11] [2006] HCA 22, 225 CLR 180.

[12] Ibid [21] (Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ).

[13] *Brown v Rezitis* (1970) 127 CLR 157, 169 (Menzies J).

[14] *Fish v Solution 6 Holdings Pty Ltd* [2006] HCA 22, 225 CLR 180 [114]–[115] (Kirby J).

[15] FW Act ss 26(1) and (2)(e).

[16] *Independent Contractors Act 2006* (Cth) s 7(1)(c).

[17] See, eg, *Keldote Pty Ltd v Riteway Transport Pty Ltd* [2008] FMCA 1167, 176 IR 316 [86] (Cameron FM); *Fabsert Pty Ltd v ABB Warehousing (NSW) Pty Ltd* [2008] FMCA 1198, 176 IR 169 [38]–[39] (Driver FM); *Informax International Pty Ltd v Clarius Group Ltd* [2012] FCAFC 165, 207 FCR 298, 231 IR 422 [183] (Besanko, Jagot and Bromberg JJ).

[18] [2004] NSWCA 436, 61 NSWLR 661, 141 IR 14.

[19] *Lavings v Barclay Mowlem Construction (NSW) Ltd* (1994) 99 IR 247, 253–254 (Hill J); *Sutton v BE Australia WD Pty Ltd (No 3)* [2017] NSWSC 689, 272 IR 311 [102] (Walton J).

[20] Cf. *Independent Contractors Act 2006* (Cth) s 12(3), which only permits the Court to have regard to circumstances as they were when the contract was made.

[21] *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*').

[22] *Australian Securities and Investments Commission v Auto & General Insurance Company Limited* [2025] FCAFC 76, 309 FCR 473 [28] (O'Bryan and Cheeseman JJ).

[23] See, for example, *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] FCA 377 [54] (Gilmour J); *Australian Securities and Investments Commission v Auto & General Insurance Company Limited* [2025] FCAFC 76, 309 FCR 473 [28]–[39] (O'Bryan and Cheeseman JJ).

[24] See, in different contexts, *Jetstar Airways Pty Ltd v Free* [2008] VSC 539, 30 VAR 295 [127] (Cavanough J); *Australian Securities and Investments Commission v Auto & General Insurance Company Limited* [2025] FCAFC 76, 309 FCR 473 [35] (O'Bryan and Cheeseman JJ).

[25] *Director General of Fair Trading v First National Bank* [2001] UKHL 52; [2002] AC 481 [17] (Lord Bingham); *Jetstar Airways Pty Ltd v Free* [2008] VSC 539, 30 VAR 295 [128] (Cavanough J); *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] FCA 377 [54(g)] (Gilmour J).

[26] *Tooheys Ltd v Commissioner of Stamp Duties* [1961] HCA 35, 105 CLR 602, 620 (Taylor J); *Re Dingjan; Ex parte Wagner* [1995] HCA 16, 183 CLR 323, 354 (Toohey J), 370 (McHugh J); *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28, 194 CLR 355 [87] (McHugh, Gummow, Kirby and Hayne JJ).

[27] *R v Khazaal* [2012] HCA 26; (2012) 246 CLR 601 [31] (French CJ); *Minister for Home Affairs v DLZ18* [2020] HCA 43; 270 CLR 372 [43] (Kiefel CJ, Bell, Gageler, Keane and Gordon JJ).

[28] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) [36].

[29] FW Act s 15P(1).

[30] Ibid s 15H(1).

[31] *May v Lilyvale Hotel Pty Ltd* (1995) 68 IR 112, 116–117 (Wilcox CJ); *Oliveri v Australian Industrial Relations Commission* [2005] FCAFC 36, 145 IR 120 [25] (Nicholson, Weinberg and Selway JJ).

[32] *Re Equal Remuneration Decision 2015* [2015] FWCFB 8200, 256 IR 362 [276].