



DECISION

Fair Work Act 2009
s.365—General protections

Fahad Ullah

v

Om Security Pty Ltd
(C2025/11024)

DEPUTY PRESIDENT BOYCE

SYDNEY, 30 MARCH 2026

Application for costs under ss.375B and 611 of the Fair Work Act 2009 - threshold under s.375B met - discretion to award costs against the Costs Respondent enlivened - discretion exercised in favour of Costs Applicant against the Costs Respondent - costs order made.

[1] These reasons for decision were originally made on an *ex-tempore* basis on transcript. In publishing same, I have taken the opportunity to revise, make additions to, and/or amend these reasons in accordance with the principles stated by Kirby J in *Ex Tempore Judgments - Reasons on the Run* (1995) 25 UWALRev 213 (at 229-230, including the authorities cited therein), and the New South Wales Court of Appeal in *Bar-Mordecai v Rotman & Ors* [2000] NSWCA 123 (at [193]-[195], including the authorities cited therein).

[2] On 2 February 2026, Om Security Pty Ltd (**Costs Applicant**) filed a Form F6 Application for Costs (**Costs Application**) against Mr Fahad Ullah (**Costs Respondent**).¹ The Costs Applicant seeks the payment of its legal costs under s.611 and/or s.375B of the *Fair Work Act 2009 (Act)*.

[3] Directions were issued on 3 February 2026,² and the matter was set down for Hearing on 18 March 2026. Those Directions read:

[1] By **4.00pm AEDT on Tuesday, 17 February 2026**, Om Security Pty Ltd (**Costs Applicant**) must file in the Commission and serve upon Mr Fahad Ullah (**Costs Respondent**) an outline of submissions, witness statements, and any documents in support of its application for costs.

[2] By **4.00pm AEDT on Tuesday, 3 March 2026**, the Costs Respondent must file with the Commission and serve upon the Costs Applicant an outline of submissions, witness statements, and any documents in opposition to the application for costs.

[3] By **4.00pm AEDT on Tuesday, 10 March 2026**, the Costs Applicant must file in the Commission and serve upon the Costs Respondent any submissions in reply, and any documents in support of those reply submissions.

[4] The matter is listed for hearing via Microsoft Teams Video Call in regard to the application for costs made by the Costs Applicant against the Costs Respondent at **10:00am AEDT on Wednesday, 18 March 2026**.

[5] Filing of documents is to occur by email to the Associate to Deputy President Boyce at chambers.boyce.dp@fwc.gov.au. Please note that any correspondence sent to Chambers regarding this matter must copy in all other parties and/or their representatives.

[4] On 17 February 2026 the Costs Applicant filed and served its evidence and submissions in accordance with the Directions.

[5] On 18 February 2026 the Costs Respondent emailed my Chambers stating that the Fair Work Commission (**Commission**) does not have any jurisdiction to determine the Costs Application. There were then email exchanges between my Chambers and the Costs Respondent, as follows:

Email from the Costs Respondent to Chambers at 8:00am AEDT on Wednesday, 18 February 2026

“Dear Associate / Commission,

I write in response to the directions issued in relation to costs submissions in the above matter.

I respectfully place on the record that I do not concede that the Commission presently has jurisdiction to determine the costs issue. The question of jurisdiction, including whether the Commission ought to have exercised jurisdiction while an appeal was on foot before the Federal Court, is presently before the Federal Court on appeal.

In those circumstances, and without waiving any rights, I do not propose to make substantive submissions on costs at this stage. My position is that the costs issue is affected by, and dependent upon, the outcome of the Federal Court proceedings.

This correspondence is provided to ensure the Commission is aware of my position. I reserve all rights.

Yours sincerely, Fahad Ullah”

Email from Chambers to the Costs Respondent at 12:40pm AEDT on Wednesday, 18 February 2026

“Dear Mr Ullah

I refer to your email below, and respond on behalf of Deputy President Boyce.

It is noted that you have advised that you will not be complying with the Directions issued on 3 February 2026 in respect of the Costs Application, despite every opportunity to do so. That is a matter for you, and choice that you have yourself decided to make.

Please note, the Costs Application currently before the Commission has absolutely nothing to do with any proceedings before the Federal Court of Australia. Nor is the Costs Application currently before the Commission contingent upon any finding/s previously or yet to be made by the Federal Court of Australia.

As per the Notice of Listing, the matter will now proceed to hearing via MS Teams at 10am AEDT on Wednesday, 18 March 2026. Only materials filed in accordance with the Directions will be permitted to be relied upon at this hearing.

Yours faithfully,

[Associate]”

Email from the Costs Respondent to Chambers at 4:55pm AEDT on Wednesday, 18 February 2026

“Dear Associate,

I acknowledge receipt of your email below and note the listing of the costs application for hearing on 18 March 2026.

For the avoidance of doubt, I maintain my previously stated position that I do not concede the Commission’s jurisdiction to determine the costs application in the present circumstances. That issue, including whether the Commission ought to have proceeded while an appeal was on foot before the Federal Court, is before the Federal Court on appeal.

Consistent with that position, and without waiving any rights, I do not propose to file substantive materials or make submissions on the costs application. My non-participation is principled and jurisdictional in nature.

This correspondence is provided to ensure the Commission is aware of my position. I reserve all rights.

Yours sincerely, Fahad Ullah”³

[6] Ultimately the Costs Respondent did not comply with the Directions or otherwise file any evidence or submissions. He did not attend the hearing listed on 18 March 2026. At the commencement of the hearing, I made the following statement in relation to the Costs Respondent’s non-attendance:

“I note there's no appearance from the Costs Respondent, Mr Ullah. I note that he received the Notice of Listing and has corresponded with the Commission [since then]. [Directions were] issued with the Hearing set out as commencing today, 10:00 am, 18

March 2026. My Associate has attempted to contact [the Costs Respondent] and he has not been able to be contacted. Therefore I have determined to proceed in his absence, particularly having regard to the email exchange between Chambers and the Costs Respondent found at pages 76 to 78 of the Digital Hearing Book prepared for this Costs Application [see correspondence at paragraph [5] of this Decision].”⁴

[7] Other than asserting the Commission has no jurisdiction, the Costs Respondent has provided no explanation for his failure to attend the Hearing on 18 March 2026.

[8] The proceedings to which this Costs Application relates concern the Costs Respondent’s application under s.365 of the Act, being an application to deal with contraventions involving dismissal (**365 Application**), which was filed around 10 months (or 304 days), out of time. The Costs Respondent’s request for an extension of time was dismissed (by the Commission as presently constituted) on 19 January 2026 (Decision - [2026] FWC 164, Order - [PR795954](#)).⁵ No appeal has been filed with the Commission in respect of this decision or order.

[9] At the Hearing on 18 March 2026, Mr *Sebastian McIntosh*, of Counsel, instructed by Ms *Alexandra Abbott*, Senior Associate, HWL Ebsworth lawyers, appeared with permission (previously granted) for the Costs Applicant.

Legislative provisions on costs

[10] The power to award costs under s 611 of the Act is limited. It reads:

“611 Costs

- (1) A person must bear the person's own costs in relation to a matter before the FWC.
- (2) However, the FWC may order a person (the **first person**) to bear some or all of the costs of another person in relation to an application to the FWC if:
 - (a) the FWC is satisfied that the first person made the application, or the first person responded to the application, vexatiously or without reasonable cause; or
 - (b) the FWC is satisfied that it should have been reasonably apparent to the first person that the first person's application, or the first person's response to the application, had no reasonable prospect of success.

Note: The FWC can also order costs under sections 376, 400A, 401 and 780.

- (3) A person to whom an order for costs applies must not contravene a term of the order.

Note: This subsection is a civil remedy provision (see Part 4-1).”

[11] Section 375B of the Act reads:

“375B Costs orders against parties

(1) The FWC may make an order for costs against a party (the *first party*) to a dispute for costs incurred by the other party to the dispute if:

- (a) an application for the FWC to deal with the dispute has been made under section 365; and
- (b) the FWC is satisfied that the first party caused those costs to be incurred because of an unreasonable act or omission of the first party in connection with the conduct or continuation of the dispute.

(2) The FWC may make an order under subsection (1) only if the other party to the dispute has applied for it in accordance with section 377.

(3) This section does not limit the FWC's power to order costs under section 611.”

Case law as to costs under the Act

s.611

[12] In *Church v Eastern Health t/as Eastern Health Great Health and Wellbeing*⁶ (**Church**), the Full Bench stated:

“[26] Section 611 sets out a general rule - that a person must bear their own costs in relation to a matter before the Commission (s.611(1)) - and then provides an exception to that general rule in certain limited circumstances. The Explanatory Memorandum confirms this interpretation of the section, it is in the following terms:

2353. Subclause 611(1) provides that generally a person must bear their own costs in relation to a matter before FWA.

2354. However, subclause 611(2) provides an exception to this general rule in certain limited circumstances. FWA may order a person to bear some or all of the costs of another person where FWA is satisfied that the person made an application vexatiously or without reasonable cause or the application or response to an application had no reasonable prospects of success.

2355. A note following subclause (2) alerts the reader that FWA also has the power to order costs against lawyers and paid agents under clauses 376, 401 and 780 which deal with termination and unfair dismissal matters.

2356. Subclause 611(3) provides that a person to whom a costs order applies must not contravene a term of the order.

[27] In the context of s.570 and its legislative antecedents, courts have observed that an applicant who has the benefit of the protection of a provision such as s.570(1), (i.e. the general rule that parties bear their own costs), will only rarely be ordered to pay costs and that the power should be exercised with caution and only in a clear case. In our view

a similarly cautious approach is to be taken to the exercise of the Commissions powers in s.611 of the FW Act.”⁷

[13] In *Hansen v Calvary Health Care Adelaide Limited*⁸ a Full Bench of the Commission (in relation to s.611 generally) stated:

“[15] It is trite to observe that the statutory and policy imperative underpinning a costs application under the Act, is that a person in a matter before the Commission must bear their own costs. So much is plainly obvious by the precise and unambiguous language of s 611(1).

[16] However, the statutory scheme sets out the relatively circumscribed circumstances in which an order for costs might be found by the Commission to be appropriate in a particular case. It includes the exercise of discretionary power where the Commission is satisfied that one, or more of the circumstances set out in s 611(2), has been established. If such circumstances are established, the Commission, in the broad exercise of its discretion, may make an order that a person/s bear some, or all of the costs of another person, in relation to the application, including on an indemnity basis, or decline to make any order at all.”

[14] In *Mitford Investments Pty Ltd ATF The JJG Trust T/A Integro Private Wealth v Rick Adaszko*,⁹ Deputy President Beaumont crucially noted that:

“The starting point in relation to costs of proceedings before the Commission is that each person involved in a matter must bear their own costs. This statutory imperative is said to have derived from the policy purpose that a person is entitled to make or defend an application made under the Act, without the risk that a costs order may be made against them.”

[and]

“Section 611 contains no indication of the considerations which the Commission must take into account in deciding how to exercise its discretion. The discretion conferred is expressed in general, unqualified, terms.”¹⁰

s.611(2)(a)

[15] The relevant principles concerning the interpretation and application of s.611(2)(a) of the Act were comprehensively stated in *Church*, and can be summarised as follows:

- i. An application is made vexatiously when the predominant motive or purpose of the applicant is to harass or embarrass the other party or to gain a collateral advantage.
- ii. An application is not made without reasonable cause simply because the application did not succeed.

- iii. Whether an application is made without reasonable cause may be tested by asking, on the facts apparent to the applicant at the time the application was made, whether there was no substantial prospect of success.
- iv. If success depends upon the resolution in the applicant's favour of one or more arguable points of law, it is inappropriate to characterise the application as having been made without reasonable cause.
- v. In relation to an appeal, the question becomes whether the appeal has no substantial prospect of success. The prospect of success must be evaluated in the light of the facts of the case, the judgment appealed from and the points taken in the notice of appeal. If there is a not insubstantial prospect of the appeal achieving some success, it cannot fairly be described as having been made without reasonable cause.
- vi. An application will have been made without reasonable cause if it can be characterised as so obviously untenable that it cannot possibly succeed, is manifestly groundless or discloses a case where the tribunal is satisfied it cannot succeed.¹¹

[16] It is also appropriate to highlight the reasoning of Justice Snaden of the Federal Court of Australia in *Macushla Pty Ltd (Trading as Sunnypop Bakery Ciabatta Della Nonna) v El Souki*¹² (in relation to similar wording under s.570(2)(a) of the Act):

“In *Baker v Patrick Projects Pty Ltd (No 2)* [2014] FCAFC 166; (2014) 145 ALD 548 (Dowsett, Tracey and Katzmann JJ), a Full Court of this Court endorsed (at [9]) what was said about the application of s 570(2)(a) of the FW Act in *Construction, Forestry, Mining and Energy Union v Corinthian Industries (Australia) Pty Ltd (No 2)* [2014] FCA 351 (Pagone J). There, Pagone J, at [8], said that:

‘...[t]o exercise the discretion conferred by [s 570(2)(a) of the Act] the Court must be satisfied that the claims were, relevantly, instituted without reasonable cause. That is not established merely because a party fails in the claims: *R v Moore; ex parte Federated Miscellaneous Workers Union of Australia* [1978] HCA 51; (1978) 140 CLR 470, 473. The relevant provisions reflect ‘a policy of protecting a party instituting proceedings from liability for costs’ and costs will rarely be awarded unless justified by exceptional circumstances: see *Kangan Batman Institute of Technology and Further Education v Australian Industrial Relations Commission* (2006) 156 FCR 275 at [60]. In *Kangan Batman Institute* it was said by the Full Court at [60] that ‘a proceeding will be instituted without reasonable cause if it has no real prospects of success, or was doomed to failure’. In *Kanan v Australian Postal and Telecommunications Union* [1992] FCA 539; (1992) 43 IR 257 Wilcox J indicated at 264 that one way of testing whether a proceeding was instituted ‘without reasonable cause’ was to ask whether, upon the facts apparent to the applicant at the time of instituting the proceeding, there was no ‘substantial prospect of success’. His Honour went on to say that a proceeding lacks a reasonable cause where it is clear that it must fail on the applicant’s own version of the facts.’”¹³

s.611(2)(b)

[17] In relation to s.611(2)(b), the principles were summarised by the Full Bench in *Baker v Salva Resources Pty Ltd*¹⁴ as follows (footnotes omitted):

“[10] The concepts within s.611(2)(b) ‘should have been reasonably apparent’ and ‘had no reasonable prospect of success’ have been well traversed:

- ‘should have been reasonably apparent’ must be objectively determined. It imports an objective test, directed to a belief formed on an objective basis, rather than a subjective test; and
- A conclusion that an application ‘had no reasonable prospect of success’ should only be reached with extreme caution in circumstances where the application is manifestly untenable or groundless or so lacking in merit or substance as to be not reasonably arguable.”¹⁵

[18] In *Keep v Performance Automobiles Pty Ltd*¹⁶ (**Keep**), a Full Bench further stated:

“As to s.611(2)(b), the FWC may make a costs order against a person if satisfied that ‘it should have been reasonably apparent’ to that person that their application had ‘no reasonable prospect of success’. The expression ‘should have been reasonably apparent’ in s.611(2)(b) imports an objective test, directed to a belief formed on an objective basis as opposed to the applicant’s subjective belief.

There is Full Bench authority for the proposition that the Commission should exercise caution before arriving at the conclusion that an application had ‘no reasonable prospects of success’. In *Deane v Paper Australia Pty Ltd* a Full Bench made the following observation about this expression in the context of enlivening a power to award costs under s.170CJ(1) of the *Workplace Relations Act 1996*:

‘unless upon the facts apparent to the applicant at the time of instituting the [application], the proceeding in question was manifestly untenable or groundless, the relevant requirement in s.170CJ(1) is not fulfilled and the discretion to make an order for costs is not available’.”¹⁷

[19] In *Qantas Airways Limited v Mr Paul Carter*,¹⁸ the Full Bench stated that it was clear from the terms of s.611 that the point at which the Commission must determine whether or not an application was vexatious, without reasonable cause or had no reasonable prospect of success, was when the application was made.¹⁹

s.375B

[20] The Full Bench in *Keep* provided the following context for the consideration of applications under s.375B:

“[11] Section 375B was inserted into the FW Act by the Fair Work Amendment Act 2013 (Cth). The new provision came into effect on 1 January 2014 and applies to dismissals which took effect from that date.

[12] The *Supplementary Explanatory Memorandum to the Fair Work Amendment Bill 2013 (Cth)* states as follows:

“New section 375B allows the FWC to order costs against a party to a general protections dismissal dispute (the first party) if it is satisfied that the first party caused the other party to the dispute to incur costs by an unreasonable act or omission in connection with the conduct or continuation of the dispute. New section 375B is similar to the costs orders that are available against parties in relation to unfair dismissal matters (see section 400A).

57. This power to award costs is in relation to the dispute before the FWC and does not include costs associated with a general protections court application.

58. The power to award costs under new section 375B is not intended to prevent a party from robustly pursuing or defending a general protections dispute before the FWC. Rather, the power is intended to address the small proportion of litigants who pursue or defend disputes in an unreasonable manner. The power is only intended to apply where there is clear evidence of unreasonable conduct by the first party.

59. The FWC’s power to award costs under subsection 375B(1) is discretionary and is only exercisable where the first party (whether the applicant or respondent) causes the other party to incur costs because of an unreasonable act or omission.

60. However, the power to award costs is only available if the FWC is satisfied that the act or omission by the first party was unreasonable. What is an unreasonable act or omission will depend on the particular circumstances but it is intended that the power only be exercised where there is clear evidence of unreasonable conduct by the first party.

61. New subsection 375B(2) provides that the power to award costs against one party in these circumstances is only exercisable if the other party to the dispute makes an application in accordance with section 377. New subsection 375B(3) makes it clear that the new power to award costs under subsection 375B(1) operates in addition to subsection 611(2), which enables the FWC to make costs orders against a person in certain circumstances, such as where an application is made vexatiously or without reasonable cause.”

[13] It is apparent from the *Supplementary Explanatory Memorandum* that the legislature intended that the power to order costs provided by s.375B only be exercised where there is clear evidence of unreasonable conduct. Such an approach is entirely consistent with the jurisprudence relating to the other costs provisions in the FW Act (such as s.611).”²⁰

[21] Section 375B of the Act allows for costs orders to be made if the Commission is satisfied that costs were incurred because of an unreasonable act or omission of a party in connection to

the conduct of the case. An unreasonable act or omission includes one which was either deliberate or reckless. A failure to consider the possible settlement of a matter may be unreasonable, but is not necessarily so, as may be unreasonably failing to discontinue an application. A “warning” provided to a party about the prospects of their case may be relevant to the assessment of whether the continuation of a matter was reasonable.²¹

Consideration

[22] On the issue of the Commission’s power or jurisdiction to hear and determine the Costs Application in this case, I endorse and adopt the Costs Applicant’s written submissions in reply dated 10 March 2026, as follows:²²

1. The Costs Respondent, Fahad Ullah, has asserted that the Fair Work Commission (FWC) as constituted by the Deputy President has no jurisdiction to entertain the [Costs Applicant’s] application for costs in circumstances where the [Costs Respondent] has lodged an appeal against the Deputy President’s decision in the Federal Court of Australia.
2. The [Costs Respondent] is incorrect. The FWC retains the jurisdiction to deal with the [Cost Applicant’s Costs] application. The reasons for this can be succinctly stated.
3. First, in respect of s375B of the *Fair Work Act 2009* (Cth) (FW Act), the power to make an “order for costs” is relevantly contingent on the costs order being sought:
 - a. “against a party ...to a dispute”;
 - b. “by the other party to the dispute”;
 - c. if “an application for the FWC to deal with the dispute [was] made under section 365”;
 - d. if the application for costs was made “in accordance with section 377”; and
 - e. the FWC being satisfied of certain matters.
4. An application for appeal (whether properly, or improperly made) does not limit the Commission’s power on this front. Patently, there was an application to deal with a dispute under s365, the costs order is sought against a party to the dispute by another, and the application was brought within the timeframe required by s377 of the FW Act. Nothing in the text of s375B warrants the approach for which the [Costs Respondent] contends, which would effectively stay all applications for costs in the event of an appeal against the primary decision.
5. Second, s611 provides that the power to order costs against “a person” is (in part) contingent on there having been “an application to the FWC”. Again, the [Costs Respondent] made “an application to the FWC”. It matters not in respect of the consideration of costs on that application whether an appeal has been lodged.

6. Third, the [Costs Respondent's] appeal to the Federal Court of Australia is incompetent. The process for dealing with appeals against decisions of the FWC is provided for by ss 604 to 607 of the FW Act. The [Costs Respondent] has not followed that process, and instead seeks to have the matter immediately determined by the Federal Court of Australia.
7. The [Costs Applicant] maintains its application for costs, and submits that the FWC, constituted as the Deputy President, has the power to determine the application.

[23] I equally observe that the Costs Respondent's contention that the Commission does not have jurisdiction to hear and determine the Costs Application stands in stark contrast to his s.365 Application. In other words, on the one hand the Costs Respondent filed a s.365 Application, asserting that the Commission had the power (jurisdiction) to extend the time for filing of same, and thereafter deal with the s.365 Application in accordance with s.368 of the Act. Whilst on the other hand, the Costs Respondent, having failed in his bid to extend time, now asserts that the Commission does not have the power (jurisdiction) to award costs. The Costs Respondent cannot have it both ways.

[24] I find that I have jurisdiction to hear and determine the Costs Application in this case.

[25] I do not accept that the requirements set out under s.611 are satisfied in this case.

[26] For reasons that follow, I find that my discretion to award costs has been enlivened under s.375B of the Act.

[27] To obtain an extension of time to file his s.365 Application, the Costs Respondent was required to satisfy the Commission as to the existence of "exceptional circumstances" (s.366(2) of the Act).

[28] In its Form F8A Employer Response (filed on 2 December 2025), the Costs Applicant put the Costs Respondent on notice that his substantial delay could not (ever) meet the legal test of "exceptional circumstances", having regard to the events that had happened in the lead up to him filing his s.365 Application.²³

[29] In the out of time decision ([2026] FWC 164), I relevantly made the following findings as to the Costs Respondent's reasons for delay in filing his s.365 Application:

"[11] Reasons for delay are not in and of themselves required to be exceptional. They are just one of the factors that must be weighed in assessing whether, overall, there are exceptional circumstances. An Applicant need not provide reasons for the entire period of a delay. Depending upon all the circumstances, an extension of time may be granted where the Applicant has not provided any reason for any part of the delay, but this would be most unusual. The focus is upon the period of delay following the expiry of the 21-day period, albeit circumstances arising prior to the delay may be relevant.

[12] The Applicant's reasons for delay are summarised as follows:

- a) he is a litigant in person, with no legal knowledge or training, and has confronted jurisdictional complexity;
- b) there is confusion around the wording of s.365 of the Act by reference to the words “may apply”. This confusion led the Applicant to believe that he could commence proceedings in the Federal Court of Australia without first filing a s.365 application, attending upon a conciliation conference, and obtaining a certificate under s.368 of the Act. These are genuine misunderstandings, not deliberate, and only constitute procedural errors.

[13] In finding that the Applicant’s reasons for delay do not weigh in favour of a finding as to the existence of exceptional circumstances in this case, I note that the Applicant:

- a) filed proceedings in the Federal Court of Australia on 8 April 2025 (FCA Proceedings). He subsequently amended his originating application on 21 May 2025, adding in a dismissal in contravention of Part 3-1 of the Act (Dismissal Contravention);
- b) was invited by the First Respondent to discontinue the FCA Proceedings, on 12 June 2025, and 23 June 2025, on the basis that he had not first obtained a s.368 certificate from the Commission (noting s.370 of the Act);
- c) was advised by Justice Halley of the Federal Court of Australia, in no uncertain terms, on 9 October 2025, that he needed to file a s.365 application with the Commission, and obtain a s.368 certificate from the Commission, prior to advancing the Dismissal Contravention;
- d) attended upon a two-day hearing before Justice Halley on 9 and 10 October 2025 in respect of the FCA Proceedings. Justice Halley published his decision (in respect of this two-day hearing) on 3 November 2025. The FCA Proceedings are ongoing, with a further case management hearing before Justice Halley set down for 6 February 2026. The Applicant has also filed an appeal against Justice Halley’s decision of 3 November 2025.

[14] The reasons for delay put forward by the Applicant in this case are not reasonable and/or credible explanations in the sense that they do not adequately justify his substantial delay in filing of his Application, having regard to his conduct set out in paragraph [13] above. This is not a case where the Applicant, upon being notified of a defect in his case, has moved to immediately correct same by filing a s.365 application with the Commission. The evidence before me is that the Applicant made a choice to continue on with the FCA Proceedings in respect of the Dismissal Contravention. The Applicant’s conduct (reasons for delay) cannot weigh in favour of a finding as to the existence of exceptional circumstances because he made a choice (election) not to file a s.365 application with the Commission (prior to 4 November 2025), despite being on notice of the need to do so as early as 12 June 2025.”

[30] In my view, the unreasonable act in this matter arises from the Costs Respondent's continuation of the proceedings post the filing by the Costs Applicant of its Form F8A Response. Relevantly, in the Form F8A, the Costs Applicant puts the Costs Respondent on notice about his s.365 Application being doomed to fail (due to it being filed 10 months out of time), and references various interactions that the Costs Respondent has already had with the Costs Applicant's solicitors on 12 June 2025, and the submissions that it made in the Federal Court proceedings involving the parties (along with the comments of Justice Halley of the Federal Court of Australia to the Costs Respondent on 9 and 10 October 2025).

[31] In short, having regard to what the Costs Respondent was put on notice of in the Form F8A, which was not otherwise challenged by him during the extension of time hearing, I am satisfied that the continuation of the s.365 Application before the Commission in all of the circumstances (i.e. post 2 December 2025) was an unreasonable act or omission.²⁴

[32] I also find that:

- (a) the legal costs incurred by the Costs Applicant were caused by the Costs Respondent's unreasonable act or omission in continuing, or failing to discontinue, the s.365 Application (post receipt of the Costs Applicant's Form F8A);
- (b) the overall circumstances (in this case) are undoubtedly exceptional and/or extraordinary such that they displace any notion under the Act that each party should bear their own costs, and enliven my discretion to award costs under s.375B of the Act; and
- (c) any assertion that the Costs Applicant was not required, or did not need to, actively engage with opposing the s.365 Application, or that the Costs Applicant did not require legal representation before the Commission to do so, must be rejected. In all of the circumstances, I consider that it was most certainly appropriate for the Costs Applicant to oppose the s.365 Application (at the out of time stage, and thereafter), including via the engagement of legal representation to do so.

[33] Having found that the relevant requirements or thresholds under s.375B of the Act have been met, I now have a discretion as to whether costs, or any amount of costs, should be awarded. I consider that there is no reason for my discretion to be exercised other than in favour of making an order for costs against the Costs Respondent, payable to the Costs Applicant. I observe by reference to s.377A of the Act, that there is not a costs schedule that applies to s.375B under the *Fair Work Regulations 2009*.

[34] The witness statement of Ms Sofia Rose Bryan dated 2 February 2026 was tendered at the hearing. Her evidence was uncontested. Ms Bryan sets out the costs that have been relevantly incurred by the Costs Respondent in the conduct of its opposition to the s.365 Application at the out of time hearing. In this regard, I'm prepared to award the costs set out at paragraphs [5]–[6] and [8] of Ms Bryan's witness statement, subject to some discounting.

[35] In respect of the costs sought at paragraph [5] of Ms Bryan's witness statement, I have determined to award costs in the amount of \$1,105 plus GST. In respect of the amount at paragraph [6] of Ms Bryan's statement, I have determined to award costs in the amount of

\$607.75 plus GST. In respect of paragraph [8], I have determined that it is fair and reasonable to award the costs (otherwise ordinarily considered as disbursements) set out therein in relation to Counsel's work and appearance, and I thus award costs in the amounts of \$1,800 plus GST and \$4,200 plus GST.²⁵

[36] On 18 March 2026, I issued an Order ([PR797748](#)) for the total of those cost amounts, being \$8,484.03 (including GST), payable by the Costs Respondent to the Costs Applicant on or before 30 March 2026.



DEPUTY PRESIDENT

Appearances:

Mr *Sebastian McIntosh*, of Counsel, instructed by Ms *Alexandra Abbott*, Senior Associate, HWL Ebsworth lawyers, appeared with permission for the Costs Applicant (Om Security Pty Ltd).

Mr *Fahad Ullah*, the Costs Respondent, did not appear.

Printed by authority of the Commonwealth Government Printer

<PR798009>

¹ Digital Hearing Book (CB) pp.62-70.

² CB, p.2.

³ CB, pp.76-78.

⁴ Transcript, PN392.

⁵ CB, pp.53, 61.

⁶ [\[2014\] FWCFB 810](#), 240 IR 377.

⁷ *Ibid*, at [26].

⁸ [\[2016\] FWCFB 8162](#).

⁹ [\[2021\] FWC 4632](#).

¹⁰ *Ibid*, at [31] and [33].

¹¹ [\[2014\] FWCFB 810](#), 240 IR 377, [23]-[33].

¹² [2019] FCA 643.

¹³ *Ibid*, [15].

¹⁴ [\[2011\] FWAFB 4014](#), 211 IR 374.

¹⁵ *Ibid* [10].

¹⁶ [\[2015\] FWCFB 1956](#).

¹⁷ *Ibid*, [18]-[19].

¹⁸ [\[2013\] FWCFB 1811](#), [20].

¹⁹ See also *Mitford Investments Pty Ltd ATF The JJG Trust T/A Integro Private Wealth v Rick Adaszko* [\[2021\] FWC 4632](#), [39], and *Oz & Kosaroglu v Amity College Australia Limited* [\[2021\] FWC 5041](#), [37]-[38].

²⁰ [\[2015\] FWCFB 1956](#).

²¹ *Goffett v Recruitment National Pty Ltd* [2009] AIRCFB 626, [47]; *Roy Morgan Research Ltd v K Baker* [2014] FWCFB 1175, [12], [21]-[23] (with reference to *Brazilian Butterfly Pty Ltd v Charalambous* (2006) 155 IR 36, [39] – [45]); *Kube v Dominelli Group Pty Ltd T/A Rockdale Nissan* [2016] FWC 8933, [15].

²² CB, pp.79-80.

²³ Form F8A Employer Response, filed 2 December 2025, at Items 2.1 and 3.1.

²⁴ I have also had regard to references to the transcript of the out of time hearing that Mr McIntosh of Counsel for the Costs Applicant referred me to during the Costs Application hearing.

²⁵ \$1,105.00 (excl GST) (per Ms Sofia Rose Bryan Statement (2 February 2026), at [5]) + \$607.75 (excl GST) (per Ms Sofia Rose Bryan Statement (2 February 2026), at [6]) + \$1,800.00 (excl GST) (per Ms Sofia Rose Bryan Statement (2 February 2026), at [8(a)]) + \$4,200.00 (excl GST) (per Ms Sofia Rose Bryan Statement (2 February 2026), at [8(b)]) = \$7,712.75 (excl GST) + GST (10% of \$7,712.75 = \$771.28) = \$7,712.75 + \$771.28 = Total \$8,484.03. Note, there are no schedule of costs prescribed under the *Fair Work Regulations 2009* for costs to be awarded under s.375B of the Act (cf. s.377A of the Act, and compare Regs 3.04(1), 3.08(1), 3A.04(1), and 6.06(1) of the *Fair Work Regulations 2009*).