DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

SC Hydro Pty Ltd
v
Construction, Forestry and Maritime Employees Union and Another
(C2024/8921)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT BOYCE
DEPUTY PRESIDENT BUTLER

SYDNEY, 9 FEBRUARY 2026

Appeal against decision [2024] FWC 3196 of Commissioner Crawford at Sydney on 20 November 2024 in matter number C2024/3663 – Dispute about correct classification for employees performing tunnelling work on the Snowy Hydro 2.0 project – Full Bench made determination in resolution of the dispute – SC Hydro has failed to implement the decision – Application for further orders to resolve the dispute – Whether the Full Bench is functus officio – Whether the Commission is able to make 'orders' in dealing with a dispute referred to it under an enterprise agreement – Further orders made.

Introduction

[1] This is the third decision of the Full Bench in relation to an appeal brought by SC Hydro Pty Ltd against a decision of a Commissioner of the Fair Work Commission. The further decision is necessary because of the admitted and continuing failure of SC Hydro to implement the outcome of the dispute determined by the Full Bench in its earlier decisions.

[2] The proceedings arise from a decision in relation to a dispute referred to the Commission under s 739 of the *Fair Work Act 2009* (the **Act**) and clause 3.12, Dispute Prevention and Settlement Procedure, of the *SC Hydro Pty Ltd – AWU Tunnel and Associated Works Greenfield Agreement 2021 – 2025* (the **Agreement**). The dispute concerned a number of employees who drive concrete agitator trucks on the Snowy Hydro 2.0 project in New South Wales. SC Hydro and the Construction, Forestry and Maritime Employees Union (the **CFMEU**) are in dispute as to whether the employees are correctly classified as Tunneller Class 2 – TW2 or Tunneller Class 1 – TW3 under the Agreement.

[3] In the first appeal decision handed down on 28 May 2025, the Full Bench determined the disputed question of construction in relation to the classifications of Tunneller Class 2 – TW2 or Tunneller Class 1 – TW3 in the Agreement. Different constructions were advanced in the appeal by SC Hydro and a notice of contention filed by the CFMEU.[1] As the Full Bench observed, the notice of contention filed by the CFMEU was more in the nature of a cross-appeal in that it sought a different outcome to the determination of the Commissioner at first instance.

As the Full Bench also observed, SC Hydro made no objection to the Full Bench considering the argument advanced in the notice of contention.

[4] In the first appeal decision (the **Appeal Decision**), the Full Bench allowed the appeal, quashed the decision of the Commissioner and directed that the parties confer as to whether there was any remaining dispute as to the implications of the decision of the Full Bench for the particular employees who are subject of the dispute.[2] The parties were unable to agree on the implications of the first appeal decision. As a result, following the receipt of further submissions from the parties, the Full Bench handed down the second decision on 29 July 2025 (the **Remaining Matters Decision**).[3] The Full Bench determined the dispute as follows:[4]

> Raymond Orreal, Edward Riley, Gavin Blyth, Steven Roach, Clyde Farr, Ian Starr and Brett Rewald should be classified as Tunneller Class 1 (TW3) in their current roles.

[5] On 17 November 2025, the chambers of Vice President Gibian received an email from the CFMEU in the following terms:

> Dear Associate
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> We refer to the decisions of the Full Bench of the Commission made in this matter on 29 July 2025 and 28 May 2025.
>
> The CFMEU respectfully requests that the Commission make an order reflecting the determination made by the Commission on 29 July 2025. The CFMEU wishes to commence court proceedings against SC Hydro Pty Ltd for failure to comply with the arbitrated outcome.
>
> We note that Mr Sebbens and Ms Hollings, representatives of SC Hydro Pty Ltd, are copied into this email.

[6] On 18 November 2025, the Vice President's chambers indicated to the parties that the Vice President would conduct a brief mention of the matter on 20 November 2025. In advance of that listing, the CFMEU provide the terms of the order it sought following the earlier Full Bench decision. The order sought by the CFMEU is in the following terms:

> *Further to the decision made on 29 July 2025, and in accordance with s 739 of the Fair Work Act 2009, the Full Bench of the Fair Work Commission orders that:*
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> 1. *Within 7 days of the date of this Order, SC Hydro Pty Ltd is required to inform Raymond Orreal, Edward Riley, Gavin Blyth, Steven Roach, Clyde Farr, Ian Starr and Brett Rewald in writing that, in accordance with this Order, they are each classified as Tunneller Class 1 (TW3) in their roles as concrete agitator truck drivers.*
> 2. *From the date of this Order, SC Hydro Pty Ltd is required to pay each of Mr Orreal, Mr Riley, Mr Blyth, Mr Roach, Mr Farr, Mr Starr and Mr Rewald at TW3 rates for their work as concrete agitator truck drivers.*
> 3. *Within 21 days of the date of this Order, SC Hydro Pty Ltd is required to backpay to each of Mr Orreal, Mr Riley, Mr Blyth, Mr Roach, Mr Farr, Mr Starr and Mr Rewald, for the period commencing on the date that each had completed 6 months of employment with SC Hydro Pty Ltd, until the date of this Order, the difference between the rate that they were paid by SC Hydro Pty Ltd and the TW3 pay rate.*
> 4. *Within 21 days of the date of this Order, SC Hydro Pty Ltd is required to provide to the Construction, Forestry and Maritime Union, copies of the backpay calculations for*

> *each of Mr Orreal, Mr Riley, Mr Blyth, Mr Roach, Mr Farr, Mr Starr and Mr Rewald, and any documents on which these calculations were based.*

[7] Following receipt of this correspondence, the Vice President conducted a short case management hearing in relation to the appeal on the morning of 20 November 2025. A solicitor from Ashurst Australia, Trent Sebbens, appeared for SC Hydro. The CFMEU was represented by its NSW Senior Legal Officer, Leah Charlson.

[8] Mr Sebbens confirmed that SC Hydro understood the effect of the decision of the Full Bench and had simply not implemented the decision for some months. The transcript of the case management hearing includes the following exchange:[5]

> THE VICE PRESIDENT: Is there any lack of clarity, so far as your client's concerned, in what the Full Bench decided was the correct application of the agreement?
>
> MR SEBBENS: No. My client understands the Full Bench's decision.
>
> THE VICE PRESIDENT: So it's just disobeyed it for some months.
>
> MR SEBBENS: It hasn't implemented the decision, that's correct.

[9] No other explanation was provided for the failure of SC Hydro to implement the outcome determined by the Full Bench. SC Hydro evidently understands the effect of the determination. It has simply decided, knowingly and consciously, not to comply with its obligations under the Agreement as determined by the Full Bench.

[10] During the case management conference, Mr Sebbens indicated that he had received instructions shortly before the hearing commenced to file judicial review proceedings in the Federal Court of Australia with respect to the decisions of the Full Bench. Notwithstanding that indication, no proceedings appear to have been commenced in the Federal Court at the time of the preparation of this decision.

[11] At the case management conference, SC Hydro communicated that its position was that the Full Bench had no power to make orders in the nature sought by the CFMEU. At the request of the parties, directions were issued for the CFMEU and SC Hydro to file written submissions addressing the CFMEU's request for orders and the power of the Commission to make any such orders. The CFMEU filed written submission in accordance with the directions on 4 December 2025. SC Hydro filed submissions in reply on 11 December 2025.

[12] For the reasons which follow, we consider that the Commission can and should vary its earlier decision making additional and more specific orders as to what SC Hydro is required to do to resolve the dispute.

Submissions of the parties

[13] The CFMEU observes that, when the Commission deals with a dispute pursuant to a dispute settlement clause of an enterprise agreement, it is acting as a private arbitrator. The CFMEU says that it accepts that, in exercising dispute resolution powers conferred by the Agreement, the Commission cannot make a 'statutory order' relying on the provisions of the

Act. It submits, however, that the Commission does have the power to resolve the dispute pursuant to clause 3.12 of the Agreement and that this includes making a determination, award or 'order' as to what SC Hydro is required to do in order to resolve the dispute. The CFMEU submits that, where SC Hydro has not complied with its obligation to resolve the dispute consistent with the Full Bench's decision, the Commission should make a formal award or determination that clearly identifies what the appellant is required to do.

[14] SC Hydro submits that the Commission does not have power to issue binding orders under the Act when exercising powers of private arbitration to resolve a dispute. It submits that the only power conferred on the Commission by clause 3.12(h) of the Agreement is to '*arbitrate the dispute'* and '*make a determination that is binding on the Parties, subject to either Party exercising a right of appeal against the decision to a Full Bench of the FWC'*. SC Hydro says that, having made a determination, the Commission has exhausted its arbitral powers. Its submissions include:

> Having done so, the Commission has exhausted its arbitral powers with respect to the dispute. That resolution, by determination under clause 3.12(h)(ii), is as set out in the Appeal Decision and Remaining Matters Decision. There are no issues remaining in contest between the parties which are still before the Commission in respect of the dispute. That is clear on the face of the Remaining Matters Decision – which was to resolve any matters identified as remaining in contest between the parties following the Appeal Decision, so as to dispose of the dispute. The Full Bench accepted this was the purpose of the appeal, and the determination of the Remaining Matters in particular.

[15] SC Hydro says that, in those circumstances, the Commission is *functus officio*. In any event, SC Hydro submits that clause 3.12 of the Agreement does not empower the Commission to issue any kind of 'order' and that the 'orders' now sought by the CFMEU would require the exercise of judicial powers not possessed by the Commission. To the extent that the CFMEU now describes what it seeks as a determination or award identifying what SC Hydro is required to do, it submits that this semantic distinction cannot obscure the substance of the further application made by the CFMEU.

Whether the Commission can take further steps in the dispute?

[16] It is appropriate to first consider whether the Commission is *functus officio* in the sense that the Full Bench has no power to take any further step with respect to the dispute as it is requested to do by the CFMEU.

[17] As the parties acknowledged, the role performed by the Commission in dealing with a dispute referred to it pursuant to the dispute settlement term of an enterprise agreement is in the nature of private arbitration.[6] Sections 738(b) and 739 provide for the Commission to 'deal with' a dispute if a term of an enterprise agreement that provides a procedure for dealing with disputes requires or allows the Commission to perform that function. Those sections facilitate the Commission performing the function, but do not confer public duties on the Commission.[7] In hearing the appeal in this matter, the Full Bench is undertaking an appeal which itself forms part of a process of private arbitration.[8]

[18] The scope of powers able to be exercised by the Commission in the performance of its arbitral function as contemplated by s 739(4) are primarily defined by the terms of the

agreement under which the dispute is referred to it,[9] at least in the sense that s 739(3) provides that the Commission 'must not exercise any powers limited by the term'. If the relevant enterprise agreement is silent in relation to the nature of the powers able to be exercised by the Commission, it is generally assumed that the parties intended to take the Commission as they find it.[10] That is, unless express provision is made to the contrary, it is assumed that the parties intended that the Commission is able to exercise its usual powers and will adopt its usual procedures.

[19] The question of whether the Commission can be *functus officio* once it has exercised a power is not straightforward. The doctrine of *functus officio* refers to a circumstance in which, having exercised a statutory power, the authority of a decision-maker is spent and the decision-maker has no power to revisit or alter their decision. In *Jayasinghe v Minister for Immigration & Ethnic Affairs* (1997) 76 FCR 301, for example, Goldberg J said:[11]

> [The doctrine of functus officio] … is a description or consequence of the performance of a function having regard to the statutory power or obligation to perform that function. The effect of the application of the doctrine is that once the statutory function is performed there is no further function or act for the person authorised under the statute to perform: *R v Moodie; Ex parte Mithen* (1977) 17 ALR 219 at 225; *Comptroller-General of Customs v Kawasaki Motors Pty Ltd* (1991) 32 FCR 219 at 225.

[20] We note that, because a decision involving jurisdictional error is 'no decision at all', there is no impediment to the decision-maker making a further decision where an earlier decision is invalid.[12] Similarly, if an arbitrator has made an award which is beyond power and a nullity, there has been no valid determination and the arbitrator cannot be *functus officio*.[13] The submission of SC Hydro that the Full Bench is *functus officio* must involve recognition that the determination of the Full Bench was validly made. Indeed, SC Hydro expressly submits that 'the Commission had a dispute referred to it under clause 3.12 of the Agreement, and then exercised its powers, at first instance and on appeal, in resolving the dispute by issuing the Appeal and Remaining Matters Decisions'.

[21] Whether a decision-maker is authorised to reopen or reconsider a decision which has been validly made presents a question as to the construction of the statute conferring the particular power at issue.[14] A statute may confer such a power expressly or by implication. In the case of the Commission, s 603(1) expressly provides that, with the exception of certain types of decisions listed in subsection (3), the Commission may vary or revoke its decisions. The discretionary power in s 603(1), to vary or revoke a decision, is a power of 'very considerable breadth'.[15] The power is intended to apply to any decision of the Commission, other than those specified in s 603(3).[16] It is not cast in terms of a power to be exercised only in particular stated events or circumstances or subject to unexpressed limitations.[17]

[22] Leaving aside the instances listed in s 603(3), s 603(1) means that the Commission cannot be *functus officio* in the sense that the Commission is prevented from reopening or revisiting a decision. It is unambiguously authorised to do so by s 603(1). Of course, the public interest in the finality of litigation will frequently be relevant in deciding whether the discretion to vary or revoke a prior decision should be exercised. Ross J, President, observed in *Grabovsky v United Protestant Association of NSW Ltd* [2015] FWC 5161, that:

> **[38]** The power to vary or revoke a decision has generally only been exercised where there has been a change in circumstances such as to warrant the variation or revocation of the original decision or, where the initial decision was based on incomplete or false information, fraudulently procured or otherwise.
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> **[39]** As a general proposition applications to vary or revoke a decision should not be used to re-litigate the original case. After a case has been decided against a party, that party should not be permitted to raise a new argument which, deliberately or by inadvertence, it failed to put during the original hearing when it had the opportunity to do so.

[23] Similarly, the availability of an appeal under s 604(1) of the Act is likely to mean that the Commission will be reluctant to vary or revoke a decision where the applicant for the order is a person who is simply aggrieved by the decision and should pursue an appeal.[18] The Commission would not ordinarily permit an application to vary or revoke a decision under s 603(1) to be used to avoid the requirements applicable to an appeal, including the requirement to obtain permission to appeal, that an appeal must be determined by a Full Bench and the time limit applying to filing a notice of appeal.

[24] The question which arises is whether clause 3.12 of the Agreement has removed the power the Commission generally has to vary or revoke one of its decisions when dealing with a dispute referred to it under the Agreement. As we have observed, s 739(3) provides that the Commission must not exercise any powers limited by the term. A term of an enterprise agreement could limit the power the Commission generally has to vary or revoke a decision under s 603(1) of the Act. Whether it does so is a matter that will turn on the construction of the term which requires or allows the Commission to deal with the dispute. The meaning of the term is to be determined by what a reasonable person would understand it to mean, having regard to its text, surrounding circumstances, purposes and objects.[19]

[25] The task of a private arbitrator is ordinarily exhausted once a final and binding award has been made and the arbitrator has no further power to deal with the dispute. In *CBI Constructors Pty Ltd v Chevron Australia Pty Ltd* [2024] HCA 28; (2024) 98 ALJR 1096, the High Court considered whether an arbitrator was entitled to revisit an interim award. Gageler CJ, Gordon, Edelman, Steward and Gleeson JJ observed that:

> **[27]** On handing down a final and binding award, the position of the arbitral tribunal has been variously described as the tribunal then ceasing to have authority, jurisdiction or capacity, or being functus officio, in relation to the issues addressed in the award. As explained by Mustill and Boyd in *The Law and Practice of Commercial Arbitration in England*:
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> > When an arbitrator makes a valid award his authority as an arbitrator comes to an end and with it his powers and duties in the reference: he is then said to be functus officio. This at least is the general rule, although it needs qualification in two respects:
> >
> > First, if the award is merely an interim award, the arbitrator still has authority to deal with the matters left over, *although he is functus officio as regards matters dealt with in the award*.
> >
> > Second, if the award is remitted to the arbitrator by the Court for reconsideration he has authority to deal with the matters on which the award has been remitted and to make a fresh award.

> **[28]** As has been explained, once a final and binding award is made, an arbitral tribunal has no authority to reconsider, or further consider, the subject matter of that award. That is, the tribunal no longer has jurisdiction in relation to the issues determined by it in an earlier award and will act "in excess of jurisdiction where it revisits an issue it has already dealt with in an earlier award".

[26] However, the source of an arbitral tribunal's jurisdiction to resolve a dispute, and its mandate, competence or authority to act, is the arbitration agreement.[20] Whether an arbitrator has exhausted their powers upon making a determination, or whether clarification or further explication is possible, will ultimately turn upon the powers conferred on the arbitrator by the arbitration agreement, in this case the relevant enterprise agreement.

[27] Clause 3.12(h) of the Agreement provides for arbitration of a dispute by the Commission in the following terms:

> (h) If the FWC is unable to resolve the dispute in conciliation, the Fair Work Commission may then:
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> (i) arbitrate the dispute;
>
> (ii) and make a determination that is binding on the Parties, subject to either Party exercising a right of appeal against the decision to a Full Bench of the FWC.

[28] SC Hydro submits that, because the Commission is authorised to 'arbitrate the dispute' and make a 'determination that is binding on the Parties', the Commission is not able to exercise the powers it otherwise possesses under s 603(1) to vary or revoke one of its decisions.

[29] A similar issue was considered by the Full Bench in *Glen Cameron Nominees Pty Ltd v Transport Workers' Union of Australia* [2017] FWCFB 4636; (2017) 273 IR 33. In that matter, the Full Bench determined that it was empowered to revoke a decision made in relation to a dispute referred to the Commission under s 739 of the Act. The Full Bench concluded:

> **[39]** … we do not agree that the reference to a decision made pursuant to cl 21 of the Agreement as being "final" renders the Commission unable to utilise the powers bestowed upon it under s 603 of the Act. The most applicable definition of the word "final" in the context of cl 21 of the Agreement is defined in the Oxford Dictionary as "allowing no further dispute or doubt". There is nothing to suggest that such finality somehow precludes the Commission from revoking a decision in order to resolve a dispute. Nor does s 603 stipulate that the Commission cannot utilise its power to revoke a decision issued in conjunction with private arbitration.

[30] We consider that the same conclusion should be reached in this matter. Parties who choose to go to arbitration with the Commission take the body as they find it with knowledge of its structure and powers, including the power of the Commission under s 603.[21] We do not consider that the power of the Commission to vary or revoke its decision has been removed merely because clause 3.12(h) of the Agreement provides for the Commission to arbitrate or to make a determination that is binding on the parties. For those reasons, we do not accept that the Full Bench is *functus officio* or lacks the capacity to take further steps in the dispute.

Whether the Commission can make 'orders'?

[31] The parties also disagree as to the nature of the powers able to be exercised when resolving a dispute referred to it under clause 3.12 of the Agreement. The CFMEU submits that

the Commission 'cannot make a statutory order' relying on the provisions of the Act when arbitrating a dispute but says that it is empowered to resolve the dispute including by making a determination, award or order specifying what SC Hydro is required to do in order to resolve the dispute. SC Hydro submits that nothing in clause 3.12 of the Agreement empowers the Commission to make an 'order' rather than a 'determination' and that, to the extent that the CFMEU seeks an order compelling it to reclassify any employee, pay any employee in accordance with a different classification or back pay an employee subject of the dispute, such a determination or award would necessarily require the exercise of judicial powers not possessed by the Commission.

[32] In our view, neither party correctly describes the powers of the Commission in dealing with a dispute under s 739 of the Act. Section 739(4) authorises the Commission to 'arbitrate' a dispute if the parties have agreed for it to do so. The term 'arbitrate' is not defined in the Act. However, s 595 provides an important indication as to what is contemplated by the term. Most notably, s 595(3) provides that, in dealing with a dispute by arbitration, the Commission may make 'any orders it considers appropriate':

> **595 FWC's power to deal with disputes**
> …
> (3) The FWC may deal with a dispute by arbitration (including by making any orders it considers appropriate) only if the FWC is expressly authorised to do so under or in accordance with another provision of this Act.

[33] The section plainly contemplates that 'arbitration' may involve the Commission making 'any orders it considers appropriate'. In *Construction, Forestry, Maritime, Mining and Energy Union v Falcon Mining Pty Ltd* [2022] FWCFB 93; (2022) 317 IR 367 (***Falcon Mining***), for example, the Full Bench stated:

> **[76]** … s 595(3) empowers the Commission, when expressly authorised to arbitrate, to make any orders it considers appropriate. This provision would operate in respect of any arbitration conducted pursuant to s 739(4) provided that the relevant dispute resolution procedure does not prohibit or restrict the making of orders by the Commission and thus engage the limitation on the Commission's powers contained in s 739(5).

[34] The Full Bench expressed the view that any order made by the Commission under the Act is given legal effect by s 675 which provides that, unless any of the exclusions in s 675(2) apply, if a person bound by an order engages in conduct in contravention of the order, the person commits an offence.[22]

[35] More recently, the nature of the powers available to the Commission when arbitrating a dispute under s 739 of the Act was considered by Wheelahan J in *Monash University v Murthi* [2024] FCA 663 (***Murthi***). In that matter, Monash University sought a declaration that the Commission did not have jurisdiction to determine whether an academic had engaged in plagiarism when arbitrating a dispute which had been referred to it under the dispute settlement provisions of the relevant enterprise agreement. His Honour found that the Commission had jurisdiction to arbitrate the dispute but was required to also consider whether the Commission was able to make an 'operative order'. His Honour described the powers of the Commission in dealing with a dispute referred to it under an enterprise agreement as follows:[23]

A necessary first step, however, is to identify the source, and so the scope, of the Commission's power, which is found in s 595(3) of the Act which I set out at [14]. Senior counsel for the University submitted in reply that this section should be read as meaning that the Commission can only exercise a particular power if it is "expressly authorised" to exercise a power of that kind. Read as a whole, however, the section is not concerned with authority to exercise a power, but authority to *deal with a dispute* by arbitration only if the Commission is expressly authorised to do so. The authorisation of the Commission to deal with a dispute is the function of clause 12.5 of the Agreement, in combination with s 739(4) of the Act. If the Commission has authority to deal with the dispute, then its power is to make "any orders it considers appropriate". That power is subject to ss 739(3) and (5), which provide –

> (3) In dealing with a dispute, the FWC must not exercise any powers limited by the term.
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> …
>
> (5) Despite subsection (4), the FWC must not make a decision that is inconsistent with this Act, or a fair work instrument that applies to the parties.

The resulting position is that the Commission may make any order within the broad bounds of orders that the Commission may properly consider appropriate, unless the dispute resolution clause in the Agreement relevantly limits the powers of the Commission, or the order would relevantly amount to "a decision that is inconsistent with" the Agreement. As for the first of these exceptions, clause 12 — which is the relevant "term" — contains no provision limiting the powers of the Commission

[36] Later, his Honour compared the powers of the Commission to make 'any orders it considers appropriate' under s 595(3) with the power of the Federal Court under s 545(1) to 'any order the court considers appropriate' in the event that a person has contravened a civil remedy provision. His Honour said:[24]

It remains to consider the second issue, whether the Commission has power to make an operative order, such as a formal determination, dealing with whether plagiarism in fact occurred. I did not understand this to be the primary way in which the University argued for the declaration it sought, but it is appropriate for me to deal with this issue, so as to address all the ways the argument could be put.

As I have noted, the powers of the Commission are broad. The Commission has power to deal with the dispute by arbitration, including by making whatever orders it considers appropriate, but subject to the limitations in ss 739(3) and (5). As I have also noted, this language is the same language as s 545(1) of the *Fair Work Act*, which empowers a court to make "any order the court considers appropriate" in certain circumstances. In the *Personal Payment Order Case* at [103], Keane, Nettle and Gordon JJ, with whom Gageler J apparently agreed at [51], said –

> What is "appropriate" for the purpose of s 545(1) falls to be determined in light of the purpose of the section and is not to be artificially limited. As the ABCC submitted, such broad terms of empowerment are constrained only by limitations that are strictly required by the language and purpose of the section. (Footnotes omitted.)

Drawing a distinction in that case between penal and non-penal orders, their Honours went on to hold at [110] that s 545(1) was "limited to making appropriate preventative, remedial and compensatory orders". Of course, the context of s 545(1) is that the Court is empowered to deal

> with civil remedy provisions. The context of s 595(3) is different, but the breadth of the orders contemplated by the latter section is not obviously narrower. It includes the power to make "remedial" orders.

[37] With respect, we consider that the conclusions in *Murthi* are consistent with the views expressed by the Full Bench in *Falcon Mining* and should be followed. If the parties have agreed that the Commission may arbitrate a dispute, the Commission is authorised to do so by s 739(4). The powers of the Commission in arbitration are limited by s 739(3) and (5) in that the Commission cannot exercise any powers limited by the term which requires or allows it to deal with the dispute and cannot make a decision that is inconsistent with the Act or a fair work instrument which applies to the parties. Otherwise, s 595(3) makes clear that, once the Commission is authorised to arbitrate a dispute by s 739(4), the capacity to 'arbitrate' includes that the Commission may make 'any orders it considers appropriate', including remedial orders.

[38] That conclusion is harmonious with the intention of the Parliament, apparent from the terms of the Act, that the Commission be able to effectively resolve disputes. The object of the Act includes, in s 3(e), the provision of 'accessible and effective procedures to resolve grievances and disputes'. Section 186(6) requires that an enterprise agreement include a term that provides a procedure that requires or allows the Commission, or another person independent of the parties, to settle disputes about matters arising under the agreement. Section 595, 738 and 739 facilitate the Commission dealing with disputes where, among other things, a modern award, enterprise agreement or contract of employment requires or allows the Commission to do so. In *Linfox Australia Pty Ltd v Transport Workers' Union of Australia* [2013] FCA 659; (2013) 213 FCR 479, Rares J described the purposes of the statutory scheme, relevantly, as follows:[25]

> It is important to appreciate that the statutory scheme under the Act has, as its central foundation, the premise that an enterprise agreement must include a term that establishes a procedure that allows either the Commission, or another person independent of the parties covered by that agreement, to settle disputes about any matters arising under it. The Act made detailed provisions for those disputes to be settled in a private arbitration either by the Commission or a third party. However, the Act also created limitations and consequences in respect of such settlements of disputes.
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> Thus, the Parliament gave effect to a well-recognised function of private arbitration when it authorised parties to enterprise agreements to appoint the Commission to act as a private arbitrator as well as providing for others to act in that capacity. The High Court had found previously that function was capable of being conferred on the Commission in statutory predecessors of the Act. Indeed, s 186(6) of the Act required that an enterprise agreement must have a dispute resolution procedure that allowed the Commission, or someone else independent of the parties, to resolve disputes. This demonstrated that the intention of the Parliament was that such dispute resolution be effective and operate with the incidents of a private arbitration.

[39] It is consistent with the statutory object of providing for an effective mechanism for dispute resolution that s 595(3) permits the Commission to make any order it considers appropriate in arbitration of a dispute. It is also significant that the avenue of private arbitration is intended to constitute an alternative to curial intervention where the parties have agreed to that course. Arbitration of a dispute by the Commission would not constitute a true alternative to judicial proceedings unless the Commission is able to take steps which effectively resolve the dispute, including by making appropriate remedial orders.

[40] Section 595(4) is also relevant. It provides that, in dealing with a dispute, the Commission may exercise any powers it has under subdivision B of Division 3 of Part 5-1 of the Act. Those powers include requiring a person to attend before the Commission (s 590(2)(a)), requiring a person to provide copies of documents or records, or to provide other information to the Commission (s 590(2)(c)), directing a person to attend a conference (s 592(1)), making 'orders' prohibiting or restricting the publication of the names and addresses of persons appearing at a hearing or evidence given or document before the Commission (s 593(3)) and making 'orders' prohibiting or restricting the publication of evidence, the names and addresses of persons making submissions, matters contained in documents lodged with the Commission or the whole or part of any decision or reasons of the Commission (s 594(1)). Those powers plainly involve making coercive orders.

[41] This was acknowledged by the Full Court in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd* [2015] FCAFC 123; (2015) 235 FCR 305 (*ALS*) in which Dowsett, Tracey and Katzmann JJ said:[26]

> The effect of the High Court's decision in *Gordonstone*, and that in *TCL*, is that an arbitrator's power to resolve a dispute arises out of the agreement to arbitrate. It follows that to the extent that FWC exercises power derived from such an agreement, it is not exercising government powers and so is not susceptible to the issue of the constitutional writs. However, as the Union has submitted, in carrying out the arbitrator's function FWC may exercise a power conferred upon it by statute. Section 739(3) assumes such a possibility. We have previously referred to the powers conferred upon FWC by ss 590 and 595 of the *Fair Work Act*. Section 595(4) seems to permit FWC to exercise statutory powers in the course of a private arbitration. There may be room to argue that such exercise is pursuant to the statutory conferment of power. However it might also be argued that the availability of the power is a function of the agreement to arbitrate. It is possible that review by way of the constitutional writs may be available to third parties (eg persons summoned as witnesses) but not against parties to the arbitration agreement. We need not take this matter further. We do not understand the Union to challenge any exercise by FWC of a specific statutory power.

[42] When the parties confer the role of arbitrator on the Commission, the Commission is authorised to perform that function by s 739. Although the authority of the Commission to arbitrate the dispute is derived from the agreement of the parties, the Commission is able to exercise the powers it otherwise possesses, including by making orders, once that authority is conferred. It is unnecessary, for present purposes, to consider whether an order made in arbitral proceedings arising from a dispute referred to the Commission under the terms of an enterprise agreement is directly enforceable (as an offence under s 675 of the Act) or simply enforceable in the same manner as other stipulations that are agreed and recorded in the relevant enterprise agreement.[27]

[43] The submission of SC Hydro that making any 'order' or 'determination' requiring it to reclassify any employee, pay any employee in accordance with a different classification or back pay an employee subject of the dispute would involve the exercise of judicial power is misconceived. The Commission, when dealing with a dispute referred to it under an enterprise agreement, is able to make decisions in relation to the legal rights and liabilities of the parties because it does so with consent of the parties, rather than through the exercise of the coercive powers of the state. It is not thereby exercising the judicial power of the Commonwealth. This

was explained by the High Court in *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* [2001] HCA 16; (2001) 203 CLR 645:[28]

> There is, however, a significant difference between agreed and arbitrated dispute settlement procedures. As already indicated, the Commission cannot, by arbitrated award, require the parties to submit to binding procedures for the determination of legal rights and liabilities under an award because Ch III of the Constitution commits power to make determinations of that kind exclusively to the courts. However, different considerations apply if the parties have agreed to submit disputes as to their legal rights and liabilities for resolution by a particular person or body and to accept the decision of that person as binding on them.
>
> Where parties agree to submit their differences for decision by a third party, the decision maker does not exercise judicial power, but a power of private arbitration. Of its nature, judicial power is a power that is exercised independently of the consent of the person against whom the proceedings are brought and results in a judgment or order that is binding of its own force. In the case of private arbitration, however, the arbitrator's powers depend on the agreement of the parties, usually embodied in a contract, and the arbitrator's award is not binding of its own force. Rather, its effect, if any, depends on the law which operates with respect to it.
>
> To the extent that s 170MH of the IR Act operates in conjunction with an agreed dispute resolution procedure to authorise the Commission to make decisions as to the legal rights and liabilities of the parties to the Agreement, it merely authorises the Commission to exercise a power of private arbitration. And procedures for the resolution of disputes over the application of an agreement made by parties to an industrial situation to prevent that situation from developing into an industrial dispute are clearly procedures for maintaining that agreement. Parliament may legislate to authorise the Commission to participate in procedures of that kind. Accordingly, s 170MH of the IR Act is valid.

[44] That does not mean that a determination or order made by an arbitrator is not enforceable in the courts. Where the parties have agreed for a particular dispute, or disputes of a particular type, to be referred to an arbitrator, the arbitrator has authority to make an award which is binding on the parties and enforceable by the process of the courts.[29]

[45] It remains to deal with the decision of the Full Court in *Duggan v Metropolitan Fire and Emergency Services Board* [2017] FCAFC 112; (2017) 251 FCR 1 (***Duggan***) which is referred to by SC Hydro. In *Duggan*, a dispute in relation to a proposal to terminate Mr Duggan's employment was referred to the Commission under the dispute settlement provision of the relevant enterprise agreement. A Commissioner found that the employer was not entitled to terminate Mr Duggan's employment and made certain orders, including extending the period of Mr Duggan's probation and restraining termination of his employment. A Full Bench of the Commission quashed the decision and orders of the Commissioner primarily on the basis that the Commissioner went outside the scope of the dispute. The Full Bench also asserted that it was inappropriate to make orders in arbitrating the dispute because the parties cannot confer jurisdiction on the Commission to make binding orders.[30]

[46] The Full Court dismissed an application for judicial review finding that the decision of the Full Bench was supported by its conclusion that the Commissioner went beyond the scope of the dispute.[31] The Full Court added:[32]

> We note for completeness that it was common ground that, on no view, could the Commissioner's orders stand, because he had no power to make them. He had power, as a

> private arbitrator, to make a determination; he could not make binding orders of the kind which the Commission was empowered to make under the FW Act.

[47] This apparently emphatic statement is, obviously enough, *obiter dicta*. The Full Court had already concluded that the application for judicial review should be dismissed for other reasons, and the observation was added 'for completeness'. It does not concern a matter that was contested by the parties to those proceedings. The position stated was 'common ground'. No mention was made of s 595(3), its relationship with the authority conferred on the Commission by s 739(4) to arbitrate a dispute or the statutory context referred to by Wheelahan J in *Murthi* and by the Full Bench in *Falcon Mining*. The only basis stated for the conclusion is the assertion that, because it is performing a function in the nature of private arbitration, the Commission is unable to make binding orders of the kind it is empowered to make under the Act. That assertion is inconsistent with other Full Court authority, particularly *ALS*.

[48] In those circumstances, we do not consider that the observation of the Full Court is binding or controlling. A case is not authority for a proposition that was not argued or necessary for the decision.[33] Furthermore, in *Murthi*, Wheelahan J cited *Duggan* without remarking upon the observation made by the Full Court in relation to the capacity of the Commission to make orders when arbitrating a dispute.[34] His Honour did not regard the decision in *Duggan* as precluding his conclusion that the Commission, when arbitrating a dispute, is able to make any order it considers appropriate.

Whether any further order or determination should be made?

[49] The question of whether the Full Bench should make a more specific determination or more specific orders is a matter of discretion. The Amended Statement of Agreed Facts filed by the parties in the proceedings at first instance described the dispute which had been referred to the Commission as follows:

> 9. SC Hydro contends that the Affected Employees are correctly classified as Tunneller Class 2 under the Agreement. The Affected Employees have at all relevant times been classified and paid by SC Hydro as Tunnellers Class 2.
>
> 10. The Affected Employees contend that as agi-truck drivers:
>
> a. they should each be classified and paid under the Agreement as a Tunneller Class 1; and
>
> b. they each should have been classified and paid as a Tunneller Class 1 from the commencement of their employment as agi-truck drivers with SC Hydro.

[50] In the Appeal Decision, the Full Bench determined the dispute question of construction as to the meaning of the classification descriptions for the Tunneller Class 1 and Tunneller Class 2 classifications. The Full Bench summarised the construction it favoured as follows:

> **[61]** It follows from the foregoing that we consider that a Tunneller who is required only to operate an agi-truck can nonetheless be a Tunneller Class 1 so long as the employee has more than six months' experience as a Tunneller Class 2 (or is subject of accelerated progression), is assessed as competent to perform work in a position involving more than an "assisting" role and is required to perform work in or is appointed to a role which is not assisting a Tunneller Class 1.

[51] In the Remaining Matters Decision, the Full Bench determined that Raymond Orreal, Edward Riley, Gavin Blyth, Steven Roach, Clyde Farr, Ian Starr and Brett Rewald should be classified as Tunneller Class 1 in their current roles. The consequence of that determination is that the seven identified employees must be treated and paid at the classification of Tunneller Class 1 going forward and for as long as they have been performing their existing roles, at least after completing six months of experience as in a Tunneller Class 2 role.

[52] The determination of the Full Bench is binding on SC Hydro and it cannot challenge the determination simply on the basis it disagrees with the conclusion.[35] SC Hydro has not suggested there is any lack of clarity as to the meaning of the determination. The consequence is that, to comply with the Agreement, SC Hydro is required to treat and pay the identified employees at the classification of Tunneller Class 1. To the extent that SC Hydro continues to fail to do so, it is contravening the Agreement. The identified employees and the CFMEU is able to commence proceedings in the Federal Court or Federal Circuit and Family Court to recover underpayments or for pecuniary penalties to be imposed with respect to the apparent non-compliance.[36]

[53] Arguably, that would constitute a sufficient remedy, and it is unnecessary for the Commission itself to take further steps. However, in our view, in circumstances in which SC Hydro is openly and consciously defying the determination of the Commission, there is merit in the decision of the Full Bench being varied by making orders which more clearly articulate steps which the Full Bench considers should be taken to resolve the dispute and that those steps should be taken at a particular time to bring the dispute to an end. Such a step has the potential to aid the effective resolution of the dispute.

[54] Aside from submitting that the Full Bench could not make any further order or determination, SC Hydro did not submit that the orders proposed by the CFMEU do not reflect the Appeal Decision and the Remaining Matters Decision or that those orders do not appropriately implement those decisions. We are satisfied that it is appropriate to make orders in the form proposed by the CFMEU.

VICE PRESIDENT

Appearances:

T Sebbens, solicitor, of Ashurst for SC Hydro Pty Ltd.
C Massy, of counsel, instructed by *L Charlson*, Senior Legal Officer, for the Construction, Foresty and Maritime Employees Union.

Final written submissions:

11 December 2025.

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[1] *SC Hydro Pty Ltd v Construction, Forestry and Maritime Employees Union* [2025] FWCFB 110.

[2] *SC Hydro Pty Ltd v Construction, Forestry and Maritime Employees Union* [2025] FWCFB 110 at [66].

[3] *SC Hydro Pty Ltd v Construction, Forestry and Maritime Employees Union* [2025] FWCFB 159.

[4] *SC Hydro Pty Ltd v Construction, Forestry and Maritime Employees Union* [2025] FWCFB 159 at [23].

[5] Transcript, 20 November 2025, PN18-21.

[6] *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* [2001] HCA 16; (2001) 203 CLR 645 at [31] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ); *Construction, Forestry, Mining and Energy Union v Wagstaff Piling Pty Ltd* [2012] FCAFC 87; (2012) 203 FCR 371 at [41] (Buchanan and Katzmann JJ); *Linfox Australia Pty Ltd v Transport Workers' Union of Australia* [2013] FCA 659; (2013) 213 FCR 479 at [27] (Rares J).

[7] *Duggan v Metropolitan Fire and Emergency Services Board* [2017] FCAFC 112; (2017) 251 FCR 1 at [56] (Tracey, Wigney and O'Callaghan JJ).

[8] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd* [2015] FCAFC 123; (2015) 235 FCR 305 at [57]-[58] (Dowsett, Tracey and Katzmann JJ).

[9] *United Firefighters' Union of Australia v Fire Rescue Victoria* [2024] FCAFC 84; (2024) 304 FCR 219 at [10] (Colvin, Raper and Dowling JJ).

[10] *DP World Brisbane Pty Ltd v Maritime Union of Australia* [2013] FWCFB 8557; (2013) 237 IR 180 at [47]-[48]; *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd* [2015] FCAFC 123; (2015) 235 FCR 305 at [51], [57] (Dowsett, Tracey and Katzmann JJ).

[11] *Jayasinghe v Minister for Immigration & Ethnic Affairs* (1997) 76 FCR 301 at 311 (Goldberg J).

[12] *Minister for Immigration and Multicultural Affairs v Bardwaj* [2002] HCA 11; (2002) 209 CLR 597 at [53] (Gummow and Gaudron JJ), [67] (McHugh J).

[13] *ABB Service Pty Ltd v Pyrmont Light Rail Co Ltd* [2010] NSWSC 831; (2010) 77 NSWLR 321 at [69]-[70] (Ward J).

[14] *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at p 211 (Gummow J); *Sloane v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429 at 443 (French J).

[15] *Esso Australia Pty Ltd v Australian Workers' Union* [2017] HCA 54; (2017) 263 CLR 551 at [49] (Kiefel CJ, Keane, Nettle and Edelman JJ).

[16] *Grabovsky v United Protestant Association of NSW Ltd* [2015] FWC 5161 at [28]; *Minister for Industrial Relations for the State of Victoria v Esso Australia Pty Ltd* [2019] FCAFC 26; (2019) 268 FCR 520 at [33] (White, Lee and Wheelahan JJ).

[17] *Minister for Industrial Relations for the State of Victoria v Esso Australia Pty Ltd* [2019] FCAFC 26; (2019) 268 FCR 520 at [73] (White, Lee and Wheelahan JJ); *Re Aged Care Award 2010* [2022] FWCFB 118 at [4].

[18] *Minister for Industrial Relations for the State of Victoria v Esso Australia Pty Ltd* [2019] FCAFC 26; (2019) 268 FCR 520 at [74] (White, Lee and Wheelahan JJ).

[19] *Airservices Australia v Civil Air Operations Officers' Association of Australia* [2022] FCAFC 172; (2022) 295 FCR 36 at [99] (O'Callaghan J) referring to *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; (2004) 218 CLR 451 at [22] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ) and *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13; (2019) 267 CLR 514 at [44] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

[20] *CBI Constructors Pty Ltd v Chevron Australia Pty Ltd* [2024] HCA 28; (2024) 98 ALJR 1096 at [31] (Gageler CJ, Gordon, Edelman, Steward and Gleeson JJ).

[21] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd* [2015] FCAFC 123; (2015) 235 FCR 305 at [57] (Dowsett, Tracey and Katzmann JJ).

[22] *Construction, Forestry, Maritime, Mining and Energy Union v Falcon Mining Pty Ltd* [2022] FWCFB 93; (2022) 317 IR 367 at [77].

[23] *Monash University v Murthi* [2024] FCA 663 at [61]-[62].

[24] *Monash University v Murthi* [2024] FCA 663 at [70]-[71].

[25] *Linfox Australia Pty Ltd v Transport Workers' Union of Australia* [2013] FCA 659; (2013) 213 FCR 479 at [25]-[26] (Rares J).

[26] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd* [2015] FCAFC 123; (20150 235 FCR 305 at [85] (Dowsett, Tracey and Katzmann JJ).

[27] See discussion in *United Firefighters' Union of Australia v Fire Rescue Victoria* [2025] FCAFC 7 at [34] (Katzmann, Snaden and Shariff JJ).

[28] *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* [2001] HCA 16; (2001) 203 CLR 645 at [30]-[32] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

[29] *TCL Air Conditioner (Zhongshan) Company Ltd v Judges of the Federal Court of Australia* [2013] HCA 5; (2013) 251 CLR 533 at [45] (Hayne, Crennan, Kiefel and Bell JJ).

[30] *Metropolitan Fire and Emergency Services Board v United Firefighters' Union of Australia* [2016] FWCFB 8120; (2016) 262 IR 83 at [60]-[62].

[31] *Duggan v Metropolitan Fire and Emergency Services Board* [2017] FCAFC 112; (2017) 251 FCR 1 at [91] (Tracey, Wigney and O'Callaghan JJ).

[32] *Duggan v Metropolitan Fire and Emergency Services Board* [2017] FCAFC 112; (2017) 251 FCR 1 at [94] (Tracey, Wigney and O'Callaghan JJ).

[33] *CSR Ltd v Eddy* [2005] HCA 64; (2005) 226 CLR 1 at [13] (Gleeson CJ, Gummow and Heydon JJ); *Spence v Queensland* [2019] HCA 15; (2019) 268 CLR 355 at [294] (Edelman J); *Bird v DP* [2024] HCA 41; (2024) 98 ALJR 1349 at [101] (Gleeson J).

[34] *Monash University v Murthi* [2024] FCA 663 at [5], [55], [85] (Wheelahan J).

[35] *Linfox Australia Pty Ltd v Transport Workers' Union of Australia* [2013] FCA 659; (2013) 213 FCR 479 at [33] (Rares J); *Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2016] FCAFC 82; (2016) 244 CR 178 at [34] (North, Jessup and Reeves JJ).

[36] *Airservices Australia v Civil Air Operations Officers' Association of Australia* [2022] FCAFC 172; (2022) 295 FCR 36.