



# DECISION

*Fair Work Act 2009*  
s.604 - Appeal of decisions

## **Cowra Meat Processors Pty Limited**

v

## **Leigh Moiler**

(C2025/9482)

VICE PRESIDENT GIBIAN  
DEPUTY PRESIDENT SAUNDERS  
DEPUTY PRESIDENT DOBSON

SYDNEY, 13 FEBRUARY 2026

*Appeal against decision [\[2025\] FWC 2793](#) of Commissioner Walkaden on 18 September 2025 in U2025/4135 – Application under s 394 of the Fair Work Act 2009 (Cth) for an unfair dismissal remedy – Employee dismissed for reasons including no communication of absence to employer, conduct towards other employees and leaving shift early without supervisor permission – Commissioner found that there was a valid reason for dismissal but dismissal was harsh, unjust or unreasonable and ordered reinstatement – Whether Commissioner erred in treating certain evidence as hearsay and in applying the ‘rule’ in *Browne v Dunn* – Permission to appeal granted for some grounds – Appeal allowed and order for reinstatement quashed – Application remitted to redetermine the question of remedy.*

### **Introduction**

[1] This appeal arises from an unfair dismissal application made under s 394 of the *Fair Work Act 2009* (Cth) (the **Act**) by Leigh Moiler against his former employer Cowra Meat Processors Pty Limited (**Cowra Meat**). Cowra Meat operates an abattoir in the regional town of Cowra in the Central West of New South Wales. Mr Moiler commenced employment as a production worker at the abattoir in 2017 and was terminated without notice for alleged serious misconduct following a meeting on 19 March 2025.

[2] On 3 April 2025, Mr Moiler applied to the Commission for an unfair dismissal remedy. The application was dealt with by Commissioner Walkaden. On 18 September 2025, the Commissioner handed down his decision. The Commissioner found that Mr Moiler had been unfairly dismissed and ordered that Mr Moiler be reinstated and that the continuity of his employment be maintained.<sup>1</sup> The Commissioner indicated that he was satisfied that an order to restore lost pay was appropriate, but that he was not able to make such an order on the material before him.<sup>2</sup> Directions were issued for further material to be filed to permit quantification of the order with respect to lost remuneration.

[3] On 26 September 2025, Cowra Meat filed a notice of appeal in which it sought permission to appeal, and to appeal, with respect to the decision and orders of the Commissioner made on 18 September 2025. An amended notice of appeal was filed on 1 October 2025 which

added additional grounds of appeal. In its written submissions and during the hearing of the appeal, counsel for Cowra Meat made clear that the appeal does not challenge the finding of the Commissioner that Mr Moiler's dismissal was harsh, unjust or unreasonable for the purposes of s 385(b) of the Act. Cowra Meat seeks to challenge only the decision of the Commissioner to make an order for reinstatement.

[4] For the reasons that follow, permission to appeal should be granted and that appeal allowed. The orders made by the Commissioner on 18 September 2025 should be set aside and Mr Moiler's unfair dismissal application remitted to the Commissioner to redetermine the question of the unfair dismissal remedy to be ordered arising from his dismissal.

## **Background**

[5] Mr Moiler was employed as a production worker at an abattoir owned by Cowra Meat from 2017 until 19 March 2025. The events leading to Mr Moiler's dismissal are as follows and were set out in the Commissioner's decision.

[6] Mr Moiler was on annual leave from 24 February 2025 to 28 February 2025 and his first shift back from that period of annual leave was to be on 3 March 2025. Mr Moiler did not return to work on 3 March 2025, nor did he return to work for the two weeks following his period of annual leave. Mr Moiler next attended work on 17 March 2025.

[7] Mr Moiler's evidence was that he travelled to Dirranbandi on 21 February 2025 to visit and care for his father on the station. Dirranbandi is in a remote area on Yuwaalaraay country near the border between Queensland and New South Wales. Several hours into the journey, he began experiencing difficulties with his Ute and saw a mechanic when he reached Walgett, approximately two hours from Dirranbandi. The mechanic told Mr Moiler there was a problem with his Ute, that he did not have time to complete the repair and that Mr Moiler may reach his destination. Mr Moiler continued the drive and made it to Dirranbandi.

[8] On 24 February 2025, Mr Moiler spoke to a mechanic in St George, approximately 40 minutes north of Dirranbandi. He booked an appointment with the mechanic for 25 February 2025 and his Ute was repaired and collected from the mechanic on the afternoon of 10 March 2025. Further, on Mr Moiler's evidence, he was not allowed to make outgoing calls from the telephone at the station, and he delegated the notification of his absence to his daughter, Shay Grant, in circumstances where this process of notifying an absence from work had never previously been an issue at Cowra Meat.

[9] Mr Moiler returned to work on 17 March 2025. A number of allegations were made in relation to Mr Moiler's conduct on that day. It was alleged that Mr Moiler verbally abused Peter Brown, the acting foreman at the abattoir, displayed a hostile attitude towards other staff and left the shift before its completion without notifying his supervisor.

[10] On 18 March 2025, at about 5:30am at the start of his shift, the Production Manager, Wayne Rue, provided Mr Moiler with a letter, with the subject being '*24-Hour Suspension Notice*'. The letter contained the following text:

You are hereby suspended immediately for 24 hours on full pay due to your actions on 17<sup>th</sup> March 2025.

You are required to attend a formal meeting at Cowra Meat Processors 1:00 PM on 19<sup>th</sup> March 2025 to discuss this matter. You may bring a support person if you wish.

[11] Mr Moiler did not attend work on 18 March 2025 and returned to work on 19 March 2025. Mr Moiler and his support person met with Mr Rue and Chris Cummins, the owner of the business, after the end of Mr Moiler's shift. During the meeting, Mr Rue advised Mr Moiler of his dismissal and gave Mr Moiler a letter dated 19 March 2025. The letter contained the following text and was signed by Mr Rue:

**Subject: Termination of Employment**

Dear Leigh,

Further to your suspension and our subsequent meeting with you on the 18<sup>th</sup> of March 2025 in your position of Meat Process Worker with Cowra Meat Processors Pty Ltd ('Cowra Meats'), we are notifying you of your termination of employment by way of serious misconduct.

Over the past weeks we have endeavoured to contact you to speak to you about your unexplained absences from the 3<sup>rd</sup> of March to the 14<sup>th</sup> of March 2025. During this time, we had limited communication with a family member as to your whereabouts, and at no time did you contact your immediate supervisor, despite our instruction to you and the company process.

When you eventually returned to the workplace on the 17<sup>th</sup> of March 2025. You left your shift early without notifying your supervisor, and subsequently engaged in multiple outburst towards other staff members. This behaviour in the workplace is unacceptable as outlined in our Anti-Harassment, Discrimination and Bullying Policy and the Code of Conduct Policy that you acknowledged on the 3<sup>rd</sup> of July 2024.

Due to the seriousness of these examples, we are terminating your employment with immediate effect on the basis of serious misconduct. You are not required to work out your notice period and you will receive a payment in lieu of notice.

You are required to return all company property, including uniforms and access cards immediately to Bonnie Stewart. Your final pay, including any entitlements, will be processed in accordance with company policy.

Yours sincerely

Wayne Rue  
Production Manager  
Cowra Meat Processors

[12] At the hearing at first instance, Mr Rue indicated that the reasons for Mr Moiler's dismissal also included that it was alleged Mr Moiler had made racist comments at work, engaged in bullying behaviour towards other staff members, refused to follow instructions from management, including regarding the need to train other staff, and displayed a hostile attitude towards staff members. Mr Rue confirmed these were not set out in the letter of dismissal or in raised during the meeting advising Mr Moiler of his dismissal on 19 March 2025.

**Decision of the Commissioner**

[13] In his decision, the Commissioner first set out the preliminary matters, finding that Mr Moiler was a person protected from unfair dismissal, had been dismissed, that the Small Business Fair Dismissal Code did not arise and Mr Moiler's dismissal was not a case of genuine redundancy.<sup>3</sup> The Commissioner then set out the events leading to the dismissal and made a number of factual findings in relation to Mr Moiler's conduct.

[14] The Commissioner initially addressed the evidence concerning Mr Moiler's absence from work and the communications between Ms Grant and Stephanie Taylor, a Payroll Officer for Cowra Meat, about Mr Moiler's absence. The Commissioner favoured Ms Taylor's evidence regarding the telephone conversations between Ms Grant and Ms Taylor. He favoured the evidence that on 3 March 2025, Ms Grant made two telephone calls to Ms Taylor, which Ms Taylor did not answer.<sup>4</sup> Ms Taylor then called Ms Grant the same day, and they exchanged words to the following effect:<sup>5</sup>

Ms Grant: *"Dad is stuck where he went up to his dad last week. His car is broken down and we are still waiting for it to be fixed. There isn't any mobile reception so dad can't call. I have to drive into town to make the call. Dad will be back at work next week."*

Ms Taylor: *"Your dad will need to call Mick and speak with him about this."*

Ms Grant: *"Dad can't use his phone."*

Ms Taylor: *"Why can't he use your phone?"*

Ms Grant: *"Ok."*

[15] The reference to 'Mick' during this conversation is a reference to Mick (Allen) Ryan, Beef Foreman at the abattoir. Ms Taylor sent an email to Mr Rue following the call stating (amongst other things) that Mr Moiler *'expects to be back at work next week'*.<sup>6</sup> The Commissioner accepted the evidence of Ms Taylor that she did not have any further telephone conversations with Ms Grant after 3 March 2025.<sup>7</sup> The Commissioner found that Ms Grant did not tell Mr Moiler that he had been asked by Ms Taylor to contact Mr Ryan, Mr Moiler was unaware of the Facebook messenger calls made by Mr Ryan on 3 March 2025, 10 March 2025 and 12 March 2025, Cowra Meats made no effort to contact Mr Moiler apart from on 3 March 2025, 10 March 2025 and 12 March 2025 and Mr Moiler hardly looked at his phone during this period especially since he did not have access to Wi-Fi at the station.<sup>8</sup>

[16] The Commissioner found the evidence of Mr Rue regarding the interaction between Mr Moiler and Mr Brown on 17 March 2025 in his witness statement dated 6 June 2025 was hearsay evidence. The witness statement included a conversation between Mr Rue and Mr Brown, in which Mr Rue asked Mr Brown words to the effect of *'Where has he gone?'* to which Mr Brown responded words to the effect of *'He just followed me down the stairs abusing me. He was really aggressive and has really rattled me. He accused me of deliberately stopping the machines and slowing down their shift on purpose. He said I was trying to sabotage their work. He swore at me a few times and was raising his voice. I felt like he was really threatening me. Leigh said he needed to get the hell out of here and shouldn't have to stay at work so long. There have been a few problems with the chain today, but it was fixed and the rest of the team got stuck into it and the shift is still going. I have no idea where he is now. He just stormed off.'*

*The real issue today has been Leigh having a go at others along the line swearing at them and telling them to hurry up. He has been abusive towards me and others today'. Mr Rue then asked Mr Brown words to the effect of "Do you know where Leigh is he now? I will need to speak to him straight away" to which Mr Brown responded words to the effect of 'I don't know, he just stormed off after yelling at me. He hasn't asked for permission to leave early or told me that he is leaving'.*

**[17]** In relation to the interaction with Mr Brown on 17 March 2025, the Commissioner preferred the evidence of Mr Moiler in circumstances in which Mr Moiler gave direct evidence and was cross-examined. The Commissioner made the following findings:

**[50]** As explained above, Mr Brown did not give evidence. The only evidence before me concerning the interaction between Mr Moiler and Mr Brown on Monday 17 March 2025 is Mr Moiler's evidence and the hearsay evidence given by Mr Rue. Mr Moiler was cross-examined about his interaction with Mr Brown. It was put to Mr Moiler that he had an argument with Mr Brown. Mr Moiler disagreed that it was an argument and said that he was voicing his opinion. Mr Moiler said, and I find, that he said words to the effect of: *"It's fucked that it's going this way. It's not the same place that I'd started at"*. It is clear from Mr Moiler's evidence under cross-examination that he expressed his dissatisfaction with the delay experienced and I find that Mr Moiler said words to the effect that it felt like they (being a reference to CMP or management) were trying to slow us down (being a reference to the workers) and that it should not take as long as it did on that shift to process the number of animals. Mr Moiler denied that he raised his voice at Mr Brown. In the absence of anything other than hearsay evidence to the contrary, I accept Mr Moiler's denial.

**[18]** Mr Moiler told an unidentified employee to hurry up, was swearing and spoke in a loud voice that was short of yelling on 17 March 2025. The Commissioner found that Mr Moiler and the unidentified employee were standing in close proximity and both behaving in a similar manner. This was based on the evidence before the Commissioner in relation to this incident, being Ms Bonnie Stewart's evidence based on watching the CCTV footage, and Mr Moiler's evidence.<sup>9</sup> The Commissioner found that the evidence of Mr Rue and Ms Stewart regarding the interaction between Mr Moiler and the other employees on 17 March 2025 in their respective witness statements both dated 6 June 2025 was hearsay evidence. The Commissioner found that, in the absence of anything other than hearsay evidence (being a reference to the evidence of Mr Rue and Ms Stewart) to the contrary of Mr Moiler's evidence, Mr Moiler did swear and tell other staff members to hurry up on 17 March 2025<sup>10</sup> but that he did not abuse them in the production line.<sup>11</sup>

**[19]** In relation to the allegation that Mr Moiler had left the workplace before the end of his shift on 17 March 2025, the Commissioner found that Mr Moiler acted on his frustration by leaving the shift and site before its completion on 17 March 2025 without obtaining permission from and being dismissed by his supervisor, which was contrary to the requirement that production workers can only leave the site at the end of their shift after first being dismissed by their supervisor.<sup>12</sup>

**[20]** The Commissioner also addressed the other reasons raised by Mr Rue for Mr Moiler's dismissal. In relation to the allegation that Mr Moiler had made racist comments towards other staff members, the Commissioner made the following findings:

[60] The only evidence before me as to the alleged racist comments towards other staff members was hearsay evidence from Mr Ryan. Mr Ryan did not say that he witnessed Mr Moiler making racist comments. Mr Ryan says that he spoke to Mr Moiler about his language. Under cross-examination, Mr Ryan confirmed that the claims of racist comments were never investigated, Mr Moiler was not given an opportunity to respond and the specific allegations were never put to him. The allegations of racist comments were not put to Mr Moiler during his own cross-examination. I am not satisfied on the evidence before me that Mr Moiler made racist comments at work. I am satisfied that Mr Ryan spoke to Mr Moiler about his language at work. It was no more than that. Mr Ryan's comments were not expressed as a warning.

[21] With respect to the other allegations raised, the Commissioner observed that there was no evidence before him that Mr Moiler engaged in bullying behaviour towards other staff members, refused to follow instructions from management including regarding the need to train other staff, or displayed a hostile attitude towards staff members (other than the events on Monday, 17 March 2025). The Commissioner was not satisfied on the evidence that Mr Moiler engaged in such conduct.<sup>13</sup> Although Mr Ryan, in his witness statement dated 6 June 2025, alleged that he saw Mr Moiler *'hand over a bag of drugs to another employee in the hook room'*, the Commissioner found that the evidence before him did not establish what was in the bag.<sup>14</sup>

[22] In light of the grounds of appeal, it is relevant to note that the Commissioner made the following observations in relation to the allegation that Mr Moiler made racist comments to other staff members:

[63] Some of these allegations are incredibly serious. There is no place for racism at work or anywhere else. An employee that makes racist comments towards their colleagues should be disciplined. A disciplinary sanction, which would almost inevitably be dismissal, can be expected if an employee is distributing illegal drugs at work. Speaking generally, such an employee is unlikely to persuade me that their dismissal was unfair. On the Respondent's argument, Mr Moiler received verbal warnings for engaging in such conduct. A verbal warning is clearly insufficient given the gravity of any such conduct. The impression created by management's response to these allegations is that workplace behaviour and conduct was managed with a high degree of informality. It does not appear that standards of acceptable behaviour and conduct were rigorously applied and enforced. ...

[23] The Commissioner then turned to consider each of the s 387 criteria in assessing whether Mr Moiler's dismissal was harsh, unjust or unreasonable. The Commissioner found that there was a valid reason for Mr Moiler's dismissal for the purposes of s 387(a) being that Mr Moiler failed to appropriately notify his absence from the period of 10 March 2025 to 17 March 2025 and failed to seek permission from, and be dismissed by, his supervisor before leaving the shift and site on 17 March 2025.<sup>15</sup> The Commissioner was not satisfied that there was a valid reason for dismissal arising from the encounter with Mr Brown on 17 March 2025, the interaction between Mr Moiler and the unidentified employees on the same day, Mr Moiler having been abusive to other employees or the allegations of racism, bullying, refusal to follow instructions or displaying a hostile attitude towards staff members.

[24] For the purposes of s 387(b) and (c), the Commissioner found that Mr Moiler was not notified of the reason, was not given an opportunity to respond to any reason related to his conduct and that the dismissal was disproportionate to the gravity of Mr Moiler's conduct.<sup>16</sup> With respect to s 387(h), the Commissioner indicated he was satisfied that dismissal was disproportionate to the gravity of Mr Moiler's misconduct, but was not satisfied that the

personal and economic consequences of dismissal weighed in favour of a finding that the dismissal was harsh, unjust or unreasonable in circumstances in which there was no adequate evidence before the Commission as to the consequences of dismissal for Mr Moiler.

[25] The Commissioner then turned to the question of whether to order a remedy. The Commissioner noted that Cowra Meat opposed Mr Moiler being reinstated on the basis that there was significant fear arising from his behaviour and that, if Mr Moiler returned to the workplace, his reinstatement would have an impact on morale at the abattoir.<sup>17</sup> However, the Commissioner was not satisfied that the fear expressed by Ms Stewart and Cowra Meat about Mr Moiler's reinstatement was soundly or rationally based as they appeared to be based on Mr Moiler's behaviour, in circumstances where the Commissioner found that several reasons for Mr Moiler's dismissal had not been made out or did not occur in the manner alleged by Cowra Meat.<sup>18</sup> The Commissioner determined that the conduct he found had occurred, while relevant to whether there was a valid reason for dismissal, did not give rise to a sound or rational basis for the fear expressed by Ms Stewart and Cowra Meat.<sup>19</sup> The Commissioner was also not satisfied that the reinstatement would have any impact on the morale at the abattoir.<sup>20</sup>

[26] The Commissioner further considered the almost full management restructure at the abattoir, with formal processes and a new culture implemented. He observed that Mr Moiler deserves a second chance and these changes will greatly assist him in ensuring the appropriate standards of behaviour and conduct are met.<sup>21</sup> In considering all the circumstances, the Commissioner was satisfied that orders to reinstate Mr Moiler, maintain continuity of employment and restore lost payment were appropriate.<sup>22</sup>

## Grounds of appeal

[27] In the hearing, counsel for Cowra Meat confirmed that it only challenged the Commissioner's exercise of discretion as to concluding that reinstatement was an appropriate remedy, and that it did not challenge the finding in relation to whether the dismissal was harsh, unjust or unreasonable. The amended notice of appeal contains 12 grounds of appeal, which can be summarised in the following way:<sup>23</sup>

### Errors of Law

1. The Commission erred and/or misapplied legal principle by making the finding at [124] of the Judgment that *"the fear expressed by Ms Stewart and the Respondent about Mr Moiler's reinstatement is soundly or rationally based."*
2. The Commission erred and/or misapplied legal principle by making the finding at [126] of the Judgment that *"none of that conduct [being misconduct which the Commission found had occurred] involves conduct that gives rise a sound or rational basis for the fear expressed by Ms Stewart and the Respondent."*
3. The Commission erred in its assessment of the evidence on the issue of whether a sufficient level of trust and confidence could be restored to make the employment relationship viable and productive.
4. The Commission erred by failing to take proper account of, or give sufficient weight to, the misconduct on the part of Mr Leigh Moiler, which it found to have occurred at [103] of the Judgment, with respect to the issue of whether reinstatement was appropriate.

5. The Commission erred by failing to give sufficient weight to the totality of the misconduct on the part of Mr Moiler which it found to have occurred with respect to the issue of whether reinstatement was appropriate.
- 5A. The Commission erred and/or misapplied legal principle at [50] by finding that the evidence of Mr Rue was hearsay evidence.
- 5B. The Commission erred and/or misapplied legal principle at [60] by finding that the evidence of Mr Ryan was hearsay evidence.
- 5C. The Commission erred and/or misapplied legal principle at [60] by applying the ‘rule’ in *Browne v Dunn* (1893) 6 R 67 or, alternatively, if the rule applied to the application for unfair dismissal remedy, erred in its application of the rule.

#### **Significant Errors of Facts**

6. The Commission made the following significant errors of fact at [50] and [80] of the Judgment, concerning how Mr Moiler conducted himself in his interaction with Mr Brown on 17 March 2025:
  - a. the finding that Mr Moiler did not verbally abuse Mr Brown;
  - b. the finding that Mr Moiler did not raise his voice; and
  - c. the finding that there was no misconduct by Mr Moiler in how he conducted himself in his interaction with Mr Brown.
7. The Commission made the following significant errors of fact at [51] of the Judgment, concerning how Mr Moiler conducted himself in his interaction with the unidentified employee on 17 March 2025:
  - a. the finding that Mr Moiler was not swearing at this employee;
  - b. the finding that Mr Moiler was not yelling; and
  - c. the finding that there was no misconduct by Mr Moiler in how he conducted himself in his interaction with the unidentified employee.
- 7A. The Commission made the following significant errors of fact at [60] of the Judgment:
  - d. the finding that Mr Moiler did not make racist comments towards other staff members; and
  - e. the finding that Mr Ryan did not say that he witnessed Mr Moiler making racist comments.
8. Consequent upon the above errors, the Commission erred and/or misapplied legal principle by making the finding at [124] of the Judgment that “*the fear expressed by Ms Stewart and the Respondent about Mr Moiler’s reinstatement is soundly or rationally based.*”

#### **Further evidence on appeal**

[28] Cowra Meat sought the admission of new evidence on appeal. The evidence sought to be introduced by Cowra Meat was a witness statement of Mick (Allen) Ryan dated 15 October 2025.

[29] The Full Bench is able to receive further evidence on appeal under s 607(2) of the Act. The principles ordinarily applied to the discretion to admit new evidence on appeal are set out in the judgment of Clarke JA in *Akins v National Australia Bank* (1994) 34 NSWLR 155

(*Akins*). In that case, his Honour identified three conditions which need to be met before fresh evidence can be admitted. These are: (1) it must be established that the evidence could not have been obtained or adduced with reasonable diligence for use at first instance; (2) it must be evidence which is of such a high degree of probative value that there is a probability that there would have been a different result at first instance; and (3) the evidence must be credible.<sup>24</sup> In considering whether to exercise the discretion in s 607(2) to receive further evidence, it is permissible to depart from the principles set out in *Akins* in an appropriate case and those principles need not be strictly applied.<sup>25</sup>

**[30]** The Full Bench was not satisfied that it was appropriate to admit the witness statement of Mr Ryan dated 15 October 2025 as further evidence on appeal. The further statement of Mr Ryan was intended to clarify whether the evidence contained in his witness statement dated 6 June 2025, which was admitted at first instance, intended to convey that Mr Ryan had directly heard Mr Moiler make racist statements to other employees. Cowra Meat's primary submission is that Mr Brown's earlier witness statement did not contain only hearsay evidence of racist comments towards other staff members by Mr Moiler. If this submission is accepted, it is unnecessary to admit the further witness statement of Mr Ryan. On the other hand, if Mr Ryan's evidence at first instance, on a fair reading, merely conveyed hearsay knowledge, then this is a deficiency that the Commissioner identified in the evidence of Cowra Meat. In this case, we do not consider it is not in the interests of justice to admit further evidence on appeal simply to permit a party to remedy a deficiency in the drafting of its evidence at first instance. To allow the evidence to be introduced now would also result in procedural unfairness to Mr Moiler in circumstances where it could have been put on at first instance by Mr Ryan in clear terms.

### **Permission to appeal**

**[31]** Section 604(1) of the Act makes it clear that there is no right to appeal, and an appeal may only be made with the permission of the Commission. Generally, the Commission must grant permission to appeal if satisfied that is in the public interest to do so.<sup>26</sup> Otherwise, the Full Bench has a broad discretion as to whether permission to appeal should be granted.<sup>27</sup> However, it will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated.

**[32]** The discretion of the Commission to grant permission is more confined in the case of an application for permission to appeal from a decision of the Commission made in unfair dismissal proceedings under Part 3-2 of the Act. In that respect, s 400 of the Act provides:

- (1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under this Part unless the FWC considers that it is in the public interest to do so.
- (2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under this Part can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact.

**[33]** Section 400(1) manifests an intention that the threshold for a grant of permission to appeal is higher in respect of appeals in unfair dismissal proceedings than that applying to appeals generally.<sup>28</sup> Permission to appeal can only be granted if the Full Bench is satisfied it is in the public interest to do so, and no residual discretion exists if that threshold is not met.

Section 400(2) limits review on appeal based on an alleged mistake of fact in that an alleged error of fact must involve a significant error of fact.

**[34]** In *Illawarra Coal Holdings Pty Ltd (t/as South32) v Sleiman* [2024] FWCFB 364, the Full Bench described the statutory purpose underlying the provision and its consequences in the following way:

The statutory purpose of restricting the avenue of appeal with respect to a decision in unfair dismissal proceedings and constraining the grounds on which such an appeal can be made, is not difficult to discern. The apparent objective is to limit the time, costs and inconvenience associated with unfair dismissal proceedings. The object of Part 3-2 of the Act includes to establish procedures for dealing with unfair dismissal that are ‘quick, flexible and informal’, including that the procedures and remedies provided for ensure a ‘fair go all round’ is accorded to both the employer and employee concerned.<sup>11</sup> An unconstrained right of appeal, or a threshold for permission to appeal being granted which is too low, would hinder the achievement of the object of the Part.

It is not possible, or appropriate, to attempt to confine or fetter the broad discretionary assessment required to be made in each case as to whether it is in the public interest to grant permission to appeal. However, the statutory context to which we have referred does suggest that it will commonly not be in the public interest to grant permission to appeal where the grounds of appeal, in substance, seek to relitigate the factual findings made at first instance. There may, of course, be cases in which it can be demonstrated that something has gone seriously wrong in the decision-making at first instance which demands reconsideration of the evidentiary material and the factual findings on appeal. It will often not be in the public interest, though, for a Full Bench of the Commission to engage in a detailed analysis of the primary factual material simply because an appellant alleges that different conclusions should have been drawn from the evidence.

**[35]** Those observations are pertinent in this matter. A number of the grounds of appeal simply seek to attack factual findings of the Commissioner or inferences drawn from the facts as found. Grounds 6, 7 and 7A ask the Full Bench to revisit a series of factual findings made by the Commissioner. Grounds 1, 2, 3 and 8 allege error in the inferences the Commissioner drew from the evidence as to whether the evidence demonstrates a sound and rational basis for Cowra Meat to fear Mr Moiler returning to the workplace or for asserting that it had lost trust and confidence in Mr Moiler. Grounds 4 and 5 allege error only on the basis that the Commissioner attached insufficient weight to the misconduct he found had occurred in assessing whether reinstatement was appropriate.

**[36]** We are not satisfied that permission to appeal should be granted with respect to grounds 1, 2, 3, 4, 5, 6, 7 and 8 in the notice of appeal. Those grounds do not seek to raise any matter of principle or general importance to the jurisdiction of the Commission. The grounds are concerned solely with factual findings which are particular to the present case and raise no matters which we consider establish that it is in the public interest to grant permission to appeal. Leaving to one side the more specific errors of approach alleged in grounds 5A, 5C and 5B, we do not consider that it is in the public interest to grant permission to appeal simply to permit the Full Bench to reconsider the factual findings made by the Commissioner, the inferences the Commissioner drew from the findings he did make and the weight attached to the finding of misconduct made by the Commissioner.

[37] However, we are satisfied that it is in public interest to grant permission to appeal with respect to grounds 5A, 5B, 5C and 7A. Grounds 5A, 5B and 5C raise issues concerning the approach adopted by the Commissioner to hearsay evidence, to the weight to be attached to direct as opposed to hearsay evidence and to evidence not subject of cross-examination. In our view, those grounds raise issues of general importance, and it is in the public interest for permission to be granted with respect to these grounds. Ground 7A alleges an error of fact, but one which relates to the same matter dealt with in grounds 5B and 5C. Given the views we have formed in relation to ground 5B in particular, it is in the public interest for permission to appeal to be granted in relation to that ground.

## Consideration

### *Ground 5A – Encounter with Mr Brown*

[38] Ground 5A alleges that the Commissioner erred at paragraph [50] of the decision, or misapplied legal principle, by finding that the evidence given by Mr Rue was hearsay evidence. As elaborated upon in its oral submissions on appeal, Cowra Meat also submitted that the Commissioner had erred in attaching no weight to the evidence of Mr Rue.

[39] The evidence of Mr Rue referred to in paragraph [50] of the decision concerned the allegation that Mr Moiler was verbally abusive towards Mr Brown during the shift on 17 March 2025. Mr Rue gave evidence in relation to a conversation he says he had with Mr Brown during the day on 17 March 2025 in which Mr Brown told him that Mr Moiler had been abusive towards, and swore at, him and other employees on that day. Mr Brown did not give evidence. In paragraph [45] of the decision, the Commissioner noted that Mr Brown had retired from his employment and was overseas at the time of the hearing.

[40] The primary submission advanced by Cowra Meat in relation to this evidence is that the Commissioner erred in treating the evidence of Mr Rue in relation to the encounter between Mr Brown and Mr Moiler as hearsay evidence. The hearsay rule is stated in s 59(1) of the *Evidence Act 1995* (Cth) as follows:

#### **59 The hearsay rule—exclusion of hearsay evidence**

(1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.

[41] Cowra Meat notes that the *Evidence Act 1995* (Cth) contains various exceptions to the hearsay rule such that, in various circumstances, evidence may be admissible notwithstanding that it is hearsay. Relevantly, s 63 provides, in certain circumstances, that the hearsay rule does not apply to evidence of a previous representation if the person who made the statement is not available to give evidence about an asserted fact. Cowra Meat submits that, in circumstances in which Mr Brown was not available to give evidence, the Commissioner should not have treated the evidence of Mr Rue as hearsay evidence. Cowra Meat also submits that the evidence of Mr Rue falls within the *res gestae* rule, a further exception to the hearsay rule.

[42] The submission is, in our opinion, misconceived. The hearsay rule set out in s 59(1) of the *Evidence Act 1995* (Cth) makes hearsay evidence inadmissible in proceedings to which the

Act applies. Sections 60 to 66A set out a series of exceptions to the hearsay rule such that, in various circumstances, a previous representation may be admissible to provide the existence of a fact asserted in the representation. Evidence which is admissible under one of the exceptions to the hearsay rule is nonetheless of a hearsay nature. The submission of Cowra Meat is premised on the proposition that, if an exception to the hearsay rule applies, evidence ceases to be hearsay in nature. The submission is simply wrong.

[43] Section 591 of the Act provides that the Commission is not bound by the rules of evidence. That, of course, does not mean that the rules of evidence are irrelevant to whether the Commission should receive evidence or how the Commission should treat evidence which is received. The Commission tends to follow the rules of evidence as a general guide to good procedure.<sup>29</sup> The rules of evidence reflect a system which is calculated to produce a body of proof which has rational probative force and should not generally be set aside, without danger of injustice, in favour of methods of inquiry which advantage one party and disadvantage the opposing party.<sup>30</sup>

[44] It may be appropriate for the Commission to receive hearsay evidence in some circumstances. If the Commission receives hearsay evidence, the hearsay nature of the evidence is nonetheless relevant in assessing the weight which should be given to the evidence and when weighing that evidence against direct evidence given by a witness. The rationale for the hearsay rule is that a hearsay statement may be unreliable, is not made subject to any compulsion to tell the truth and cannot be tested in cross-examination. Even if admitted as evidence, a hearsay statement will often be accorded less weight than direct evidence given by a witness and subject to cross-examination. There was no error in the Commissioner considering the hearsay nature of Mr Rue's evidence when assessing whether to accept Mr Moiler's evidence in relation to his encounter with Mr Brown on 17 March 2025.

[45] Cowra Meat also submits that the Commissioner erred by according no weight to Mr Rue's evidence. We do not accept the submission. In paragraph [50] of the decision, the Commissioner noted that Mr Moiler gave direct evidence about the interaction with Mr Brown and was cross-examined about the event. Having seen and heard Mr Moiler give this evidence, the Commissioner accepted Mr Moiler's denial of having raised his voice '[i]n the absence of anything other than hearsay evidence to the contrary'. This does not, in our view, suggest that the Commissioner accorded no weight to Mr Rue's hearsay account of what Mr Brown told him. On a fair reading of the decision, the Commissioner considered the value of both pieces of evidence and, having weighed the different forms of evidence, accepted that aspect of Mr Moiler's evidence. We detect no error in the approach of the Commissioner.

#### **Ground 5B and 5C – Alleged racist comments by Mr Moiler**

[46] Grounds 5B and 5C relate to the findings made by the Commissioner in relation to the allegation that Mr Moiler had, at some time in the past, made racist comments to other employees at the abattoir who were from a Pacific Islander background. As we have recorded, the Commissioner indicated, at paragraph [60] of the decision, that he was not satisfied that Mr Moiler made racist comments at work. The Commissioner repeated that finding at paragraph [85] in addressing whether there was a valid reason for dismissal and at paragraph [124] when considering whether reinstatement was an appropriate remedy.

[47] The conclusion in paragraph [60] of the decision was reached, in part at least, on the basis of the Commissioner's understanding that 'Mr Ryan did not say that he witnessed Mr Moiler making racist comments' and that the allegation of having made racist comments was not put to Mr Moiler in cross-examination. Those two aspects of the reasoning of the Commissioner are subject of grounds 5B and 5C. Ground 5B alleges that the Commissioner erred, or applied a wrong principle, in treating Mr Ryan's evidence as hearsay and ground 5C alleges that the Commissioner erred by applying the 'rule' in *Browne v Dunn* (1893) 6 R 76 or erred in the application of that rule.

[48] In relation to ground 5B, it is apparent that the Commissioner treated the evidence given by Mr Ryan, that Mr Moiler had made racist comments to other employees, as hearsay. The Commissioner understood Mr Ryan's evidence to be that he had not himself witnessed Mr Moiler make racist comments. The relevant part of Mr Ryan's witness statement dated 6 June 2025 is paragraph 11 and is in the following terms:

I had previously spoken to the Applicant about his conduct in the workplace. I do not recall the exact dates of these conversations. These conversations took place on the kill floor between the Applicant and myself. The Applicant did not appear to like working with Islander employees and referred to them as 'tree apes', 'black cunts' and 'monkeys'. He would use these expressions in the presence of other workers and speak to them in an aggressive manner. I could observe his conduct it was upsetting for them. I had spoken to the Applicant about his language and said to him words to the effect "*you cannot call others those names*".

[49] Mr Ryan was not cross-examined about the truth of the allegation that Mr Moiler had made racist statements to Pacific Islander employees. The cross-examination of Mr Ryan in relation to that matter was limited to clarifying whether any investigation was conducted or disciplinary action was taken against Mr Moiler in relation to that matter. Mr Ryan confirmed that no investigation had been conducted and he had simply spoken to Mr Moiler about the matter on the kill floor.

[50] There is much to lament about the way this evidence was put forward. Cowra Meat did not, expressly at least, rely upon alleged racism on the part of Mr Moiler to justify his dismissal. The evidence given by Mr Ryan about the matter was very general. It is unclear whether it is alleged the comments were made by Mr Moiler on a small number of occasions or often or whether these incidents had occurred recently or many years in the past. Although he indicated that he does not recall the exact dates of the conversations, Mr Ryan does not provide any indication as to when the incidents occurred. No clarification or further detail was provided in Mr Ryan's oral evidence.

[51] Notwithstanding the unsatisfactory manner in which the evidence was presented, it is clear that Mr Ryan's evidence was that he had personally witnessed Mr Moiler make racist statements. Mr Ryan stated that Mr Moiler 'did not appear to like working with Islander employees' and 'referred to them' as 'tree apes', 'black cunts' and 'monkeys'.. Mr Ryan asserts that Mr Moiler 'would use these expressions' in the presence of other workers, would 'speak to them in an aggressive manner' and that he 'could observe his conduct it was upsetting for them'. Those aspects of the evidence in Mr Ryan's witness statement, which he adopted in the witness box, assert that he had directly witnessed racist comments being made.

[52] With respect, we consider that the Commissioner erred in treating the evidence of Mr Ryan in relation to racist statements made by Mr Moiler as hearsay. Paragraph [60] of the decision indicates that, unsurprisingly, the Commissioner treated that evidence as of lesser value because he understood it to be second hand, rather than direct evidence. We do not consider that the Commissioner misapplied legal principle. However, ground 5B is established to the extent that the Commissioner misread the evidence of Mr Ryan.

[53] In relation to ground 5C, Cowra Meat submits that the rule in *Browne v Dunn* is inapplicable in proceedings before the Commission and, accordingly, the Commissioner erred in having regard to the fact that Mr Moiler was not cross-examined about allegedly making racist comments to other employees in arriving at his factual findings. We do not accept the submission.

[54] In *Re Ruddock; Ex parte Applicant S154/2002* [2003] HCA 60; (2003) 77 ALJR 1909, Gummow and Hayne JJ concluded that the rule in *Browne v Dunn* has no application to proceedings in the then Refugee Review Tribunal on the basis that those proceedings were ‘not adversarial, but inquisitorial’ and the Tribunal was not bound by ‘technicalities, legal forms or rules of evidence’.<sup>31</sup> Cowra Meat also referred to *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93; (2014) 226 FCR 555 (*Sullivan*) in which the members of the Full Court said that the Administrative Appeals Tribunal was not universally, or even generally, required to apply the rule in *Browne v Dunn*.<sup>32</sup>

[55] The application of those decisions to proceedings before the Commission is not straightforward. Although the Commission is not bound by the rules of evidence, proceedings before the Commission are commonly conducted in an adversarial fashion. The procedures adopted in proceedings arising from the dismissal of an employee generally, and unfair dismissal proceedings in particular, have traditionally been understood to be adversarial rather than inquisitorial in nature.<sup>33</sup> Furthermore, the rule in *Browne v Dunn* is ultimately a rule of procedural fairness.<sup>34</sup> The Commission is required to afford parties before it procedural fairness and a party may be denied procedural fairness if findings are made about the person in circumstances in which the person has not had a fair opportunity to address the matter. That was acknowledged by the Full Court in *Sullivan*. In relation to the Administrative Appeals Tribunal, Logan J observed that:<sup>35</sup>

... In undertaking such a review and where there are interested parties to the review with conflicting positions, there can be circumstances where it would be procedurally unfair for the Administrative Appeals Tribunal to base its decision on the acceptance of a particular witness called by one party without affording another party due notice of a differing version. To recognise this is not to subvert *S154* by assimilating the differing nature of judicial and administrative review proceedings. It is just that the inherently flexible content of a procedural fairness obligation can, where that obligation attends the exercise of administrative power, entail a requirement which resembles that which would flow in a judicial proceeding from observance of the rule in *Browne v Dunn*.

[56] The Commission may also be required to apply an approach at least akin to the rule in *Browne v Dunn* so as to ensure that parties to proceedings before it are accorded procedural fairness. What is required to ensure that persons affected by a decision of the Commission are accorded procedural fairness will depend upon the circumstances of each case.

[57] In this matter, the question is not whether Cowra Meat or Mr Moiler were denied procedural fairness, but whether the Commissioner erred in having regard to the fact that Mr Moiler was not cross-examined in relation to the allegation he made racist comments in the workplace. The Commissioner was required to make factual findings based on a review of the whole of the evidence. It was not irrelevant to the Commissioner's review of the evidence that Mr Moiler was not cross-examined about that matter. We do not consider that the Commissioner erred by considering the fact that Mr Moiler was not cross-examined in making factual findings as to whether Mr Moiler made racist statements. Ground 5C is rejected.

### **Ground 7A – Findings relating to racist statements**

[58] Ground 7A alleges that the Commissioner erred in finding that Mr Moiler did not make racist comments towards other staff members and that Mr Ryan did not say that he witnessed Mr Moiler making racist comments. For the reasons we have given, we consider that the Commissioner erred by misreading the witness statement of Mr Ryan and finding that Mr Ryan did not say that he personally witnessed Mr Moiler making racist statements. This error also infected the Commissioner's finding that Mr Moiler did not make racist comments because the finding was made, in part, on the incorrect understanding that Mr Ryan did not witness Mr Moiler making racist comments. We consider that this constitutes a significant error of fact for the purposes of s 400(2) of the Act. Accordingly, ground 7A is established.

### **Conclusion and disposition**

[59] For these reasons, permission to appeal is granted with respect to grounds 5A, 5B, 5C and 7A in the notice of appeal and error is established in the decision of the Commissioner on the basis set out in grounds 5B and 7A. With respect, the Commissioner erred in treating the evidence of Mr Ryan in relation to racist statements alleged to have been made by Mr Moiler as being hearsay rather than direct evidence.

[60] That is not necessarily the end of the matter. Even if an error is found in a first instance decision, the Full Bench could nonetheless dismiss the appeal if it concludes that the error was not likely to have affected the outcome. It is by no means obvious that the Commissioner would have come to a different conclusion in relation to the appropriateness of reinstatement had he correctly understood Mr Ryan's evidence. The Commissioner may still have found the statements were not made. Furthermore, the allegation that Mr Moiler had made racist statements is complicated by the fact that the evidence did not establish when the events were alleged to have occurred, the racist statements (if they were made) were not treated by Cowra Meat as warranting any disciplinary action other than a verbal discussion, and the allegation was not overtly relied upon at the time of dismissal.

[61] However, the statements attributed to Mr Moiler by Mr Ryan (if they were made) constitute instances of repugnant and deplorable racism. The Commissioner rightly observed, in paragraph [63] of the decision, that the allegations were 'incredibly serious' and that 'there is no place for racism at work or anywhere else'. In those circumstances, we consider that it is possible the Commissioner might have made a different factual finding if he had correctly understood Mr Ryan's evidence and that the Commissioner might have reached a different conclusion in relation to reinstatement. In those circumstances, the appeal must be allowed and

Mr Moiler's unfair dismissal application remitted to the Commissioner to redetermine the question of remedy.

[62] The Full Bench makes the following orders:

- (a) Permission to appeal is granted with respect to grounds 5A, 5B, 5C and 7A;
- (b) The appeal is allowed;
- (c) The order made by Commissioner Walkaden on 18 September 2025 in matter number U2025/4135 is quashed;
- (d) The application in matter number U2025/4135 is remitted to the Commissioner to redetermine the question of remedy consequent upon his finding that the dismissal of Mr Moiler was harsh, unjust or unreasonable.



## VICE PRESIDENT

### *Appearances:*

*A Harding*, of counsel, instructed by Wotton Kearney for the appellant.

*B Swan*, National Industrial Officer of the Australian Meat Industry Employees Union, for the respondent.

### *Hearing details:*

12 November 2025.

Sydney (in person).

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<sup>1</sup> *Leigh Moiler v Cowra Meat Processors Pty Limited* [2025] FWC 2793 at [132].

<sup>2</sup> [2025] FWC 2793 at [132].

<sup>3</sup> [2025] FWC 2793 at [10]-[11].

<sup>4</sup> [2025] FWC 2793 at [37].

<sup>5</sup> [2025] FWC 2793 at [37].

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- <sup>6</sup> [\[2025\] FWC 2793](#) at [38].
- <sup>7</sup> [\[2025\] FWC 2793](#) at [39].
- <sup>8</sup> [\[2025\] FWC 2793](#) at [40]-[42].
- <sup>9</sup> [\[2025\] FWC 2793](#) at [51].
- <sup>10</sup> [\[2025\] FWC 2793](#) at [53].
- <sup>11</sup> [\[2025\] FWC 2793](#) at [52].
- <sup>12</sup> [\[2025\] FWC 2793](#) at [56].
- <sup>13</sup> [\[2025\] FWC 2793](#) at [61].
- <sup>14</sup> [\[2025\] FWC 2793](#) at [62].
- <sup>15</sup> [\[2025\] FWC 2793](#) at [86].
- <sup>16</sup> [\[2025\] FWC 2793](#) at [93].
- <sup>17</sup> [\[2025\] FWC 2793](#) at [120].
- <sup>18</sup> [\[2025\] FWC 2793](#) at [124].
- <sup>19</sup> [\[2025\] FWC 2793](#) at [126].
- <sup>20</sup> [\[2025\] FWC 2793](#) at [127].
- <sup>21</sup> [\[2025\] FWC 2793](#) at [128].
- <sup>22</sup> [\[2025\] FWC 2793](#) at [128].
- <sup>23</sup> Amended Notice of Appeal dated 1 October 2025 at [2.1].
- <sup>24</sup> *Akins v National Australia Bank* (1994) 34 NSWLR 155 at 160 (Clarke JA).
- <sup>25</sup> *JJ Richards & Sons Pty Ltd v Transport Workers' Union of Australia* [\[2010\] FWAFB 9963](#); (2010) 202 IR 180 at [95]; *Mermaid Marine Vessel Operations Pty Ltd v Maritime Union of Australia* [\[2014\] FWCFB 1317](#); (2014) 241 IR 35 at [18]; *Mining and Energy Union v Specialised Mine Services Pty Ltd* [\[2025\] FWCFB 103](#) at [54]-[55].
- <sup>26</sup> *Fair Work Act* 2009 (Cth), s 604(2).
- <sup>27</sup> *Wan v Australian Industrial Relations Commission* [2001] FCA 1803; (2001) 116 FCR 481 at [30] (Spender, Kiefel, Dowsett JJ); *Ferryman Pty Ltd v Maritime Union of Australia* [\[2013\] FWCFB 8025](#); (2013) 238 IR 258 at [9]-[12].
- <sup>28</sup> *Coal & Allied Mining Services Pty Ltd v Lawler and others* [2011] FCAFC 54; (2011) 192 FCR 78 at [34] (Buchanan J); *Workpac Pty Ltd v Bambach* [2012] FWAFB 3206; (2012) 220 IR 313 at [14]; *Barwon Health – Geelong Hospital v Colson* [\[2013\] FWCFB 4515](#); (2013) 233 IR 364 at [6].
- <sup>29</sup> *King v Freshmore (Vic) Pty Ltd* (Print S4213, AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000) at [61]-[62]; *Hail Creek Coal Pty Ltd v CFMEU* (2004) 143 IR 354 at [48]-[50]; *Australian Meat Industry Employees' Union v Dardanup Butchering Company Pty Ltd* (2009) IR 1 at 2; *Gibbens v The Commonwealth of Australia (Department of Home Affairs)* [\[2018\] FWCFB 6449](#) at [33].
- <sup>30</sup> *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482 at 491-492 (Brennan J).
- <sup>31</sup> *Re Ruddock; Ex parte Applicant S154/2002* [2003] HCA 60; (2003) 77 ALJR 1909, at [55] and [57] (Gummow and Hayne JJ).
- <sup>32</sup> *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93; (2014) 226 FCR 555 at [48] (Logan J) and [158]-[159] (Flick and Perry JJ).
- <sup>33</sup> *Liddell v Lembke (t/a Cheryl's Unisex Salon)* (1994) 56 IR 447 at 455 (Wilcox CJ and Keely J); *Department of Social Security v Uink* (1997) 77 IR 244 at 248; *Fox v Australian Industrial Relations Commission* [2007] FCAFC 150; (2007) 161 FCR 263 at [75] (Buchanan J); *Gonva Group Ltd v Ramirez* [\[2025\] FWCFB 4](#) at [38].
- <sup>34</sup> *Carter v Federal Commissioner of Taxation* [2020] FCAFC 150; (2020) 279 FCR 80 at [26]-[28] (Jagot, Davies and Thawley JJ); *Australian International Islamic College Ltd v Brownson* [\[2025\] FWCFB 187](#); (2025) 343 IR 224 at [35].
- <sup>35</sup> *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93; (2014) 226 FCR 555 at [48] (Logan J).