NAVIGATION

*Unfortunately, the product's efficient navigation system with the index to the left of screen cannot be contained in this preview. Just use the scroll mechanism to the right and make sure you see the incredible depth of this publication by perusing the Index at p. 3.

GUIDE TO COMMONWEALTH & SOUTH AUSTRALIAN INDUSTRIAL & OHS LAW

UPDATE TO OCTOBER 2014

Index - Keyword headings
Index - Legislative Links
Index - Fair Work Act sections 1994
Index - Fair Work Act Commonwealth sections
Index - Fair Work (General) Regulations 2009
Index - Fair Work (Registered Organisations) Act 2009
Index - Fair Work Act Rules 2010
Index - Fair Work (Transitional Provisions ...) Act 2009
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Index - Long Service Leave Act 1997
Index - Occupational Health Safety & Welfare Act 1998 **Repealed**
Index - Work Health and Safety Legislation (National Scheme)

FAIR WORK AUSTRALIA TERMINATION OF EMPLOYMENT DECISIONS NOW INCLUDED

This guide aims to point the subscriber to all the relevant cases, and to provide helpful 'judicial' commentary stating the general principles, but it is no substitute for carefully researched legal consideration or advice.

The author is available on **0408 802 212** to answer any queries.

Every effort has been and will be made to keep the statements of law contained herein up-to-date, but please be careful to check the latest legislation and decisions yourself before relying on an older decision.

I thank my assistants Patricia Lee and Mark Nemstas for their assistance in the preparation of the Hardcover Loose Leaf and Web versions.

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USERS' GUIDE

Contents:
Summary of annotated legislation:

- Fair Work Act (SA) 1994 (formerly Industrial & Employee Relations Act 1994)
- Fair Work Act & Regulations (C'th)
- Fair Work (Registered Organisations) Act 2009
- Fair Work Act Rules 2010
- Fair Work (Transitional Provisions …) Act 2009
- Industrial Proceeding Rules
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- Long Service Leave Act 1987
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- South Australian Supreme Court decisions in State Reports (SASR) from 1971 ...
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- Unreported South Australian Supreme Court decisions from 1990.... (referred to as e.g. S/C2962). Decisions from 1999 onward referred to as 99(year)S/C279(No.) i.e. 99S/C279
- Decisions in the South Australian Industrial Reports from 1989. They are referred to not as **58 SAIR 759**, but rather simply as **58.759**, 58 being Vol. 58 and 759 being page 759.
- South Australian Industrial Reports, decisions from 1976-1989 (Vols. 43-55) - only decisions of special interest have been included.
- South Australian Industrial Court decisions 2000... referred to as CT1/00 (decision No 1 of 2000); South Australian Commission decisions - CM1/00.
- South Australian Industrial Court/Commission I prints 1990-1999 referred to as e.g. I35/95. "I35" is print number 35, "95" is the year.
- Industrial Relations Court "M" Prints from 1996.

C'th Coverage

The following FWA/FWC decisions are considered for publication in this service:

- FWA/FWC termination of employment/redundancy cases *Australia-wide*
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- Full Federal Court appeals from FWA/FWC decisions
- Cases of the SA branch of FWA/FWC on all issues
- Federal Circuit Court cases and appeals *starting from July 2014 (but working back)
- Academic articles of interest are also included
- Major legislative changes in the form of repeals or substitutions will be noted for sections that are included in this publication. Users are advised to check legislative history thoroughly.

Please Note:

Where a quote in a précis contains bold emphasis it was highlighted by the author for your assistance.

Re Section Annotations - the letters and numbers in brackets refer to the sub-sections.

Precedential value only - decisions not considered of precedential value are not included.

Whilst every care has been taken in the preparation of this Guide, Kidd LRS Pty Ltd and David Kidd accept no responsibility for any inaccuracy, error or omission contained in this Guide or for any damage or loss arising from any such inaccuracy error or omission.

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Coercion

Commentary

"[25] The application of the term 'coercion' to an industrial relations setting was discussed in the matter of Hodges v Webb [1920] 2 Ch. 70 when Peterson J was considering an issue of alleged coercion of an employer in the context of certain threatened disputation. Notwithstanding that context, the following approach is generally relevant to the issue before the Tribunal:

> 'Freewill has been much discussed in the region of metaphysics, and lawyers might be content that the discussion should not extend to the realm of law. The test may be equivalent to an inquiry whether the employer would have acted in a particular way if the particular motive or inducement had been absent. But the fact that he would have acted differently if the circumstances had been different does not show that in adopting the course in question he was acting under coercion or compulsion. Such a test would be inconsistent with the views expressed by several of the learned Lords in Allen v Flood and would admit as coercion any act which induced a man to do something which he is reluctant to do. "Coercion" involves something in the nature of the negation of choice; and I respectfully adopt the view of Lord Watson in Allen v Flood, that an employer cannot properly be said to be coerced if, having two alternative courses presented to him, he follows that course which he considers conducive to his own interests.' (86 - 87)"

Collateral challenge

CT35/08 T & R ("There is no general principle that a collateral challenge is permissible in the case of all legislative or administrative acts … [See] *Jacobs v Onesteel Manufacturing Pty Ltd & WorkCover Corporation*. … [where] Besanko J acknowledged that there is nothing in *Ousley* which would suggest that a collateral challenge to the validity of subordinate legislation such as the [WCT] Rules 2002 relating to costs cannot be determined by that Tribunal when determining a worker's entitlement to costs" @ 4)

Collective bargaining

Cooper & Ellem, '*Fair Work and the Re-Regulation of Collective Bargaining*' (2009) 22 Australian Journal of Labour Law 284

Hon Acton J, '*Negotiating the Bargaining Highway*' (2010) 16(7) Employment Law Bulletin 94

Naughton R, '*The Low Paid Bargaining Scheme – An Interesting Idea, But Can it Work?*' (2011) 24 Australian Jo. of Labour Law 214

Dismissal – *Assault / aggressive behaviour*

Butterworth S, *'Investigating Fights at Work: Should the Employees be Dismissed?'* (2012) 18(1) Employment Law Bulletin 15

Fair Work Act… CM21/06 Thomson (**carer in volatile situation while restraining struggling client with help from others inappropriately landed blows to client's head** in a momentary lapse - dismissal not harsh etc)

FWA - Cth [2010] FWA 2605 **NSW** *Zoumas v TNT Aust* (A dismissed for retaliatory conduct when provoked by co-worker - R had a 'no fighting' policy - A's conduct had been blown out of proportion - **no valid reason for his dismissal** - A reinstated), [2010] FWA 2956 **Vic** Gleeson v Aurora Energy (dismissal not harsh etc when A **deliberately punched co-worker**, causing injury to co-worker's eye, where little in the way of provocation), [2010] FWA 5156 **WA** *Cutrali v Chubb Security* (A, even if he was under threat from co-worker, used **excessive force** against co-worker - dismissal not harsh etc), [2010] FWA 6124 **SA** *Evreniadis v Swire Cold Storage P/L* (valid reason existed for A's dismissal when **A forcefully shoved co-worker who provoked him and then denied doing so** - dismissal not harsh etc), [2010] FWA 8062 **NSW** *M v The Company* (**prison officer not found to have exercised unreasonable force on inmate** - dismissal harsh etc - reinstated), [2011] FWA 111 **Vic** *Murphy v David Robinson Landscaping* (the A's dismissal for a **course of violent and threatening behaviour** not harsh etc - A's claim of provocation rejected), [2011] FWA 227 **WA** *Frichot v Centre West Exports* (FWA found that the A **threatened an administration manager** "with words to the effect that she had better watch out and that he did deliberately with both hands **forcefully push a door towards her** causing her to fall backwards such that she would have fallen to the ground had she not been caught" @49 - dismissal not harsh

etc), [2011] FWA 6671 **Vic** *Forster, Keele, Marley & Azzopardi v G4S Custodial Services* (the applicants were **custody officers who were dismissed for assaulting an unruly and troublesome inmate** - dismissal not harsh etc), [2011] FWA 6843 **WA** *Rahimi v Serco Australia* (The A was a client services officer at the Perth Immigration Detention Centre - he was **late for work on one occasion and his partner was left alone with responsibility for two detainees** (a mother and child) who were high flight risks - "The nature of … [A's] work demanded that he be honest, diligent, reliable and conduct himself with integrity. … **[T]his is not an ordinary isolated instance of lateness but an Employer faced with an employee whose explanation for arriving late at work was replete with lack of credibility, lack of recall, contradictions and believability.** In the circumstances of the nature of the work, the Employer was entitled, after gathering information, giving Officer Rahimi the opportunity to explain himself and a disciplinary procedure to reject his explanation and to adequately conclude that it no longer had confidence and trust in him" @118 - dismissal not harsh etc), [2011] FWA 8046 **SA** *Guidera v Svitzer Australia* (the A was dismissed when he had a fight at employer-provided accommodation with a **co-worker who later had to be hospitalised for his leg injury sustained in the fight** - A's **claim of self-defence was rejected** - there was **little evidence of provocation** - company policies found to apply re incidents such as this occurring in employer-provided accommodation - A's four year's service considered, but dismissal not found to be harsh etc), [2012] FWA 15 **NSW** *Wach v Teys Bros* (the A was the **victim of an unprovoked assault** by co-worker - A's **retaliatory behaviour** provided R justification for his dismissal, but not his summary dismissal), [2012] FWA 992 **Qld** *Flood v Aviation Ground Handling* (airport operations manager spoke to worker about an **untoward driving incident** he was involved in - **worker not happy to be spoken to and invited manager 'outside'** [which was interpreted as an invitation for a fight] - dismissal not harsh etc), [2012] FWA 1250 **NSW** *Lambley v DP World Sydney Ltd* (the A was involved in a fight at work and such gave R a valid reason for dismissing him - however, dismissal harsh etc as A was **set up by a co-worker** with a reputation for bullying, there was manipulation of the CCTV evidence, and R failed to take into account co-worker's reputation - A re-instated with only **partial compensation for lost remuneration** - see commentary below setting out the **principles re dismissal for fighting in the workplace** - **Appeal allowed** in [2012] FWAFB 4810 - Full Bench stated that "[i]f Mr Smith had set up Mr Lambley to engage in this conduct in front of CCTV cameras, it does not in any way excuse Mr Lambley's conduct or suggest that an employer cannot reasonably discipline an employee for the conduct in which they have clearly engaged. We do not consider that this possibility, even if correct, is capable of outweighing the otherwise **inherent fairness of dismissing an employee for engaging in a serious assault** after following a procedurally fair investigation" @29 - further appeal dismissed by majority 22/11/13 in [2013] FWCFB 9230 - dismissal not harsh etc), [2012] FWA 3403 **NSW** *Vyramuthu v Challenger Cleaning* (the A **physically pushed a co-worker and used aggressive and abusive language** to get him to perform his duties more expeditiously - dismissal not harsh etc), [2012] FWA 529 **Vic** *Kotsidis v Toyota Motor Corp. Aust* (the A's dismissal for **violently grabbing his colleague around the neck and pushing him backwards** whilst under **significant provocation** not harsh etc - A was a team leader), [2012] FWA 8444 **SA** *Dransfield v Rail Commissioner* (the A was a **Passenger Services Officer who initiated "physical contact with a member of the public** which was not justified by an immediate threat to his own safety or that of others" @59 - A was being verbally abused by two members of the public - A indicated that he would behave in the same way if in the same situation - valid reason for dismissal - dismissal not harsh etc), [2012] FWA 9080 **SA** *Adewumi v Helping Hand Aged Care Inc.* (found that the **A hit and/or slapped a resident in her care** on her arms, hand and face causing a skin tear, and that such was serious misconduct - dismissal not harsh etc), [2012] FWA 10270 **Vic** *Guneyi v Melbourne Health* (**summary dismissal of security guard (A) justified** when he was threatened by patient, did not move away, was punched by patient, and responded by **slapping patient** - patient was unharmed - A said he would react in the same way if such an incident was repeated), [2013] FWC 800 **NT** *Kumar v Evolution Marketing Services* (FWC "satisfied that **Mr Flood's belief that Mr Kumar's conduct was sufficiently serious to justify summary dismissal, was reasonable.** Mr Flood was faced with an employee who had indicated that he was able to work on a full time basis, and who had behaved in an aggressive and unreasonable manner in the workplace. After demanding a meeting with Mr Flood on 15 June 2012, Mr Kumar removed chairs from Mr Flood's office giving the **impression that he was clearing the room in readiness for a physical altercation.** Prior to and throughout the meeting on 15 June 2012, Mr Kumar was aggressive and spoke with a raised voice" @62 - A's dismissal consistent with Small Business Fair Dismissal Code), [2013] FWC 290 **Vic** *Savage v Visyboard* (**unprovoked physical assault** in the nature of elbowing a co-worker provided valid reason for dismissal, as did A's **verbal abuse** which constituted **bullying and**

harassment - a reasonable concern about the safety and welfare of other workers in A's presence due to the inexplicable nature of his conduct - dismissal justified), [2013] FWC 3436 **NSW** *Chapman v Lion-Dairy & Drinks* (the A had a fight with another worker - A found to be the aggressor, and even if he wasn't, his **'retaliation in self-defence' was disproportionate in the circumstances**), [2013] FWC 7888 **NSW** *McAdie v Vanderfield* (The A was dismissed for a "**deliberate, considered, and aggressive confrontation" with his employer** in the context of their having been several complaints by customer against him - some procedural problems with A's dismissal, but on balance, dismissal not harsh etc), [2013] FWC 7908 **WA** *Whittaker v EDI Rail-Bombardier Transportation (Maintenance)* (A's **dismissal for his involvement in a fight at work with another co-worker not harsh** etc - A could have avoided the incident and he did not have reasonable grounds to believe he was in immediate danger - he **did not have to trade blows**), [2014] FWC 1645 **NSW** *Kongor v Red Lea Chickens* (the A "engaged in serious misconduct when he **refused the lawful and reasonable direction to leave the meeting** and continued to argue with those present in what can objectively be described as an **aggressive and intimidating manner**, and thereby caused distress to the female staff that were present" @30 - the police had to be called to remove him and he was then terminated - this was in the context of previous similar behaviour not amounting to serious misconduct - A not notified of his dismissal before it occurred, but "little weight [given] to this factor because of the nature of Mr Kongor's misconduct, and the fact that during the hearing he did not disclose any explanation for his conduct (beyond a mere denial …) such as to suggest that the provision of procedural fairness would have given him any real opportunity to avoid dismissal - dismissal not harsh etc), [2014] FWC 1649 **Qld** *Aiono-Yandall v Linfox Australia* (**after being given a final warning in writing for aggressive conduct toward supervisor the A was dismissed because of similar behaviour in a later incident** - in meeting regarding this incident he showed "a high level of aggression marked by abusive language and aggressive physical gestures (which caused physical damage to the employer's premises)" @78 - his behaviour caused his site managers to feel threatened - dismissal not harsh etc), [2013] FWC 8806 **Qld** *Rowe v Newland Food Company* (the **A was summarily dismissed after calling a co-worker and dog and telling them they better watch their back** - "Counselling or a warning may have been more appropriate. It certainly would have been appropriate to more thoroughly investigate … rather than to summarily dismiss … [T]he **evidence is not that the applicant entered the personal space of Mr White or that there was any indication the applicant may have been intending to physically assault Mr White**" @40 - "had no history of having threatened any other employees physically or verbally. There is evidence that the applicant appeared to be an efficient and effective employee in other respects during his employment, certainly up to at least 20 May when he was removed from the leading hand role, although there was never a real opportunity for him to understand the reasons for that. So the incident needs to be seen in that broader context where the **applicant had been given no opportunity to engage with the respondent about the decision made the previous day to demote him**" @45 - dismissal harsh etc - compensation ordered), [2014] FWC 3670 **NSW** *Brown v Coles Group Supply Chain* (the A was involved in a **physical altercation with another employee** (Mr H) - A was being taunted and harassed by Mr H and decided to confront him to sort the issue out - Mr H's "reaction was unexpected: he approached Mr Browne very quickly and came up close to his face in a way which made Mr Browne apprehend that Mr Hearne was going to strike him. That caused Mr Browne to push him in the chest" @60 - **A's push and a subsequent push, before he was punched in the face breached R's code of conduct** - valid reason for dismissal found, but A's summary dismissal "harsh in its consequences for his personal and economic situation, and it was disproportionate to the gravity of his misconduct" @72 - A has been unemployed for six months - **reinstatement ordered, but no compensation**), [2014] FWC 5071 **Tas** *Greene v Hobart Historical Cruise* (**small business** - the R **business owner "with some justification, felt he had been assaulted by Mr Greene**. Under the Small Business Code, this is justification for **summary dismissal** without notice or warning" @62)

Full Bench decisions

[2011] FWAFB 7280 **Vic** *Savinelli* (the A, who was **not provoked**, deliberately **struck another employee in the back** causing them pain - dismissal not harsh etc), [2013] FWCFB 5761 **NSW** *JBS Australia v Reng* (the R was justified in dismissing A for **deliberately failing to follow his supervisor's instructions to leave her office after violently and aggressively remonstrating** with her and another worker - A also placed her safety at risk by **pushing the office door into her**)

Commentary

[Rodgers] "13 … We think these authorities support the view that in determining whether there is a valid reason for a termination of employment arising from a fight in the workplace the Commission should have **regard to all of the circumstances in which the fight occurred including, but not limited to:**

- whether the terminated employee was provoked and whether he or she was acting in self defence;

- the employer's need to establish and retain discipline amongst its employees; and

- the service and work record of the employee concerned. …

[14] In this matter there is no evidence of provocation. This mitigates against Mr Rodgers.

[15] In regard to 'the employer's need to establish and retain discipline…', HVE's policies and objectives in ensuring the workforce is free from harassment and abuse are reasonable policies and they were well known to Mr Rodgers.

[16] The service and work record of Mr Rodgers over 14 years was impeccable which mitigates in his favour. In this regard … Mr Rogers's behaviour at the time was 'out of the ordinary'.

[17] I have considered the submissions on extenuating and mitigating circumstances and am not persuaded that, to the extent that they were a factor, they outweigh the seriousness of the misconduct.

[18] A termination of employment can arise from a single incident notwithstanding the employee's previous good service and loyalty. This is one such case.

[19] Mr Rodgers's assault [a **push to co-worker's face with an open hand with sufficient force to move it 45 degrees**] was an unprovoked act of intimidation. To describe it as at the lower level of violence followed by a 'hollow invitation' to carry it further outside only seeks to place a qualification on serious workplace misconduct which … is untenable. There can be no **acceptable level of unprovoked violence in the workplace**.

[20] …I am satisfied there was a **valid reason for the termination**." **Rodgers v Hunter Valley Earthmoving Co. P/L** 18/12/09 [2009] FWA 877 Comm. Harrison (NSW)

[Lambley] **"[139]** A Full Bench of the AIRC in *Tenix Defence Systems Pty Ltd v Fearnley* … said …

"Before dealing with each of these submissions we wish to make some brief observations on the approach taken by industrial tribunals when fighting or an assault has been established. In *AWU-FIME Amalgamated Union v Queensland Alumina Limited* Moore J summarised the relevant decisions in the following passage:

'What emerges from these decisions is that whether a dismissal or termination arising from a fight in the workplace is harsh, unjust or unreasonable will depend very much on the circumstances. However, **generally the attitude of industrial tribunals tends to be that in the absence of extenuating circumstances, a dismissal for fighting will not be viewed as harsh, unjust or unreasonable**. The extenuating circumstances may, and often do, concern the circumstances in which the fight occurred as well as other considerations such as the length of service of the employee, including their work record, and whether he or she was in a supervisory position. As to the circumstances of the fight, relevant considerations include whether the dismissed employee was provoked and whether he or she was acting in self defence'.

Not dissimilar views, albeit in a different statutory context, have been expressed by a Full Bench of the Industrial Commission of South Australia in *Torbet v Commissioner for Public Employment* as follows:

'In considering what was the appropriate remedy for the misconduct a strong push on the chest where both participants were screaming at each other, the employer seems to have regarded dismissal as the only remedy. The evidence of Mr. Keeley strongly suggests that the committee of enquiry, having reached the conclusion that an assault had taken place, thought it had no alternative than to dismiss the employee. But what this employer needed to consider was whether, upon weighing up the seriousness of the assault against the mitigating or extenuating circumstances, dismissal should occur, or whether some other and less serious punishment was appropriate. In reaching that decision the employer would also need to take into account the competing necessity to establish and retain discipline amongst its employees'.

The above passages were cited with approval by a Full Bench of the Commission in *Mobil Oil v Giuffrida*. We also note the following observation by the Federal Court - in another fighting case - *Qantas Airways Limited v Cornwall*:

‘We accept that in this case ... it is necessary to examine the circumstances surrounding the conduct relied on, which constitute the "relevant factual matrix", to decide whether the termination was supported, in the words of the statute, by "a valid reason ... connected with the employee's ... conduct". As was said in *Cosco Holdings and in Allied Express Transport*, a valid reason is one which is "sound, defensible, or well-founded". But it is important to remember that the governing words are those of the statute, and that attempts at judicial explanation should not be substituted for the statutory provision. The question remains whether, the employer having terminated the employee's employment, there was a valid reason connected with the employee's conduct.

We have already stated that the respondent, in the present case, struck his supervisor. That is not now in dispute. Nor is it in dispute that Qantas acted on this conduct as a reason when it terminated the respondent's employment. The question is whether there was a valid reason. In general, conduct of that kind would plainly provide a valid reason. However, **conduct is not committed in a vacuum, but in the course of the interaction of persons and circumstances, and the events which lead up to an action and those which accompany it may qualify or characterize the nature of the conduct involved**’.

We think these authorities support the view that in determining whether there is a valid a reason for a termination of employment arising from a fight in the workplace the **Commission should have regard to all of the circumstances in which the fight occurred including, but not limited to**:

- **whether the terminated employee was provoked and whether he or she was acting in self defence**;
- **the employer's need to establish and retain discipline amongst its employees; and**
- **the service and work record of the employee concerned**.”

[140] In the judgement of His Honour *Moore* J, in *AWU- FIME v Queensland Alumina Limited*, His Honour also observed that **fighting in a dangerous working environment could have much more severe consequences** for the participant and other employees, than fighting in a more benign environment. His Honour said at page 392:

‘QAL operates a large, complex and dangerous industrial plant and the failure of employees to carry out their duties properly can, potentially, lead to death or injury to the workforce and significant loss of production to QAL.

Witnesses called by QAL conceded that in the working environment tensions can arise between members of the workforce. I accept, however, that it is important to QAL both in its interests of the workforce to ensure that fighting does not occur at the workplace. This is obviously so in areas where plant is located. The Union made the point that that the fight occurred in the crib room which can, as it characterised it, be described as a sanctuary from the workplace.

However the policy of QAL would lose much of its effectiveness if it was to be subject to a qualification that while fighting could not occur in the vicinity of operating plant, it would not view as serious fights occurring elsewhere.’ ”

Lambley v DP World Sydney Ltd 21/3/12 [2012] FWA 1250 DP Sams

Dismissal – *Back biting*

FWA - Cth [2011] FWA 575 **Vic** *Davies v Hip Hop* (R, a small business employer, had a rigid ‘no back biting policy’ - A’s dismissal for back biting harsh etc - it **lacked procedural fairness and was a disproportionate response**)

Dismissal – *Bullying & Harassment*

See also S.789FF

Freckleton I (Dr) (SC), ‘*Employers’ Liabilities for Bullying-Induced Psychiatric Injuries*’ (2008) 16(1) Journal of Law & Medicine 9;

Rooding A, *‘Workplace Bullying - No Place to Hide’* (2008) 82(11) LIJ 54

Baker & Fletcher, *‘Victoria’s New Bullying Laws - What do they Mean for Employers?’* (2011) 14(7) IHC 77

FWA - Cth [2010] FWA 4359 **SA** *SB v FC P/L* (A was unfairly dismissed for alleged poor work performance and bullying - A was only 19 - her **age** was considered a relevant matter re R’s handling of her dismissal), [2011] FWA 2113 **NT** *Gray v Automotive Brands* (the A was a storeman who was summarily dismissed for **three acts of bullying of co-workers** - such constituted a valid reason for dismissal - there was a culture of bullying in the workplace - A had recently been to anti-bullying training and was aware of R’s **new zero tolerance policy** to bullying - A had not seen

policy, but aware of it - **dismissal harsh due to unsatisfactory investigation and failures re opportunity to respond and opportunity for support person**), [2011] FWA 2689 **NSW** *Matolov v UWS College* (the A was dismissed for conduct in relation to co-workers such as "**using a loud voice, banging his hand on a table at meetings, being aggressive, dominating meetings and engaging in heated discussions**" @9 - he was given significant opportunities to modify his behaviour - despite the lack of procedural fairness in his dismissal i.e. **not being told that he was about to enter a dismissal meeting**, A's dismissal not harsh etc), [2011] FWA 7244 **Vic** *Edmonds v Inghams Enterprises* (A's employment was terminated on 30 May 2011 following the bullying and harassment of another employee … which was found to be in **breach of [R's] harassment, bullying, anti-discrimination and equal opportunity policy**. [A] had previously been issued with a **final warning** for such behaviour with respect to the same employee on 19 April 2011" @4 - in May **A pushed her co-worker with her hands** - there had been 6-12 months of ill-will between A and the same co-worker - dismissal not harsh etc), [2012] FWA 1232 **Vic** *Starkie v Baramba Organics* (the A's "continued **aggressive and intimidatory behaviour in a small workplace**, despite having been [verbally] warned about it outweigh, by a fine margin, the lack of procedural fairness at the point of her dismissal and the lack of a formal process prior to that event" @178 - dismissal not harsh etc), [2012] FWA 6147 **Qld** *Saunders v OSI International Foods* (see précis at Absenteeism/attendance), [2012] FWA 6615 **NSW** *King v Coal & Allied Operations* (a co-worker of A, Turner, "had asked and been granted the opportunity to have a separate crib break. He was granted this request because he said that King used to harass him when he was on crib breaks. So, Turner is on a separate crib break to other employees and King came into the crib room. Why? There was no evidence that his crib break had been changed to be the same as Turner's. King then engaged in conduct that Turner said was intimidation: looking at Turner; eating a bag of chips; making louder noises than usual; **kicking a table causing Turner's table to vibrate**; when Turner looked up, King would stop and look away; and when King left the crib room, he bumped Turner's chair" @321 - found that such conduct took place and gave R a valid reason to dismiss A - it was a **major breach of R's disciplinary policy as intentional physical force was involved** - dismissal not harsh etc), [2013] FWC 6559 **Qld** *Bucknor v Aero-Care Flight Support* (the A's **abrasive and forthright behaviour toward those she was managing found not to amount to bullying**), [2013] FWC 9587 **Vic** *Federici v Kmart* (the A's dismissal for continuing to **mimic accent of a co-worker after having been warned** not harsh etc - A was familiar with R's equal opportunity policy, yet mimicked co-worker on several occasions - A's denials of conduct rejected), [2013] FWC 9484 **Vic** *Attard v Patrick Stevedores Holdings* (the A was dismissed for an **indirect threat to a co-worker** suggesting he better watch himself as the workplace was a dangerous place - this was serious misconduct - A was aware of R's policies against such conduct - R attached great importance to eradicating bullying and harassment - A's recent disciplinary record concerned R, although A had not previously been disciplined for bullying - dismissal not harsh etc), [2014] FWC 5072 **Tas** *Cannan & Fuller v Nyrstar Hobart* (there was a **long history of behaviour of a bullying nature in pre-start meetings** by applicants - the applicants strongly voiced their work and safety concerns at these meetings - R had effectively **condoned their conduct** for many years - they were employees in their 50s with very long service with R - valid reason for dismissals, but dismissals harsh - reinstatement ordered) [see also S.789FF]

Dismissal – Business downturn

FWA - Cth [2013] FWC 3868 **Qld** *Katsambis v Logandale Plaza News* (casual employee of small business dismissed due to business downturn - dismissal not harsh etc) See also Redundancy & S.389

Dismissal – Cash handling procedures / money issues

FWA - Cth [2011] FWA 3687 **ACT** *Jasinski v Navitas English* (the A's dismissal for **not following proper cash handling procedures** in relation to student money not harsh etc), [2012] FWA 6918 **Vic** *Cini v Plenty Valley Services Association* (a valid reason existed for dismissing A as he **used cash handling procedures contrary to R's policies**, albeit benevolently and not dishonestly - a procedural deficiency in the investigation rendered dismissal unfair - no remedy granted), [2012] FWA 6712 **Vic** *McGregor v Melbourne Equine Veterinary Group* (the A claimed she was constructively dismissed - she **resigned at a meeting with management over an issue she had been warned about** - A **chose not to bring a support person**, although she knew of the seriousness of the meeting and knew it would be intimidating appearing before senior management - no constructive dismissal - A had other options reasonably open to her other than

resignation - A **knew she could have retracted resignation** and the **meeting was not handled in an intimidating way** - the meeting was not one intending to bring the employment relationship to an end), [2013] FWC 6132 **WA** *Shea v Action Industrial Catering* (the A "was primarily dismissed … for obtaining, as relief manager, $468.50 from another employee to cover a **shortage in the bar cash register**. Mr Shea claims that the money was given voluntarily" @2 - A **acted contrary to R's 'no credit' policy and had manipulated employee to offer to cover shortage** - dismissal justified)

Dismissal – ***Carers leave (inappropriately taking)***
FWA - Cth [See Dismissal - Leave (issues associatd with)]

Dismissal – ***Casuals***
See Casuals

Dismissal – ***Chat room participation***
FWA - Cth [See *Lambert* at Dismissal – Sexual/Pornographic issues]

Dismissal – ***Clients (acting against interests of)***
FWA - Cth [2010] FWA 4178 **Vic** *Smith v Healthscope* (**A went to a meeting he was not entitled to attend and used a disabled client to help him attend** - his dismissal "related to his total indiscretion in taking a person with an acquired brain injury into a meeting that they were not entitled to be at" @24 - being at the meeting was **potentially harmful to the client** - A being **asked to leave** constituted a disruption to the meeting - dismissal not harsh etc)

Dismissal – ***Clients (inappropriate behaviour towards)***
[2012] FWA 5722 **WA** *Hollands v Office & Industrial Cleaning* (**foul language in a conversation with a client on one occasion** did not give a valid reason for A's dismissal), [2013] FWC 1077 **NSW** *Macdougall v Sydney City Toyota* (the A was part of R's fleet sales team and a key part of his job was to maintain good customer relations with R's clients - A found to have **initiated a heated altercation with a representative of one of R's important clients in front of other customers** - he was **quite aggressive** and rude - he **swore at R's representative** twice and caused an imminent risk to the reputation and profitability of R - dismissal not harsh etc), [2013] FWC 10064 **ACT** *Ikechukwu v Goodwin Aged Care Services* (**carer's dismissal for not attending to client's needs as requested not harsh** etc - she did not assist a client to go to the toilet, removed client's buzzers and told them to shut up - her conduct amounted to client abuse - permission to appeal refused in [2014] FWCFB 6405)

Dismissal – ***Communication of***
FWA - Cth See Dismissal - When & whether

Dismissal – ***Competition***
FWA - Cth [2012] FWA 10248 **SA** *Erskine v Steri-Flow Filtration Systems (Aust) Pty Ltd* ("In general terms, **where an employee [Erskine] engaged in research and development work, is found to be the Director and sole shareholder of another company which could be shown to be using the employer's property without express authorisation and, in effect, competing with it, is most likely demonstrating serious and wilful misconduct**" @34 - Erskine's "continued directorship and ownership of a company which was … clearly in conflict with his employer, represented a valid reason for the termination of his employment. When considered objectively, the relationship was simply unsustainable given the extent of the conflict" @42 - *summary* dismissal not however appropriate as there had been no reasonable investigation into A's conduct - **Appeal allowed** in 24/4/13 in [2013] FWCFB 1943 - reasonable investigation had been carried out - summary dismissal justified), [2013] FWC 430 **NSW** *Hepner v Fine Food Solutionz* (in the context of a **conflict between two hostile co-directors** of R, **A set up a competing company with one of the director's authorisation** - authority was not given by the company to do this -

dismissal justified - Appeal dismissed [2013] FWCFB 2060), [2013] FWC 2621 **Vic** *Mahony & Russell v Pipe Hunter* ("Both Applicants were terminated [summarily] for alleged serious misconduct, which related to the **registration of a company** on 9 September 2012 and their alleged intention to operate the business in direct competition with the Respondent in breach of the Applicant's employment obligations" @5 - **dismissal was premature and unfair as the applicants only had an intention at some stage in the future to start their own business** - the registration of the company name was not associated with an intention to soon start operating a business - decision quashed in [2013] FWCFB 4852 because Commissioner erred in deciding there was no need to determine if dismissal was harsh etc. because of finding there was no valid reason for dismissal - Commissioner did not exercise discretion required by Act - matter settled by agreement), [2013] FWC 4282 **ACT** *Pedley v IPMS* (the **A was summarily dismissed for sending an email to his employer's clients telling them that he was about to start his own business offering them his services at cheaper rates** - the fact that R had not previously objected to A running a part time after hours business of a similar nature, but on a much smaller scale did not amount to R **waiving its rights** - R had lost trust and confidence in A - dismissal not harsh etc), [2013] FWC 4348 **Vic** *Monteith v Brandon Electrical* (R dismissed A whose training contract was soon to end for **undertaking after hours off the books/cash work for one of its clients** - A's ignorance of his obligations did not excuse his misconduct - dismissal not harsh etc), [2013] FWC 6157 **Qld** *Bonaventura v Machinetek Engineering* (the R anticipated that A in the future would set up a competing business - **no valid reason for dismissal when competing business from A only anticipated** - see para 100), [2014] FWC 4411 **NSW** *Roberts v Resource Australia Transport* (three valid reasons for dismissal of A including **setting up competing business while employed by R, working in such business while claiming sick leave** and misappropriating cash from the sale of R's product - A also **dishonestly denied his misconduct** - dismissal not harsh etc)

Dismissal – *Complaints by clients*

Friedman B, '*Dismissed for being "Out of Control", or making complaints?*' (2013) 19(3) Employment Law Bulletin 34

[2011] FWA 1335 **Qld** *Zielke v National Hearing Care* (R had a valid reason to dismiss A, namely her **rudeness to clients {who had formally complained} and co-workers** - however her **dismissal was harsh as she did not intend to be rude and she had little insight into her behaviour** - further, R's process for recording and dealing with customer complaints was inadequate and such inadequacy hindered A's opportunity to respond to allegations - R should have been more proactive in helping A to improve her conduct - A was 61 and the consequences of her dismissal were harsh in terms of her employment prospects), [2011] FWA 8901 **ACT** *Lavender v Simon J Roberts Farrier Service* (small business - some **clients did not like the way A treated their horses** - a valid reason to dismiss A existed related "both to his capacity to perform his work and mainly to his conduct, in particular his attitude, both to Mr Roberts as his employer, and to the clients of the business. … [A] **failed to comply with directions** given to him by Mr Roberts and performed his work in such a manner that complaints were made about him by clients of the business" @42 - A only received informal warnings - dismissal not harsh etc), [2012] FWA 4613 **WA** *Jiang v Aus World Enterprise* (small business employer - travel agency - when a client made a complaint against A, she offered to resign, but R transferred her to another office - not long after this, another client complained about her there - **R's reputation at risk because of A's unacceptable attitude toward clients** - dismissal not harsh etc)

Dismissal – *Complaints of worker*

Friedman B, '*Dismissed for being "Out of Control", or making complaints?*' (2013) 19(3) Employment Law Bulletin 34

I84/94 Smith (applicant raised issues - accused of being trouble maker - dismissal harsh etc), I116/95 Cousins (dismissed unfairly because of complaining about underpayment of wages - compensation assessed)

Fair Work Act… CM14/07 Mazaney (worker was dismissed by employer in a "spur of the moment decision based on what he considered to be unreasonable demands of an ungrateful employee" @ 25 - dismissal harsh etc),

FWA - Cth [2010] FWA 5395 **ACT** *Salmond v Dept. of Defence* (A's dismissal for making numerous **unjustified and offensive complaints/accusations against employees of R** in breach of the APS Code of Conduct justified - **Appeal dismissed** in [2010] FWAFB 9636), [2013] FWC 2104 **Qld** *Fishley v Inclusion Works Association* (the A "engaged in a **grievance/complaint process**

against his colleagues. The range of these complaints by the Applicant could not be substantiated and undermined the working relationship. The **series of complaints had the effect of destabilising these employment relationships and reducing the effectiveness of the small business organisation**. Further, the actions of the Applicant were viewed to be vexatious and … he demonstrated a disregard for the instructions or directions given by his supervisors. He also preferred his own view of progressing matters contrary to the Respondent's policies and procedures" @73 - dismissal not harsh etc), [2013] FWC 5468 **NSW** *Finn v Penrith Seafoods* (the A was dismissed for **complaining about being paid in cash and not receiving appropriate pay advice information** - he was also dismissed for raising concerns with other workers about this despite being warned not to - dismissal harsh etc - R's practices reported to ATO and FWO)

Dismissal – *Computer (inappropriate use of)*

FWA - Cth [2011] FWA 6457 **NSW** *Williams v St Vincent de Paul Society* (the A was R's IT manager - A deliberately **disabled the workplace relations manager's ActiveSync, gained access to email accounts he shouldn't have** and was dishonest in responding to allegations - dismissal not harsh etc), [2012] FWA 5390 **Vic** *Margelis v Alfred Health* (there was a valid reason for dismissing A, an IT worker, for "seeking to breach the Alfred's IT policy by **gaining access to his manager's email accounts without authority**" @202 - valid reason also due to A engaging in on-line conversation with another worker involving inappropriate sexual remarks about another worker - dismissal not harsh etc) [See also Dismissal - Sexual/Pornographic issues]

Dismissal – *Condonation of conduct*

FWA - Cth [2010] FWA 8797 **SA** *Deng v Inghams Enterprises P/L* (A was **late for work on many occasions by just a few minutes each time due to childcare arrangements** - "the termination of Ms Deng's employment was harsh in that it followed a three and a half month period after her purported final warning where her periodic lateness was ignored or condoned and was not acted upon until the dismissal occurred on a summary basis. Further Ms Deng's behaviour has not been established to be of a character that it warranted termination of employment. It was unjust in terms of the conduct of the termination of employment meeting of 1 June 2010. Finally, it was unreasonable in so far as the termination was founded on a final warning which was itself inconsistent with Inghams' disciplinary policy" @74 - **reinstatement** ordered, but A on notice re R's punctuality requirements), [2010] FWA 7512 **NSW** *Ni v T & E Tools P/L* (The A "was dismissed for unsatisfactory performance and absenteeism. … [T]here was no evidence to establish any unsatisfactory performance. … [A]lthough the level of absenteeism was excessive, the **actions of the employer had condoned this level of absenteeism**. … [C]entral to the reason for dismissal, the **employer anticipated that the applicant would not return to work upon the expiration of his approved leave**. Consequently the **primary reason for the applicant's dismissal had no basis in fact**" @31), [2012] FWA 2056 **NSW** *Narwal v Aldi Foods* (the A was summarily dismissed for dishonesty/theft in circumstances where, as **store manager, he approached the checkout with groceries intending to pay, but soon realized he did not have his wallet - he therefore instructed the cashier to print out a suspended sales docket**, which was within his capacity to instruct, and to affix it to a computer screen to remind him to pay when he returned to work on Monday - **A forgot to pay** - someone had removed the docket from the computer screen - A "committed serious misconduct when he suspended his own sale and then left the employer's premises without paying for the goods that were in his possession. In the context of a manager working in the retail industry this misconduct represents a fundamental transgression of the reasonable expectations of any employer in this industry" @42 - A's conduct would **ordinarily provide valid reason for dismissal with notice** - R allowed A to continue in employment for a time under observation, thus providing a degree of **condonation** - R's condonation of A's conduct and the facts themselves did not justify summary dismissal for dishonesty/theft), [2014] FWC 5072 **Tas** *Cannan & Fuller v Nyrstar Hobart* (see précis at Dismissal - Bullying & Harassment)

Full Bench decisions

[2013] FWCFB 215 **Vic** *Marijan v Rail Corporation New South Wales* (an **investigation into A's conduct took three years** - "It is true that Mr Marijan was not suspended while the investigation took place and the investigation took an inordinate period of time. However, the accountabilities of Mr Marijan were modified during this period and the investigation was intended to ensure that procedural fairness was provided. While we cannot see why the investigation needed to last as long as it did … the **delay in reaching a conclusion does not, on a consideration of the evidence in this matter, amount to condoning of the conduct** in question" @16)

Dismissal – *Conduct in workplace (poor history of)*

FWA - Cth [2011] FWA 2012 **NSW** *Steele v Coffs Ex-Service Memorial & Sporting Club* (see from para 61 examples of cases where **previous warnings and poor behavioural record were factored in against the harshness of workers' dismissals -** A's dismissal for **abusing co-workers in earshot of patrons**, in light of a lengthy history of being warned for similar conduct and other issues not harsh etc)

Dismissal – *Confidentiality*

Fair Work Act... CM23/06 Gill (worker {W}, who was a senior manager, willfully breached employer's confidentiality policy by accessing and copying confidential information [a co-worker's private diary record] and inappropriately sharing it with other staff - not an isolated and unpremeditated lapse - caused conflict/tension in workplace - she also ignored recent training on changing workplace culture - "The [R] stood to place other participants' [in OCARS course] at risk if ... [W's] conduct was not sanctioned" @ 21 - W received no warnings – dismissal not harsh etc)

FWA - Cth [2010] FWA 1164 **NSW** *Delaney v Parramatta Leagues Club* (R had **valid reason for dismissing A for sending confidential information to her husband who worked in a senior position in a competing business** - A had served R for 33 years without blemish - her judgment may have been clouded by a desire to help her husband - she was not meaning to harm R's business - in all the circumstances, **dismissal regarded as harsh and unfair**, despite real possibility that the confidential information could have been used to harm R's business - reinstatement not appropriate especially in light of the valid reason for dismissal and A's difficult relationship with a co-worker - A had not found alternative employment - A awarded 12 weeks remuneration after a reduction of six weeks pursuant to s392(3) due to her misconduct contributing to her dismissal), [2010] FWA 5188 **NSW** *Lau v Winra P/L* (A "**obtained confidential formula in a secretive and unacceptable way and passed that formula onto a competitor**" @27 - dismissal not harsh etc), [2011] FWA 8037 **NSW** *Xu v DesignInc (Sydney) P/L* ("If … [A] had indeed **covertly provided … [former employee of R] with confidential company information to assist the latter take legal action against the [A's] employer [R]**, this may have constituted an act of disloyalty sufficient to form a valid reason for his dismissal" - allegations against A not substantiated - dismissal harsh etc - Appeal dismissed [2012] FWAFB 2740), [2012] FWA 1352 **NSW** *The Applicant v Australian Federal Police* (A's dismissal for breaching AFP codes of conduct including **misuse of police information** and not acting with honesty and propriety in the course of her duties justified - **Appeal dismissed** [2012] FWAFB 6949), [2012] FWA 6319 **Vic** *Cain v Ottrey … Lodge* (found that A **contravened confidentiality agreement when she rang another worker and sought to influence what she would say to the investigator** - intimidation found where A called another worker at her home and offering the phone number of the union to help her get out of the mess she had gotten herself into - also inappropriate for A to call worker on her home phone when she had not been provided with that number by same - valid reason for summary dismissal, but *summary* dismissal harsh given long history of matter), [2013] FWC 1231 **NSW** *Kim v Australian Federal Police* (the A was an unsworn police officer dismissed for **representing himself as a sworn police officer**, failing to report his associations with persons from a foreign government and **disclosing AFP Security-In-Confidence documentation to a foreign government representative without authority** - dismissal not harsh etc), [2013] FWC 4060 **Vic** *Ryan v Dept. of Human Services* (A was dismissed for **disclosing "confidential Departmental security information regarding the possible installation of razor wire at Parkville on 3AW, when he rang The Rumour File ...** In doing this, he breached section 492A of the *Children, Youth and Families Act 2005* concerning disclosing **confidential information about security arrangements at youth justice facilities**, gained whilst undertaking his role as a FSS-Co-ordinator" @102 - A also breached the public sector code of conduct and departmental values - A had hoped to spur the Department into installing razor wire because of his safety concerns - despite there being a valid reason for A's dismissal, his dismissal was harsh in light of procedural unfairness, A's genuine remorse, length of service, unblemished record and mental state due to work stress - reinstatement not considered appropriate - compensation ordered - compensation assessed in [2013] FWC 4930), [2014] FWC 1486 **Qld** *Tymczyszyn v Fabfit* (small business employer - the A provided to Mr T a commercially sensitive and highly confidential "**document which identifies and provides contact details for the overseas manufacturer, and which sets out Fabfit's margin on each electrical fitting** … Mr T while a customer of Fabfit, also on-sold products. He had worked for a competitor and had previously engaged in undercutting Fabfit's prices. The fact that the document was sent to Mr T is a matter that could cause a serious and imminent risk to the viability or profitability of Fabfit" @44 - R had reasonable grounds to conclude that A had engaged in serious misconduct - dismissal consistent with code), [2014] FWC 2771 **ACT** *Howie v RSPCA - ACT* (A's "**disclosure of confidential information that had an adverse effect on the reputation of his employer** and his **overt attempts to undermine the position of the CEO**, his direct supervisor, is behaviour that clearly establishes a valid reason for termination" @67 - dismissal not harsh etc)

Dismissal – *Conflict of interest*

FWA - Cth [2011] FWA 141 **Vic** *Villani v Holcim (Aust)* (where the employer has a **genuine, albeit arguably misguided, concern about a potential conflict of interest**, and the **employee refuses to respond** to those concerns ... there was a valid reason for the termination [of A's] ... employment - permission to appeal refused by Full Bench 12/4/11 - jurisdictional error argued in [2011] FCAFC 155 - "the allegation that there was jurisdictional error came down to the proposition that Mr Villani's failure to respond to inquiries about his business interests was irrelevant to the function of FWA, because the inquiries related to a matter that was beyond the scope of the employment relationship" @17 - no jurisdictional error found), [2011] FWA 7496 **Vic** *Bergin & Bennett v Workforce Solutions Qld* (the mere **registration of a company which might potentially compete** against employer was not a valid reason for dismissal), [2012] FWA 5763 **SA** *Bale v Langley & Olliver-Langley* (the A had been formally warned not to conduct/further his own similar business while working in R's business - element of theft also involved - A **failed to keep his business interests separate** - dismissal not harsh etc), [2014] FWC 743 **Vic** *Suckling v Adidem* (no conflict found where A worked for R which had a party-plan element to its business and when she also had a consultancy agreement with Party Lite which was also involved in **party-plan selling** and where the **products of each business were largely different** - A was given an opportunity by R to save her job by ceasing her Party Lite activity - A's dismissal was unjust despite there being a clause in A's contract saying she "was not, while working for the Body Shop, able to work for any other enterprise which the Body Shop 'considers a market place competitor'" @5 - a reasonable person would not have seen Party Lite as a competitor), [2014] FWC 5839 **Qld** *Lakatos v Termicide Pest Control* (the A and her partner worked for R - when partner was dismissed he went to work with rival company – **A's reluctance to answer R's questions about where partner worked** gave R valid reason to dismiss her due to R's legitimate concerns about conflict of interest - R lost confidence in A as an employee - dismissal not harsh etc)

Full Bench decisions

[2014] FWCFB 5648 *Coco v Thuringowa Enterprise Centre* (the **A was a part-time employee of R, but also in his capacity as a businessman, was a member of R** - "While Mr Coco's employment relationship with the Centre did not disqualify him from exercising the rights associated with his separate legal relationship with the Centre as one of its members, it was necessary for him to ensure that he exercised those rights in a manner which did not involve an **irreconcilable conflict with or departure from his fundamental obligations as an employee**. … [T]he conclusion was reasonably available that Mr Coco had used his rights as a member to advance his employment interests, and had thereby rendered untenable the continuation of his employment relationship" @36)

Dismissal – *Constructive*

FWA - Cth [2010] FWA 2411 **NSW** *McGovern v Cubbyhouse @ Kellyville* (A claimed she was constructively dismissed when she was **transferred to head office** - A held to have **resigned** - A was not prepared to try the alternative position or to work through her issues over hours, which it seemed R was prepared to negotiate - see commentary below for **principles concerning constructive dismissal**), [2010] FWA 4570 **WA** *Townend v Bureau Veritas* (A argued that R engaged in a course of conduct designed to force him to resign by **transferring him from the position of Branch Manager to Business Development Manager (Sales Manager)** - A's employment was to basically be on the same terms and conditions - A did not consider sales to be his strength and resigned - **no constructive dismissal** on facts), [2010] FWA 5577 **NSW** *Gallagher v Kids Biz* (the day before the pre-school was due to re-open A was told by the R that she was not required until they knew how many children would be enrolled - A waited, but heard nothing, and then realized casuals had been employed - she was **not told she was dismissed and was given no reasons for not being called upon to continue working** - dismissal harsh etc), [2010] FWA 5753 **WA** *Little v Petfood Processors* (**A's new supervisor basically wanted him to "fall on … [his] own sword" and resign. Alternatively, stay and enter the door of 'formal warnings'** which would ultimately lead to his termination of employment" @68 - A responded by giving one month's notice - A's constructive dismissal harsh etc), [2010] FWA 6905 **Vic** *Boulic v Robot Building Supplies* (A's return from leave was delayed by airport strikes - soon after arriving back from his arduous travel he attended a **meeting where he was under pressure to resign** - A was given the **choice of resigning or getting formal warnings** for being late back from leave and for poor sales performance - A resigned, but found to have been dismissed unfairly as no valid reason for dismissal - no adequate warnings given re his performance), [2010] FWA 9356 **Vic** *Ashton v Consumer Action Law Centre* ("the actions of the employer in **investigating Mr**

Ashton's grievance and/or in instigating higher level supervisory requirements and/or in providing him with a letter outlining specific areas of concern with his performance were not designed to force Mr Ashton to resign" @61 - no constructive dismissal), [2011] FWA 1058 **SA** *Owens v Allied Express Transport* (R, due to **A's pregnancy**, unilaterally altered A's employment contract, including changing her duties and **reducing her salary by $18,000** - A refused to accept the changes - unfair dismissal found - **Appeal dismissed** in *Allied v Owens* [2011] FWAFB 2929), [2011] FWA 3610 **ACT** *Davidson v The Commonwealth of Australia* (the **A was suspended and was being investigated in relation to a leak** - his access to the work place had been denied - A found to have resigned, rather than being constructively dismissed), [2011] FWA 6123 **Vic** *Centofanti v Assisi Centre Inc* ("it was not the conduct, or a course of conduct, of the employer that led to Mrs Centofanti's resignation. Rather, **it was her perception of how she had been treated that led her to conclude that it was untenable for her to continue in her employment**" @40 - no constructive dismissal - Appeal dismissed [2011] FWAFB 9128), [2011] FWA 3610 **ACT** *Davidson v The Cth of Aust* (the **A was suspended and was being investigated in relation to a leak** - his access to the work place had been denied - A found to have resigned, rather than being constructively dismissed - in dismissing the appeal at [2011] FWAFB 6265 the Full bench stated the "inquiry as to whether the conduct of an employer has 'forced' an employee to resign necessarily requires consideration as to the **appropriateness of the employee's response**: whether the conduct of the employer left the employee with no reasonable choice but to resign" @14 - *J. Searle v Moly Mines Limited* considered), [2011] FWA 6919 **Vic** *Dixon v Orsino Images* ("On 7 April 2011 the **Respondent issued an ultimatum to the Applicant to sign a new contract of employment by the next day**. On 8 April **the Applicant refused to sign the contract and acknowledged that her employment with the Respondent would therefore come to an end and advised that she would continue to work until 30 June 2011 unless she found alternative employment in the meantime.** The Respondent by its actions in responding to the Applicant's email of 8 April 2011 with the provision of a 'glowing reference' clearly accepted what the Applicant had said in her email of 8 April 2011. I am satisfied that **this was a constructive dismissal** at the initiative of the employer" @44 - the terms of the proposed new contract were detrimental to the A - dismissal harsh etc), [2011] FWA 8289 **Qld** *Bishop v Incitec Pivot Ltd* (**no constructive dismissal when A resigned because of policy requiring him for safety reasons to modify his facial hair** - "no matter what subjective value the Applicant placed on the retention of his beard (without the modifications permitted by his employer), it cannot be concluded on an objective basis that the requirement to modify his facial hair to accommodate the seal on a respirator was so odious so as to force the Applicant to resign his employment, or left him without any reasonable choice other than to resign" @48), [2012] FWA 1087 **Qld** *Sietu v Domain Principal Group* (the **A had worked exclusively on night shift** as an AIN with R for about four years - several **complaints were made about her treatment of residents** - **R, instead of dismissing A decided to put A on a performance improvement plan for two to four weeks during day shift** - **A refused** to work during the day as she said she had a day job - A **not found to have been dismissed**, but rather found to have caused her own employment to come to an end), [2012] FWA 4994 **WA** *Nesbitt v Super Cheap Auto* (the A's claim that she was forced to resign after a **meeting with manager to discuss complaints against her** by staff and after a meeting months later where she was given a **first warning** for disobeying manager's direction not to employ another rejected - R's actions were reasonable), [2013] FWC 1069 **Vic** *Heagney v RJ Sanderson & Associates* (the A was **mistakenly lead to believe that if she resigned another employee would probably drop legal proceedings against her** - constructive dismissal found), [2013] FWC 3711 **Vic** *Hewitt v Topero Nominees* (the A resigned because of the **allegedly bullying and threatening behaviour of her manager, a requirement that she record a log of her work activities, a direction to undertake changed duties; and being denied a request to reduce the number of days on which she worked** - the latter three matters were within R's discretion - A "resigned her employment the day after her application to reduce her number of days was put to the side by Mr Michael pending the resolution of her claims in FWA, scheduled to occur in three days time and some five to six weeks after she was advised she would be required to do some sales work" - finely balanced matter - no constructive dismissal found - **appeal allowed** in [2013] FWCFB 6321 where the question was "whether the Commission must make a determination that the applicant in a s365 proceeding has been 'dismissed' from their employment (within the meaning of s365), *before* the Commission can conduct a conference [pursuant to s368] in relation to the dispute" @14 - question answered in the negative - "Further, the Commission does not have the requisite jurisdiction to effectively dismiss a s365 application on the basis of a finding that the applicant was not 'dismissed' from their employment" @14), [2013] FWC 3941 **SA** *Bruce v Fingal Glen* (the A resigned because **R had regularly failed to pay her on time and had**

not paid her superannuation entitlements - it could not be said A had no choice but to resign - no constructive dismissal - Appeal dismissed in [2013] FWCFB 5279), [2013] FWC 5403 **ACT** *Collis v Rossglengary* (the A, a fisherman, **told his employer he would not go out to sea until he received monies owed to him** - A took several of his items off the boat - the boat later left without him - found that **A resigned**, but that he was **forced to by R not paying him his entitlements** - dismissal harsh etc), [2013] FWC 4163 **Vic** *De Laps v Victorian Association for the Teaching of English* (the making of **allegations against worker** does not of itself constitute conduct intended to force worker to resign or which had the probable consequence of such - however, in this case, because the R was giving lip service to procedural fairness, A's resignation was found to be a probable consequence - it **did not appear to A that she would be given a proper opportunity to defend herself** - constructive dismissal found - **Appeal allowed** 19/2/14 [2014] FWCFB 613 - held that "while Ms de Laps resigned from her employment with VATE, she was not forced to do so because of conduct, or a course of conduct, engaged in by VATE" @88 - A had an option to respond further at a meeting to allegations and the **opportunity to be performance managed rather than resign**), [2013] FWC 7917 **Qld** *Hunter v C'th of Australia* ("conduct, including **a course of conduct whereby an employer wrongly communicates an unsubstantiated resignation, could in some circumstances form the basis of a constructive dismissal.** However to do so, it must be found that the employer either intended to force an employee to resign, or else the conduct must be of such a nature that resignation was the probable result" @53 - insufficient evidence here to conclude that R intended to force A to resign - **A's decision "to tender his resignation was a deliberate decision, made despite the availability of reasonable alternatives** and after taking advice and checking about the extent of notice he was to provide. This may well have resulted from poor advice, however this does not mean that objectively, the written resignation provided by Mr Howes was forced or arose as the probable result of the conduct of the employer in this particular case" @60 - no constructive dismissal), [2014] FWC 1352 **ACT** *Hormann v Mediaware International* (the A's claim he was constructively dismissed due to the **employer requiring him to provide medical information before he could return to work after four months off** rejected - A had not resigned - usually constructive dismissal involves a resignation - application invalid as A had filed it before his termination took effect), [2014] FWC 1126 **NSW** *Fletcher v Precision Mechatronics* (constructive dismissal not harsh etc when A resigned because **R, which was in financial difficulty, failed to pay his wages and entitlements** - no appearance by R - see also [2014] FWC 1125 **NSW** *Matich v Precision Mechatronics* involving basically the same facts and conclusion), [2014] FWC 2024 **Vic** *Urand v Beaconsfield Children's Hub* (the **A's shifts were reduced by half** - it was therefore no longer tenable for her to work for R - R had anticipated A would resign as a result - constructive dismissal found - see [2014] FWC 2240 where compensation ordered), [2014] FWC 4539 **WA** *Challancin v Smile Dental Clinic* (workplace conflict involving A - A, upon hearing her duties and hours would change took sick leave and then announced she would not be returning - A claimed constructive dismissal – R "in **relocating Ms Challancin to another area of the Dental Clinic, and allocating her different duties**, does not evince an intention ... to no longer be bound by the employment relationship. ... **[R] was attempting to manage the workplace conflict" @39** - no constructive dismissal) [See also Resignation]

Commentary

[McGovern] "The principle which the applicant must establish in this case, is that there was some action/s on the part of the employer, which was either intended to bring the employment to an end, or had the probable result of bringing the employment relationship to an end. The much quoted authority for this principle is that found in Mohazab v Dick Smith Electronics Pty Ltd (1995) 62 IR 200. In P O'Meara and Stanley Works Pty Ltd (U2006/2874), 11 August 2006, PR973462, a Full Bench of the [AIRC], after considering the decision in Mohazab … said:

> 'In our view the full statement of reasons in Mohazab which we have set out together with the further explanation by Moore J in Rheinberger and the decisions of Full Benches of this Commission in Pawel and ABB Engineering require that there to be some action on the part of the employer which is either intended to bring the employment to an end or has the probable result of bringing the employment relationship to an end. It is not simply a question of whether "the act of the employer [resulted] directly or consequentially in the termination of the employment." Decisions which adopt the shorter formulation of the reasons for decision should be treated with some caution as they may not give full weight to the decision in Mohazab. In determining whether a termination was at the initiative of the employer an objective analysis of the employer's conduct is required to determine whether it was of such

a nature that resignation was the probable result or that the appellant had no effective or real choice but to resign.'

[67] In the Industrial Relations Commission of New South Wales, the lead authority on constructive dismissal is that found in Allison v Bega Valley Council (1995) 63 IR 68. There, the Full Bench said at page 72 to 23:

'In order to undertake the necessary analysis it is necessary to look carefully at all the relevant facts. It is necessary to determine whether the actual determination was effectively initiated by the employer or by the employee particularly where the dynamics within a factual situation may change. For example, an employer may demand a resignation with a threat of dismissal, negotiations may then ensue and the employee may ultimately be genuinely pleased with the outcome of those negotiations to the extent that any resultant resignation may be said to be given freely and without any undue influence being brought to bear by the employer.

Where an employee initiates the termination of the contract of employment it is necessary to consider whether that ostensible act of termination was given freely and without any undue pressure. If the ostensible resignation is, in effect, a response to and consistent with a desire by an employer that such resignation be forthcoming, then what has occurred may be that the termination has been brought about by the employer and that in this way the employee has been dismissed.'

[68] And in a later decision in Ward v Mobile Innovations Limited [2002] NSWIRComm 287, the Full Bench said at par 6:

'…It may be that the conduct of an employer is so onerous or unreasonable prior to a termination that a termination will be found to lay in the hands of an employer, even where the employer has not expressly required an employee to offer resignation or threatened dismissal in lieu of such an offer. However, this notion merely accords with that which has already been formulated in Allison.'

[69] Olsson J, of the Supreme Court of South Australia put the principles in a slightly different, but consistent way, when he said in Easling v Mahoney Insurance Brokers Pty Ltd (2001) 78 SASR 489, and with whom Doyle CJ and Bleby J did not disagree:

'Suffice to reiterate that the notion of constructive dismissal implies the existence of conduct on the part of an employer which is plainly inimical to a continuance of a contract of employment according to its express or implied terms. The authorities establish the concept that there is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. An intention to repudiate need not be proved. Rather, it is a matter of objectively looking at the employer's conduct as a whole and determining whether its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.' "

[2010] FWA 2411 **NSW McGovern v The Cubbyhouse @ Kellyville Pty Ltd** Sams DP

Dismissal – Contractual issues

See also Contract of employment/service

[2012] FWA 9435 **NSW** *Shoukry v The Star Pty Ltd* (the A had been employed on an ongoing basis with R before he entered into a new contract of employment - A had been sending to colleagues' work addresses pornographic emails before and after his new contract from his home computer and from his work computer - R "**had the right to consider and, if appropriate, take action in relation to the applicant's conduct prior to that contract**" @101 - dismissal not harsh etc), [2013] FWC 477 **NSW** *Severino v Galaxy Electric International* (**R changed A's employment from full-time to casual without proper consultation** - "The defect in failing to discuss the operational difficulties and attempt to devise a mutually acceptable alternative working arrangement in this case was significant because the failure precluded the real potential of avoiding termination. Against this must be balanced the prospect that no such arrangement would have been reached and the apparent business reasons behind the termination" @39 -valid reason for dismissal, but dismissal unreasonable - only 12 weeks compensation ordered as FWC not satisfied employment would have continued past 12 weeks if there had been proper consultation), [2013] FWC 2993 **WA** *Duke v Central Norseman Gold Corporation* (See *Duke précis* at Abandonment of employment), [2013] FWC 4677 **WA** *Carvalho v J-Corp* (**A "was dismissed by the respondent because he would not agree to accept either of the two new contracts offered [changing his status to a contractor].** There was no obligation on Mr Carvalho to agree to a variation to his arrangements and as such there was no valid reason for his dismissal related

to his capacity or conduct" @108 - if not a dismissal, it was alternatively a constructive dismissal - dismissal harsh etc - reinstatement ordered with continuity of service and order for lost pay to be determined), [2014] FWC 5820 **Vic** *Sheldrick v Hazeldene's Chicken Farm* (the A's **unwillingness to accept significant variation to employment contract** regarding on-call arrangements without further negotiation did not provide a valid reason for dismissal)

Dismissal – ***Counselling, rehabilitation and sickness***

I113/92[59.605] Dowdy (on rehab. for long time - unable to do full duties - dismissal harsh etc), I9/94[61.32] Vegh (worker became mentally ill and was given no warning that he would be dismissed if he did not return to work by a certain date - dismissal harsh etc), I10/94 Somerville (applicant dismissed during trial period and claimed she had been dismissed for taking sick leave - found she had been dismissed due to poor performance and attitude), I28/94[61.77] Singh-Gill (worker rightly dismissed for various reasons including falsely claiming sick leave), I33/94 West (sales targets of employer were not unreasonable - employer gave worker sufficient counselling and encouragement - dismissal not harsh etc), I85/94 Fulham (not harsh etc, applicant counselled 4 times), I11/95@11 Metcalfe (excessive sick leave - understated leave to commission, but "no objective evidence available to the Commission that the applicant was other than available for work due to illness or injury, and the employer did not ... raise concerns ... nor require additional proof of sickness"), I92/96 Elsegood (terminated before exhausting sick leave credits - at time of dismissal worker was on extended leave and it was unlikely he would return for a long while - dismissal was unreasonable), I157/96 Russian (no proper counselling of applicant as to what was required of him - dismissal harsh etc), CM25/03 Myers (fork lift driver with flu-type viral upper respiratory tract infection {URTI} dismissed because employer did not believe he was genuine, since video surveillance of him revealed he spent a significant amount of his time off at the pub drinking - Article 6 of Schedule 7 of the Termination of Employment Convention considered - duty of employee to be honest about why leave sought - accepted that he was suffering URTI - unwise to go to pub, but behaviour not sufficient to justify dismissal – appeal dismissed CM12/04), CM74/03 Kelly (employee dismissed because of absence due to illness - employee "did not discharge his responsibility to inform his employer in respect to his absence and illness but went some considerable way towards doing so" @ 13 - employer heard of absence through another employee 4 days into absence - 2 days later employer refused to let him recommence work - **employee essentially suspended on sick leave and then soon after dismissed without notice** - this sufficient in itself to render dismissal harsh etc)

Fair Work Act… CM14/07 Mazaney (employer not permitted to rely on worker's **excessive sick leave** as a reason justifying dismissal when he **acquiesced in the worker not providing sick certificates** and when he **did not raise this with her at time of dismissal**)

FWA - Cth [2010] FWA 2297 Petkovski (see précis at Dismissal - Not following lawful directions etc)

[See Absenteeism]

Dismissal – ***Co-workers*****/Managers (conflicts with)**

Note that various headings included cases on this subject.

FWA - Cth [2010] FWA 6930 **Qld** *Murphy v QR Ltd* (A made **serious allegations against team leader which he knew to be false** - A was also dishonest in the investigation process - dismissal not harsh etc), [2010] FWA 6237 **QLD** *Gramotnev v Qld Uni. of Technology* (A's **emails to colleagues "demonstrated a tone of aggression, unreasonable persistence and an inflammatory attitude inconsistent with ongoing employment**. It is acknowledged that he felt genuinely aggrieved; however his grievances were not reasonably based and he continually refused to address his concerns in a reasonable manner, despite being warned of the ramifications of such continued conduct. Further his manner of insistence on pursuing his senior colleagues and making serious, damaging and unsubstantiated allegations against them made the continued employment relationship unworkable" @136 - dismissal for serious misconduct not harsh etc) - Appeal dismissed in [2011] FWAFB 2306, [2011] FWA 1504 **Vic** *Bellia v Assissi Centre* (dismissal of **deacon of Catholic church employed in pastoral care with R** - dismissal harsh etc when "the reason for the dismissal, the **breakdown in the working relationship** between Fr Bellia and two other employees, was caused by the conduct of those employees and in circumstances where one of those employees was also on the body that constituted the employer. In this context the reason for the dismissal is neither sound, defensible nor well founded" @27), [2011] FWA 960 **NSW** *Summers v Snack Brands Aust.* (after **heated exchanges** between two employees R dismissed A, who was a longstanding employee with a good record - R acted on the dubious basis that A

brandished a knife in one of the exchanges - dismissal harsh etc and A reinstated), [2011] FWA 2796 **Qld** *Bowles v Gregg Lawyers* (A's dismissal on the ground of her conflict with co-workers harsh etc as her **misconduct had not been adequately established**), [2012] FWA 5712 **Qld** *Johnston v Iron Bark Logging & Earth Moving* (small business employer - the A had **poor relationships with co-workers and managers in the R's business** - the tension that existed provided no valid reason for dismissal - dismissal harsh etc), [2013] FWC 8616 **NSW** *Lee v Toll Transport* (FWC satisfied that the A "for no good reason - **aggressively abused a co-worker in a totally unacceptable manner**. He was highly offensive and intimidating. … [A nearby manager] was concerned that the applicant's behaviour was so aggressive that he may have become violent. … [T]he applicant was **dishonest during his interview** … appeared to show no remorse for his behaviour during the investigation and continued to try to justify his actions … [T]hese considerations in aggregate amount to a valid reason for the dismissal of the applicant on the basis of **serious misconduct**" @23), [2013] FWC 6931 **Qld** *Rohozinski v Real estate Network (Qld)* (there was "a valid reason for termination based on the Applicant's **repeated defiance of Ms Edwards managerial authority and its wider impact on the business**" @79 - despite R's failures in communicating dismissal to A, which caused her unnecessary uncertainty and stress, dismissal not harsh etc), [2014] FWC 405 **ACT** *Stephens v Aerial Capital Group* ("As a senior manager, the applicant's **refusal to work constructively with other managers was a valid reason for his dismissal.** If his medical condition did not allow this then he should have taken the time off provided by his practitioner and not returned until he was in a position to cope with the workplace" @87 - **dismissal unfair due to manner of dismissal** - "The dismissal took effect while the applicant was absent on certificated sick leave and in circumstances where he had made it clear to the respondent that he attributed his illness to stress caused by the workplace. In addition, the respondent did not clearly advise the applicant that his conduct was such that termination was being contemplated" @96), [2014] FWC 1255 **NSW** *Adriao v BlueScope Steel* (A, who was 60, dismissed because of his **abusive, disrespectful and intimidating conduct towards his supervisor** - A had various written and verbal warnings and was on a final warning for other misconduct - dismissal not harsh etc), [2014] FWC 2771 **ACT** *Howie v RSPCA - ACT* (A's "**disclosure of confidential information that had an adverse effect on the reputation of his employer** and his **overt attempts to undermine the position of the CEO**, his direct supervisor, is behaviour that clearly establishes a valid reason for termination" @67 - dismissal not harsh etc), [2014] FWC 4431 **Qld** *Jenner v Salisbury Bowls Club* (the A, a manager in a small business, continued to address a co-worker in a belittling and socially unpleasant way despite being warned not to - A's **managerial conduct toward same worker was inappropriate** - dismissal was justified) [See also Dismissal - Assault/fighting]

FAIR WORK ACT 1994 (Formerly Industrial & Employee Relations Act 1994)

Re Section Annotations - the letters and numbers in brackets refer to the sub-sections.

S.3

CM41/00(b)(c)(e)&(f) Clerks SA Award (raised at p.35-38&56), CM16/07 Gen. Appl. To Rev. Award Wages & Min Std (the fact of widespread consent between the parties given significant weight as being relevant to the objects of the Act)

S.3(1)(g)

CT5/11 Worthington, Gidman etc (**desisting with the hearing of the 2010 applications is supported by object 3(1)(g) of the Act**. … [O]bject 3(1)(g) namely the encouragement, prevention and settlement of an industrial dispute by amicable agreement may have application in circumstances of this kind" @67)

S.4

I17/97 Hand (worker fell within the definition in s4 as regards contract of employment (c) and being involved in cleaning duties), CM63/00 Prime Clerical EA 2000 ('group of employees' - were sufficiently identified despite the identity of the individuals who make up the group being likely to change during the negotiation process and during the life of the approved agreement), CM19/13 City of Holdfast Bay & ASU Administration Staff EA (No. 6) 2013 (Commission "satisfied that the absence of a **definition of 'group of employees'** in the Act was a drafting error and that

Parliament intended that 'group of employees' would be defined in the terms of s4(2) of the I&ER Act. In accordance with the rules of statutory construction, the Act should be read in its correct form, ie with the inclusion of the definition of group of employees. A group of employees therefore 'consists of a particular class of employee'. The potential exclusion from the Agreement of one or more members of the Leadership Team is inconsistent with this definition. It follows that the employees covered by the Agreement are not a group of employees as required by s75(1) of the Act. In addition … 'Leadership Team' is not defined in the Agreement or in the underpinning award. In the absence of a definition, the group of employees bound by the Agreement cannot be identified with certainty. Consequently it is my view that the Agreement does not define the group of employees bound by it as required by s77(1)(b) of the Act" @10-12)

S.6

CT6/03@3 Barton ("s6 of the Act declares the Act inter alia to be inapplicable to employment by the employee's spouse or parent. In this case the relationship is ... one between in-laws and s6 has no application")

LONG SERVICE LEAVE ACT 1987

Hyperlink to Long Service Leave Act 1987 for on-line users

Hyperlink to Long Service Leave Regulations 2002 for on-line users

S.3

*** Note: s3(2)(b) amended 16/5/05 by Act No 3/05**

M30/92(3)(a)[59.750] Dougal ("The applicant had been employed for more than 10 years with a succession of employers, all of whom had been awarded the concession to operate a catering enterprise at the Adelaide Airport" - there was continuity of service and "the respondent ran a business which was substantially, and in essence, the same business as that which had been run by the previous employer, and hence, the respondent was related to the previous employer pursuant to s3(3)(a) ..."), M3/93(3)(a)[60.216] Brown (contract of employment found to have been transferred to a company that was a related company pursuant to s3(3)(a) of the Long Service Leave Act - "where one of two or more related companies, each of which has employed the applicant, was unable or unwilling to make actual payment of the value of the applicant's entitlement, the obligation on the other to make full payment remained"), M15/93[60.821] Taylor (the worker's previous employment outside the country with related employers was not included in the calculation of his period of service - pursuant to s4 his service in NSW and SA was included), M23/99(1)&(3)(a) Bainrot (whether a 'related employer' - whether 'takes over or otherwise acquires the business' - see commentary below), CT32/02(3) McIntyre (worker continued working at same place through several owners of the business - continuity of service maintained when business run by administrator - worker entitled to long service leave - see commentary below), CT46/02@20(2)(a) Lenthall (calculation of accrued long service leave entitlements in case of employee medical practitioner working at clinic - salary sacrifice arrangement characterised as a fringe benefit and not included when calculating workers ordinary rate of pay), CT54/04(3)(b) Franzon {Anthony} (service with a 'related corporation' in this case established - "provision does not require incorporation as a necessary ingredient of being a corporation. It is my view that the word is used in a wider sense of a business or an entity capable of employment. In the present case the evidence is clear that the two entitles, if there are two entities, have substantially the same management ... [T]he [provisions require], apart from substantially the same directors, substantially the same management ... [T]his very broadness is indicative of an interpretation or meaning that is intended to be applicable to employees who work for the same persons regardless of their legal status" @ 8-9), CT65/05(3)(a) Blacker ("There is no good reason to treat all three employers as anything but related within ... s3(3)(a) ... because it is quite clear that Betanza and Shiphire successively took over the business of Shansco which did not alter in character" @ 15 - **worker worked in same capacity over entire period** and **did not receive any payouts on termination at either time of transmission**), CT42/07 LabourForce (worker {W} placed with pipe manufacturing plant by labour hire firm Rexco - Rexco was the only supplier of labour to this plant - Labourforce Solutions {A} replaces Rexco as W's employer, and also exclusively provides labour to the plant - W continues to work at plant in same capacity - issue was whether A took over or otherwise acquired that part of the business of Rexco for which W worked - A **argued that it**

acquired no part of Rexco's business as no assets changed hands [per High Court case of *Gribbles*] and that the hiring out of workers to the plant was not part of Rexco's business - **assets changing hands not regarded as a requirement of s3** by court, but court nevertheless found that intangible asset of the intellectual property as to what workers were paid by Rexco was acquired by A - also the intangible asset of Rexco's earning capacity was acquired by A - on *Appeal* at CT85/07 stated that "there is no warrant to read into the expression takes over or otherwise acquires a commercial element", and the High Court in *Gribbles* arrived at the same conclusion saying "there may be no transaction between the two employers but it may be clear that the new employer is the successor of the business of the former employer" @ 8 - Magistrate erred, not in this, but by failing to show in his reasons that he had considered evidence that placed real doubt about the extent to which Iplex supplied some of its own staff to perform maintenance work - "the limited evidence placed before the court did not enable findings to support a conclusion that in employing these tradespersons Labourforce [A] took over or acquired part of Rexco's business. Labourforce and Rexco were therefore not related employers" @ 12 - **Appeal allowed** CT85/07 - *Appeal dismissed* CT51/08 - see commentary below where Full Supreme Court concluded that Labour Force Solutions did take over part of Rexco's business and that they were 'related employers'), CT78/09 Waydock (in the case of the worker **{W} who had worked with the R for about 18 years** there "was **never a contractual basis for his re-engagement** or an undertaking that he would be re-engaged at the end of these or any other periods of no work. He simply had the expectation and the rapport. He had a good relationship with the directors … and his promotions illustrated that. He was never told that he was not to be given work. Nevertheless, regardless of the remainder of his employment, there were at least these **two gaps of three months or twelve weeks in his employment**" @19 … "The **provision of work was entirely subject to it being offered to him** and he had no form of engagement or guarantee of employment upon which he was able to rely or enforce" @23 - W **not found to have sufficient continuous service** even after considering the events of **s6** that do not break continuity of service), CT35/12 (3)(a) Moeller (the A had **continuous service with three employers** between 1998 and 2010 - **the second purchased the business of the first and the third purchased the business of the second** - the entities found to be related pursuant to s3(3)(a) - the fact that A was not included in any sale of business agreement irrelevant as his rights were determined by statute, not contract - application to reopen and appeal dismissed in CT10/13 - appeal to Full Court dismissed in CT30/13 - in [2013] SASCFC 102 permission to appeal refused - although there may be an arguable case as to continuity of service, "permission to appeal would lead to yet another re-examination, and a fourth consideration of the question of whether, on the facts of this case, there was 'continuous service' … It is relevant to bear in mind that the case raises no issue of principle" @20-21), CT53/12 Zaccardo (the applicants were **employed by a husband and wife** in partnership (Mr & Mrs Dimuccio) - **after the marriage breakdown of the R's, Mr Dimuccio continued to employ the applicants** - applicants found to be employed by 'related employer'), CT58/12 Woolford ("Flinders Ports relies on an unjustifiably narrow **interpretation of the word 'series', where it appears in the definition of 'service'.** Series is taken to mean continuous in time and without any breaks. In my opinion 'series' does not necessarily mean continuous in time. It means a set, sequence or succession of related events. The definition does not use the concept of continuous to qualify the phrase contracts of service. The definition accepts that continuous service can be comprised of a set, sequence or succession of related but not necessarily temporally continuous contracts of service" @47-48 - **Appeal dismissed** - see précis at s5 dealing with s3(4) & s5) [See also Transmission of business]

Commentary

S.3

"[W]e refer to the issue of the quantification and the reference in s8(1) of the entitlement computated according to 'his or her ordinary weekly rate of pay'. The issue has significance in this case because so much of the appellant's remuneration was provided other than by weekly or fortnightly payment to him. This component was $83,200 rising to $90,000 when the appellant became Vice-Captain of the respondent. That is out of a total remuneration of $250,000 … The appellant argued his "ordinary weekly rate of pay" should have been calculated on the full payment and not on the salary component … He argued this on the basis of Jongewaard v Dall & Ors (t/as Price Waterhouse) Print No M.9/1992. The respondent on the other hand contended that non-pecuniary benefits did not constitute his 'ordinary weekly rate of pay' and were excluded … It argued the Act made express exception for a worker's accommodation arrangements. This, the respondent argued indicated 'expressio unius' the limit set by the legislation of any non pecuniary component to be included. [13] …

In Jongewaard v Dall & Ors (above cited) the applicant claimed a sum of money under the Act. The applicant had an annual salary package of $80,833. The issue was whether that was to be used to calculate the applicant's ordinary weekly rate of pay. The amount the worker received as his pay each week, calculated annually, amounted to $63,996. The balance was diverted to professional fee payments, a business allowance, a car scheme and superannuation. Only the car scheme gave some tax benefit. The learned Industrial Magistrate referred to s3(2) and stated (at p 7):

> 'Bearing in mind that the acquired meaning of the word "ordinary" when the phrase "ordinary weekly rate of pay" is used in section 3(2) of the Act, it is used to distinguish between that part of the remuneration of the worker which is essential to the contractual arrangements between the parties and those additional components of the remuneration like overtime, shift premiums and penalty rates which are contingent upon the performance of work by the worker at particular times and in particular circumstances. …
>
> The exclusion of overtime, shift premiums and penalty rates and the specific saving of the benefits applying to commission, casual workers and workers' accommodation are all consistent with an intention to confine the calculation of an entitlement to long service leave to that part of the worker's remuneration which is **essential** to the contract between the parties.'

Her Honour then concluded the ordinary weekly rate of pay was to be calculated using the figure of $80,833. It was entirely at the worker's election how parts of this money were to be redirected. Amounts designated to specific purposes, rather than being additional features of his wage, in truth were part of the ordinary earnings.

A contrary view of the words 'ordinary weekly rate of pay' was taken in Lenthall v Australian Medical Corporation Pty Ltd (t/as Kingswood Clinic) [2002] SAIRC 46. The applicant there had half her remuneration allocated to superannuation (par 54). The learned Industrial Magistrate ruled the applicant had to abide the consequences of what was after all her own choice in sacrificing her salary. He stated:

> '56 It may be further remarked that "salary sacrifice" is itself to some extent a modern term for what were once called "fringe benefits", and the court has in the past ruled firmly that fringe benefits, including superannuation deductions cannot be taken into account in calculating a worker's ordinary rate of pay. I see no reason to depart from this position, whether one views the matter in terms of the strict construction of the provisions of the Act, or through the lens of "equity and good conscience" under the Industrial and Employee Relations Act 1994 by which the procedure of this Court is established and regulated.'

[Counsel] challenged the correctness of Lenthall. He contended if one considered a hypothetical where the worker for some reason re-directed all his or her wage and took no pay in hand, on the Lenthall approach despite many years of service, the worker would get nothing …

[Counsel] also relied on the reasoning in the decision of Wilcox CJ in Ardino v Count Financial Group Pty Ltd (1995) 126 ALR 49. That was a claim for unlawful termination of employment and for compensation. s170CD of the Industrial Relations Act 1988 (Cth) excluded this remedy to those with an annual wage of more than $60,000. The issue was whether monies paid into a superannuation fund on the applicant's instruction should be included in his 'wages'. There was a definition of 'relevant wages' in subsection (4) (at p 53). These were described as:

> 'the total amount of the wages that the employee received, or was entitled to receive, from the employer in respect of … the period of 12 months or … [a] lesser period … but in relation to an employee whose contract of employment prescribes normal hours for the performance of work … does not include any wages, additional to normal wages, in respect of additional hours of work performed or in respect of work performed at other times'.

Wilcox CJ ruled the worker's wages exceeded the amount of $60,000. His Honour concluded superannuation payments were to be regarded as part of the relevant wages. He stated, (at pp 55 - 56):

> 'So far as money payments are concerned (superannuation, school fees etc), the critical question is whether the employee ever had an entitlement to receive the money himself or herself. **If the contractual arrangement between the employer and employee was that the money would be paid to someone else as soon as the occasion arose, to the exclusion of any right of the employee to obtain payment, the money was not something that the employee received or was entitled to receive.** Although no attention was directed to the matter, it seems that the 5% superannuation payment referred to in para 8(b) of Ms Lambert's affidavit may have been in this category.
>
> However, the situation was different in respect of the superannuation payments made on Mr Ardino's instructions in May and June 1994. These were "payments" by the respondent, in

the ordinary sense of that word. The fact that they were made to a superannuation fund, rather than to Mr Ardino personally, was not something that arose out of pre-existing contractual obligation. Mr Ardino was entitled to receive the payments himself. He chose to have them diverted elsewhere. I agree that the moneys were not 'wages that the employee received'. He did not receive these moneys; he caused them to be received by someone else. However, the definition includes wages that the employee "was entitled to receive". … This is a case where, being entitled, he elected not to receive his wages but to have them paid to someone else. Accordingly, the payments must be taken into account in determining whether or not Mr Ardino's 'relevant wages' exceeded $60,000." (The emphasis is ours)

The question of the meaning of 'wages'in s170CD(1) of the Workplace Relations Act 1996 was considered in Hargreaves v. National Safety Council of Australia Ltd (1997) 77 FCR 272. There the worker received a remuneration package that included a car and the payment of school expenses. Marshall J concluded 'wages' should be understood as not including the provision of the car and the payment of the school fees. He said 'wages' had to be understood in a sense of the **regular payments** made by an employer to a worker for labour provided and was a narrower concept than the words 'remuneration' or 'emoluments'. It was not determined by the question of whether there was freedom to take the monetary value of the benefit otherwise paid to the third party.

In Quality Lodges International Pty Ltd v Bibby and Kelm (No. 2) [2002] SASC 147 the Court considered the meaning of the word 'wages'. Perry J warned that in approaching questions of this kind considerable care needed to be taken as different definitions and different statutory contexts led to different outcomes (par 16). He noted that while non monetary benefits did not equate to wages they did fall within the concept of remuneration: see May v Lilyvale Hotel Pty Ltd (1995) 68 IR 112. Perry J referred to the notion of average weekly earnings in s4 of the Workers Rehabilitation and Compensation Act 1986 and distinguished that usage from 'wages'. His Honour then concluded the weight of authorities led to the view that ordinarily the meaning of 'wages' does not extend to non pecuniary benefits (par 30).

The basis of the calculation in s8(4) of the Act is the worker's ordinary weekly rate of pay applicable immediately before the termination. This is clearly referable to that part of the remuneration which is received episodically (i.e. weekly or fortnightly). It is also clearly referable to the normal or ordinary incidence, i.e. that which would be the experience in the usual week and fairly represents the situation. The word 'rate' in this context is used to spell out the episodic nature of the payment, i.e. 'weekly rate'. Given that analysis, the usage of 'pay' in this context is the equivalent in meaning to 'wage'. Such a construction fits harmoniously with the alternative approaches to the calculation set out in s3(2). Commission and piece-work payments are to be converted to an episodic equivalent, (s 3(2)(a)). So too when the work is paid on an hourly basis or what constitutes the worker's ordinary hours are variable (s3(2)(b)). We therefore confirm the approach taken in Lenthall.

It is important to emphasise that what constitutes the 'ordinary weekly rate of pay' will be a matter of characterisation in each case. In the evidence at trial the manner of the appellant's reward or remuneration was detailed … He arranged his affairs quite purposefully, so that the bulk of his remuneration would not be by way of wages but would constitute 'salary sacrifice' … indicating the sacrificed remuneration was so organised that the monies were not received c.f. Ardino's case at p55). For these reasons the conclusion at first instance was wrong. The amount to be used for calculating his entitlement, if one existed, was $83,200 or $90,000 depending on the appellant's rank with the respondent at the relevant time.[14-18]" **Rehn v Adelaide Football Club** CT52/05 per Full Court

S3(2)

"The applicant's representative made the following submission ... :

'Subsection (2), in calculating the worker's ordinary weekly rate of pay, requires two specific actions.

Firstly, it requires to ascertain the average number of hours worked per week over the previous three years without any qualifications or without any exceptions other than disregarding the weeks when the worker was on paid leave or he wasn't working. So it's the average number of weeks worked, and average number of hours worked per week over the previous three years. Having ascertained that number, we then read on in the paragraph and it says: 'Multiply that result by the worker's rate of pay per hour at the relevant date.'

That rate of pay is, as the act says, exclusive of overtime, shift premiums and penalty rates. I think the act on this point is really quite clear: that regardless of what other definitions there may be in other acts of ordinary hours, this act says that ordinary hours are subject to this

qualification, and it then spells out quite clearly how the ordinary hours are to be calculated, and that is exactly what the applicant has done in this case.

We are not arguing that a casual worker should receive his average weekly earnings; after all, that would include overtime rates and penalty rates. The act clearly excludes those rates of pay. It refers only to the number of hours worked multiplied by the rate of pay at the date that is applicable.'

In my view the content of the award provisions are not relevant to the determination of the applicant's entitlement to Long Service Leave, the only relevant consideration is the content of the Act.

It seems to me that the legislator was trying to ensure that time and a half and double time rates were not applied, but rather, the ordinary hourly rate was applied to calculate a worker's entitlement to long service leave. The words that follow 'overtime' in the section, i.e. 'shift premiums and penalty rates', are clearly matters that pertain to the rate of pay per hour and not the averaging of the number of hours worked per week.

In my view the submission put on behalf of the applicant is correct; the words "exclusive of overtime" in s4(2)b(ii) (sic) [s3(2)(b)(ii)] relate only to the worker's rate of pay per hour and do not relate to the calculation of the averaging of the number of hours worked by the applicant."

Keynes v Barossa Quarries CT72/04 @ 4-5 per Farrell IM. Appeal dismissed, CT54/05 - not "appropriate to determine the meaning of any particular expression by reference to the meaning of that same or a similar expression in an industrial award" @ 5 given that the language of the statute is to be applied as it is a statutory entitlement that is in issue.

S3(3)

"In the present matter I am of the view that the respondent did 'take over' the business of Taralba within the wider meaning of section 3(3)(a). The respondent has taken up precisely where Taralba ceased at the same premises selling the same type of wares at the same times, using the same equipment and the same cutlery, crockery, chairs and tables. I consider that it has taken over (in the sense of taking up) the same function and business that Taralba was performing immediately beforehand and that the applicant who suffered no discernible change in her functions has been continuously employed over the change.

Such a result seems to me also to be essentially fair in that the applicant was not party to the legal changes which took place and knew little about them except that she had a new employer. These changes were beyond her control and left her completely unaffected. The applicant knew little more than that she worked continuously in that same job over the requisite period.

I therefore disagree with an argument advanced by [counsel] who appeared for the respondent that because there was no goodwill or value to the business which came to be acquired by the respondent that there could not have occurred a taking over or acquisition of the business within the meaning of section 3(3)(a).

I have had regard to the decision of Cunningham IM in Dougal v Ribbon Nominees (M30/1992). It seems to me to be on all fours with the facts presently before me even to the point of the respondent in that matter having also taken over a concession from Taralba which, as I understand the evidence in that matter, had also expired. It is evident that His Honour took a dim view of ex post facto attempts made by the respondent in that matter to establish that an agreement had been struck with Taralba wherein all entitlements relating to service would be paid out by Taralba in respect of any transferring employees and any transfers were to be made on the clear and expressed understanding that there would be no transfer of any entitlements from service with Taralba, but that was of no moment to the outcome of the matter even if it was worthy of comment. I think that His Honour correctly observed that the entitlement of Mrs Dougal, the applicant in that matter, to long service leave arises not from either of her contracts of employment or arrangements between her two employers but from the operation of the statute, the Long Service Leave Act 1987, itself. That Act did not permit of any opting or contracting out of the operation of the statute, even if that had occurred (and it was by no means clear that it had). Had the respondent required the employees to renounce their entitlements on the understanding that it would facilitate employment that requirement would have been unlawful and ineffective.

Otherwise I have reached a similar conclusion to that of Cunningham IM in that matter. The applicant has completed more than nine years continuous service in the employment of Taralba Pty Ltd and the respondent, who are deemed to be related employees for the purposes of section 3(3)(a). The applicant is entitled to receive and the respondent obliged to grant her pro rata payment for long service leave on the basis of her continuous service from 8 December

1988 to 8 January 1998 a period in excess of nine years.” **Bainrot v Ansett Ltd t/as Adelaide Domestic Terminal** M23/99@5-6 per Hardy IM

“It is not uncommon that businesses which for whatever reason do not operate successfully fall into the hands of administrators and subsequently liquidators. Parliament has recognised that the workings of the business world are such that businesses change hands and because of downturns in business, industrial disputation or other temporary absences from work for various reasonable causes a worker’s service may not be continuous. Therefore Parliament has made certain provisions by which such absences or breaks in services are deemed not to have broken the continuity of the worker∗s service. S3(3) deals with the concept of “related” employers which are so deemed by virtue of no more than a taking over or acquiring of the business. This does away with the previous concept of “transmission” between employers wherein continuity of service was deemed not to be broken in circumstances where a business was transmitted by one employer to another. As His Honour AR Cunningham IM noted in Dougal v Ribbon Nominees Pty Ltd (1992) 59 SAIR 750 at 766:

> ‘... “take over” is clearly a wider term than “transmit”, and “otherwise acquire” is broader still. Provided it can be said that the business (or part) which is being operated after the change of ownership or management is substantially the same business that existed beforehand then a certain degree of legal continuity is deemed to exist; given the breadth of the terms used, it would be difficult to imagine a circumstance in which an identifiable business had been operated under one management and was now operated under another without it being said that the latter management had either taken it over or had otherwise acquired it from the former.’

See also Bainrot v Ansett Ltd (Australian Concessions Management Division) trading as Adelaide Domestic Terminal Print M23/1999 a decision of His Honour RE Hardy IM.
The worker must establish facts on which the inference may be drawn on the balance of probability that there has in fact been a taking over or acquiring of the business by the Hennessys from the administrator. I so find on the facts as I have previously set out.
I have previously indicated in my findings as to the period of service of the applicant in the business. As His Honour Mr AR Cunningham IM indicated in Keith M Brown v Grassridge (receiver/manager appointed) 1993 SAIRC 5 ‘the right to long service leave does not arise from the contract between the parties but directly from the provisions of the Act. That Act creates a right in the worker and an obligation in the employer whenever there is continuous service of the prescribed length; continuous service can arise by the very definition and structure of the Act, from a single contract (whether or not it has been assigned or transferred) or from a series of one or more contracts where the employers are related in the sense defined in the Act itself’.” **McIntyre v J and G Hennessy** CT32/02@10-11 per Ardlie IM

34. “Rexco operated as a labour hire company … The wages of a worker were paid by Rexco and the worker was an employee of Rexco hired out to a particular business or entity. For Rexco to be able to conduct its business, it needed to engage employees who could be hired out. … The substance of Mr Mettyear’s evidence was that he responded to an advertisement by Rexco seeking a skilled electrician to be placed at the plastics operation of Iplex. …
35. It appears that shortly thereafter Mr Mettyear entered into employment with Rexco and was hired to Iplex as a specialist electrician involved in maintenance. He gave evidence that Rexco had a number of tradespeople for hire. He also explained that all of the maintenance workers at Iplex were employees of Rexco. … The employees of Rexco placed with Iplex to attend to maintenance included special class electricians, a welder and fitters. This evidence allowed the conclusion that Rexco’s business was that of a labour hire company and that its assets included the arrangements it had with employees on its books, the contracts for the placing of labour on hire from which it earned fees and the goodwill that was generated from the conduct of the business. …
36. At relevant times, part of the business of Rexco consisted of the hire of labour to Iplex in regard to its maintenance requirements and, in particular, the hiring of skilled tradespersons that performed maintenance work. This part of the business was a distinct activity, capable of being taken over or acquired. This part of the business did not consist of the employment of Mr Mettyear and the five other maintenance employees, but rather the long-term hire of labour to perform particular work at a specific site. …
37. It was common ground that Labourforce Solutions was a labour hire company that provided workers on hire to Iplex with respect to its operations outside South Australia.

Evidently, at the request of Iplex, Labourforce Solutions was asked to meet all its labour hire requirements and, in particular, to do so at the plant of Iplex at Elizabeth in South Australia. This led Labourforce Solutions to provide those labour requirements by way of hire. To meet this arrangement Labourforce Solutions took over, using that term in a most general sense and not necessarily in the statutory sense, the business of Rexco.

38. When Labourforce Solutions took on the supply of maintenance labour to Iplex, it acquired as an asset the substance of the arrangements that Rexco had with the relevant employees. These assets were applied in the same activity as they had done previously. Labourforce Solutions continued to supply, as its employees, the same skilled labour that had formed the supply of labour hire by Rexco. Furthermore, those employees who constituted the relevant skilled labour continued to perform the same work tasks under exactly the same conditions as they had previously.

39. It is not to the point that there was no agreement between Rexco and Labourforce Solutions. **It is a question of fact whether part of Rexco's business was taken over by Labourforce Solutions. In my view it plainly was. After June 2002, in every practical way, Labourforce Solutions was operating the same part of the business as was previously operated by Rexco**. [my emphasis]

40. There does appear to have been a degree of co-operation and contact between Rexco and Labourforce Solutions. Advice about the change in circumstances was given by Labourforce Solutions to Rexco employees. In the case of Mr Mettyear, an arrangement was made that Rexco would continue to provide his wage until the end of the financial year as a matter of convenience. This evidence provides some support to the conclusion that that part of the business of Rexco was taken over and subject to this particular arrangement.

41. As a consequence of this analysis, Labourforce Solutions acquired a part of the business of Rexco in accordance with section 3(3) of the *Long Service Leave Act*, and consequently, Rexco and Labourforce Solutions were related employers within the meaning of that section." **Hitchin v Labourforce Solutions Pty Ltd** 1/4/09 [2009] SASC 85 Gray J, Full Court

OCCUPATIONAL HEALTH & SAFETY ACT 1986 AND REGULATIONS
ACT NOW REPEALED

OHSW Act repealed by the *Work Health and Safety Act*, 2012 (the *WHS Act*) on 1 January 2013.

Hyperlink to Occupational Health, Safety & Welfare Act 1986
Hyperlink to Occupational Health, Safety & Welfare Regulations 1995

*For cases under the Work Health and Safety Acts throughout Australia see the **Work Health and Safety Act** division immediately following this division. The provisions of this legislation are mirrored in acts by the same title in states and territories of the Commonwealth. **Only selected interstate cases will be catalogued here. SA case law will be canvassed in full**.*

Articles

Gunningham N, '*Prosecution for OHS Offences: Deterrant or Disincentive?*' (2007) 29(3) Sydney Law Review 359

Richardson K, '*Justice Needs to be Done and Seen to be Done: Examining Conflicting Evidence in Occupational Health & Safety Prosecutions*' (2009) 29(6) Queensland Lawyer 293; Hammond & Bion, '*Legal Privilege Following Critical OHS Incidents*' (2009) 15(8) Employment Law Bulletin 130

Smith G & Catanzariti J, '*Proposed Federal Occupational Health and Safety Legislation: Update*' (2010) 16(1) Employment Law Bulletin 11

S.4

M14/96(2), CT69/03 Adel Brighton Cement (consideration of meaning of the phrase in s4(2) 'but the principal's duties under this Act in relation to them extend only to matters over which the principal has control' - see commentary below - appeal dismissed CT78/04), CT40/07 Construction Services (improvement notices and prohibition notice cancelled as A was not occupier of work sites and was not in control of them or the work done on them by independent contractors - each contractor should supply to A written hazard identification and risk assessment procedure before

working on site), CT76/08 Watson & Sons Constructions (**s4(2)** considered in case where carpenter fell while attempting to move timber away from the edge on the second floor of a building - **relevant authorities canvassed** - timber should not have been placed near edge - there was no handrail or fall protection - carpenter had subcontracted with D, who in turn had contracted with builder - held that the manoeuvring of timber was in builder's control, not D's - handrail and fall protection, such as scaffolding, in the control of both, and despite this protection only being required for a relatively short period it was **reasonably practicable for D to provide fall protection** - D thus liable)

Commentary

"The Full Court of the Supreme Court in Complete Scaffold v Adelaide Brighton Cement & Anor [2001] SASC 199 (18 June 2001) considered the scope of s4(2). Per Doyle CJ:

'[50] It is a provision which I find puzzling.

[51] The maintenance work carried by Allied was done to facilitate the conduct by ABC of the trade or business that it carried on at its plant. ABC needed to do the work to carry on its trade or business. Carrying out maintenance work on its premises is something done by ABC as part of its trade or business, and in a sense in the course of that trade or business. But if that suffices for the purposes of s4(2), then whenever a person engaged in trade or business employs a contractor to do work that advances or facilitates that trade or business, the principal will be a deemed employer of any worker employed or engaged by the contractor. On this approach a firm that contracts with a contractor to clean its offices, will be a deemed employer of the cleaners. A business that retains an accountant for accounting advice, or a solicitor for legal advice, will be a deemed employer of the accountants and solicitors who work in those firms... I give these examples merely to illustrate the wide reach of the suggested meaning of the provision. Of course, one must not overlook the limitation found in the latter part of s4(2), and the need to consider the effect of the operative provisions of the OHSW Act. Nevertheless, allowing for all that, the suggested scope is so wide as to make me think that such a meaning could not have been intended.

[52] But, in the end, I have been unable to identify a more limited meaning that fits with the words of the provision. It is tempting to think that the expression "in the course of a trade or business" is to be read in limited fashion. ...

[54] The statutory expression is sufficiently imprecise to provide no firm criterion for a more limited operation to be given to the provision. Accordingly, with some hesitation and with some unease about the implications of the decision, I accept the submission that Mr Henry is to be deemed for the purposes of the OHSWAct to have been employed by ABC.

[55] ... But it has to be borne in mind that as a deemed employer ABC has limited duties under the Act. Mr Henry's injury resulted from a casual act of negligence by a scaffolder who put two planks in place, without making adequate enquiry as to how they would be used, and without considering the risk of the planks shifting. Mr Henry was injured as a result of carelessness in the course of a matter over which ABC had no control.

[56] 'Control' in s4(2) of the OHSW Act should be read as referring to actual control, that is to things which the deemed employer is managing or organising. Unless s4(2) is limited in this way, its reach would be very great'.

S4(2) concerns the relationship between a contractor engaged to perform work for a principal and if the contractor in turn employs or engages any person that person 'shall be deemed to be employed by the principal'. **Moore v Fielders Steel Roofing Pty Ltd** CT32/03@9-10 per IM Ardlie

"It was suggested by Mr Powell that s4(2) exists to prevent an employer escaping culpability simply by getting someone else to do the job. That is so, but there still remains the application of the limitation upon a deemed employers liability contained in s4(2) itself. I am mindful that in construing this statute that it is social legislation intended to secure the safety and welfare of persons at work and to protect them against the risks.

S4(2) enlarges the scope of the s19(1) duty so that it extends for the benefit of an independent contractor of the principal (employer) upon whom the duty is imposed, or an employee of the independent contractor.

I have referred above to the judgment of His Honour Chief Justice Doyle in Complete Scaffold. As His Honour stated a deemed employer has limited duties under the act. The injured party in Complete Scaffold sustained injuries as a result of carelessness in the course of a matter over which the deemed employer had no control. His Honour indicated that the word 'control' should be read as referring to actual control that is, to things which the deemed employer is managing

or organising. In this regard I do not accept the complainant's submission that managing and organising does not include performing the actual job. Indeed as the Chief Justice stated when addressing the factual situation in Complete Scaffold namely the erection of scaffold by a specialist independent contractor (para 70):

'In my opinion the placement of scaffolding was not something over which ABC had control. ABC was not carrying out the work, or supervising it.'

From the totality of the evidence it is in my view clear that the defendant contracted with Macweld to assess, organise, resource (albeit using the defendant's tools, materials and equipment) and undertake the repair operation in its totality. This was not a supply labour only situation.

The defendant engaged the services of Macweld to undertake the repair work namely the replacement of the cable supporting the aft longitudinal scraper aft beam. The fatal injuries sustained by Hutchins resulted from the sudden tensioning of the starboard cable during the winching process following the replacement of the cable. Control over the repair task rested with Macweld as the expert contractor hired to perform the work.

Consistent with the approach of His Honour Chief Justice Doyle in Complete Scaffold the principal (employer) or deemed employer, in this case the defendant, is not fixed with the expanded s19(1) duty in all circumstances. The duty exists only in relation 'to matters over which the principal (employer) has control'. The defendant did not have control." **Moore v Adelaide Brighton Cement Ltd** CT69/03 @ 16-17 per Ardlie IM – Appeal dismissed CT78/04

S.4(2)

CT87/08 Aquista & Collex P/L (**partnership** - worker{W} sweeping out partially unloaded trailer when bales of waste fell on him fracturing his pelvis, knee and vertebra in his back - D's argued they did not have the requisite **'control'** of W's activities as their **responsibility had been delegated to an independent board** - D's also argued that the way that they had structured their business sheltered them from liability - Liesckhe IM stated "the OHS Act demonstrates that **all people associated with a legal entity have OHS responsibilities**, including all members of the governing body of a body corporate ... Irrespective of whatever internal management structures the partners decided upon they could easily have, and should have, directed their nominees or managers to ensure a safe system of work with appropriate training and supervision for all bale loading and unloading operations was implemented. It was reasonably practicable for the defendants to require their nominees or managers to review and improve systems of work, training and supervision and for the defendants to ensure performance of such expectations. Even directing nominees or managers to ensure that a risk assessment had been completed, and that safe work practices were accurately documented, for all activities that involved an interface between plant and people, would have been a reasonable step for the defendants to have taken. Instead the defendants appear to have delegated, without appropriate direction or instruction, their OHS responsibilities to those people managing their business" @ 24 - D's liable - **Sentencing considered in** CT21/09 by Lieschke IM - no reduction for plea or contrition for either D - risk was a fatal one - risk arose from poorly thought out system of work and lack of appropriate information, training and supervision partly caused by the Ds' mistaken view of their OHS responsibilities - Collex had previous OHS offence, but such given little relevance - Acquista had no priors - **sentencing considerations re partners considered** - good post-incident remedial measures taken - Acquista fined $37,500 and Collex $40,000), CT21/10 (b) Mossop Group (D engaged subcontractors to do demolition work and whilst working they caused a metal rod to fall into a car park adjacent to the building they were demolishing which injured a visitor to the car park - D was charged under s22(2), but was not guilty as **D was not aware that the demolition work was proceeding at such time** and therefore the demolition work was **not 'a matter over which the D had control'** pursuant to s4(2)), CT74/11 Symons (here **W was employed by a labour hire firm who was then engaged by a contractor to provide services, which contractor was then engaged by a principal to provide services in the course of the trade or business of the principal** - W was then injured working at the principal's (Brice Metal's) premises - Full Bench considered **whether W was to be taken to be employed by the contractor under section 19(1), and deemed to be an employee of the principal pursuant to section 4(2) of the OHSW Act** - decided he wasn't to be - "in light of scope and penalties provided for by provisions such as ss 22, 23 and 24A of the OHSW Act, there is no need to give a generous construction to ss 4(2) and 19(1)" @37 - *Fielders Steel … v Moore* CT62/04 considered and doubted)

S.19

See subheadings below of: Adverse Publicity; Body Parts Injured by Machines; Change of Ownership; Compensation – see Sentencing & Compensation Confined spaces; Contractors injured; Control of Site; Conveyors; Conviction only; Corporate liability; Costs; CoWorkers (injured by) Cranes; Criminal Sentence; Cutting materials; Discounting for guilty plea; Double Punishment; Duplicity; Duty; Electrical; Elements of Offence; Explosions; Falling/Flying Objects; Falls/Slips; Fisherman; Fork Lifts/loaders and Warnings (ignoring); Guilty plea [see Late plea]; Hazardous Substances; Hoists; Improvements; Inspectors; Labour Hire Co Employees; Ladders; Late Plea; Liability in Issue; Lift; Lifting incidents; Loading/Unloading; Miscellaneous; Mitigation (agreement with third party); Mitigation (community activities); Mitigation (continuing existing work practice); Motor Vehicles (hit or injured by); Multiple parties responsible; No conviction recorded; No Injury (sentencing when); Non-delegable duty; Notification of failures; Oil; Palletiser; Particulars; Partnerships; Penalty a matter of discretion; Personnel boxes; Policies (failure to maintain); Pressure (release); Prior offence/Conviction cases; Procedural; Profit-Sharing arrangement; Rationale for penalties under Act; Reasonably Practicable; Reparation; Safety audits; Scaffolding; Sentencing – see Sentencing & Compensation; Slipping; Stay; Structures collapsing; Supervisors/Supervision; Trenches (injuries in); Unsafe (but no accident yet); Warnings (ignoring); Water (boiling); While at work; Young Workers;

[see also 'Failure to ensure Safety' & 'Sentencing & Compensation' & 'Labour hire companies' and see also Occupational… Welfare Act in subject guide]

s19 Confined spaces

CT52/08 Civil & Allied … (worker {W} injured and at risk of very serious injury, when **top section of ladder collapsed as he was descending manhole** - W fell to bottom of shaft - ladder was in very poor condition - D had not identified area as a confined space and **breached aspects of regs 2.4.3-2.3.8 regarding confined spaces** - no retrieval/rescue system/equipment in place - W not provided with any personal protective equipment - serious deficiencies in D's OHSW focus - no priors however - plea only made day before trial - not likely to similarly offend again due to substantial improvements - $30,400 fine), CT70/11 DID Piling (maximum $300,000 - W was **exposed to fumes emanating from a rust inhibitor whilst working in a confined space** - he blacked out and was given assistance and first aid - there was **a person trained in confined space work overseeing W's work** - D failed to provide W adequate instruction, training etc - D had some safety measures in place which enabled W to be rescued, had no priors and pleaded guilty - such an incident unlikely to recur - D "was under the misapprehension that the employee, who was not confined space trained, was allowed to enter a confined space and carry out work so long as he was accompanied by a confined space trained person (Gnatenko). The [D] concedes its wrongdoing and expresses its apology" @39 - D was not aware that the new product it was using gave off fumes - risk of respiratory complications and lung function complications - such injuries did not eventuate - $26,250 fine imposed)

s19 Contractors injured

CT78/07 IQES & Fosters (IQES was the principle electrical contractor for Foster's large Wolf Blass winery at Nuriootpa - **worker(W) was required to get into Foster's personnel box fixed to IQES forklift** - whilst 4 metres up **W directed the IQES driver to stop, but he mistakenly accelerated and crushed W between box and bridge** - W seriously injured - neither driver nor W had been trained in the safe use of the box for overhead work - **IQES failed to develop and implement a safe system of work and to adequately train its employees, and Fosters did not have an adequate system for ensuring that plant provided to contractors was used by suitably trained personnel** - IQES, which was in liquidation, fully cooperated with investigations, made early plea and improved practices, but showed little if any remorse and was fined $42,500 - Fosters had appropriate safe operating procedures re use of box but these not adequately communicated to contractors - Fosters made early plea, had no priors, responded very well post-incident and was fined $32,000)

s19 Control of site

CT36/09 Candetti Constructions (see precis at s19- Falls and see case generally on this issue)

s19 Conveyors

CT1/11 Bridgestone Aust (**worker caught in conveyor when went to clear jam** - another worker also exposed to risk - before getting on conveyor worker switched it off - whilst on **conveyor** it **unexpectedly started up** - alleged that safety lanyards attached to conveyors had not been adequately checked - **various alleged deficiencies in D's practices not established beyond reasonable doubt**)

s19 Conviction only

CT29/06 Pt Pirie Council (D Council charged on two counts, one for worker (K) who was injured when **working in a trench shoring up its walls when it collapsed** and secondly, for worker (M) who was exposed to risk, but not injured, when same trench, which he was on, collapsed, and when he was in trench rescuing first worker - first offence and early plea - D took all reasonable steps to assist in investigation - D had a method of shoring, but it could have been much better - some safety procedures were in place, but they were not adequately communicated to workers or implemented - insufficient clarity of roles of workers/leaders - safe procedures now implemented - hazards and risks of excavation inadequately inspected - serious, but not fatal risk of injury involved - $28,000 fine re K and **conviction only re M**)

s19 Corporate liability

CT39/06 Dinko Tuna (see précis of CT48/05 @ s19 - Liability... - this case discusses in depth **imposing liability on corporate offenders** and the law concerning **corporate vicarious liability** - see also on these issues at Sentencing & Compensation the commentary at sub-headings 'Corporations' and 'Whether to record a conviction' - see also s19 - Miscellaneous Stevenson/Softwood, Wisdom, Stevenson v Adelaide Tooling and Softwood Holdings v Stevenson and commentary to these cases), CT76/07 Hyledate & Elms (two separate incidents of a similar nature occurred at one of the 1st D's hotels within two weeks of each other - **two employees suffered serious burns when one slipped and fell into blanching pot containing boiling water** and when the other **two weeks later slipped and was burnt whilst carrying blanching pot** - 2nd D was responsible officer of 1st D Co. which had since ceased trading - D's had long involvement in industry without conviction, made early plea, fully cooperated, showed remorse toward one of victims and had good occupational health culture - **fault was mainly human error in chain of communication** - no safe systems of work had been implemented at time of first incident, but a safety manual existed - second incident would not have occurred if simple measure of refraining to move pots whilst water was still boiling was followed - **any fine imposed on 1st D would effectively be paid by 2nd D, so fair if the overall fine be no more than if one entity involved** - $22,500 fine for each incident and $3,750 fine for offence of responsible officer pursuant to s61(3))

ANNOTATED WORK HEALTH & SAFETY ACT 2012

Coverage

All decisions on the Work Health & Safety Act 2012 by the SAIR Court and SAIR Commission will be covered. *Selected* interstate cases on equivalent provisions will also be included.

S.19(2) – Primary duty of care

[2014] FCA 32 *Australian and International Pilots Association v Qantas Airways Ltd* (see précis at Sick leave)

S.24 – Duties of persons conducting businesses ... that import …

[2014] QSC 56 *Karimbla Construction Services P/L v President of the Industrial Court of Qld & Ors* (**contravention under ss24 and 30(1)(b)** of the Qld WHSA - "My provisional view is that **s37** does not have the effect that the prosecution is relieved from the requirement to plead that a defendant failed to discharge a workplace health and safety obligation when a relevant regulation, ministerial notice or code of practice applies, by failing to comply with the regulation, ministerial notice or code of practice. It is, however, unnecessary to resolve that question in the present case" @47 - "the first dot-point of the particulars is a particular of an omission constituting the offence charged by the complaint under s24(1) and 30(1)(b) of the WHSA … [F]ailure to allege a particular of a

relevant act or omission constituting the offence does not render the complaint invalid and incapable of cure by amendment" @58-59)

S.28 – Duties of workers

[2014] FCA 32 *Australian and International Pilots Association v Qantas Airways Ltd* (see précis at Sick leave)

S.30 – Health & Safety Duty

[2014] QSC 56 *Karimbla Construction Services P/L v President of the Industrial Court of Qld & Ors* (**contravention under ss24 and 30(1)(b)** of the Qld WHSA - "My provisional view is that **s37** does not have the effect that the prosecution is relieved from the requirement to plead that a defendant failed to discharge a workplace health and safety obligation when a relevant regulation, ministerial notice or code of practice applies, by failing to comply with the regulation, ministerial notice or code of practice. It is, however, unnecessary to resolve that question in the present case" @47 - "the first dot-point of the particulars is a particular of an omission constituting the offence charged by the complaint under s24(1) and 30(1)(b) of the WHSA … [F]ailure to allege a particular of a relevant act or omission constituting the offence does not render the complaint invalid and incapable of cure by amendment" @58-59)

S.37 – What is a dangerous incident

[2014] QSC 56 *Karimbla Construction Services P/L v President of the Industrial Court of Qld & Ors* (**contravention under ss24 and 30(1)(b)** of the Qld WHSA - "My provisional view is that **s37** does not have the effect that the prosecution is relieved from the requirement to plead that a defendant failed to discharge a workplace health and safety obligation when a relevant regulation, ministerial notice or code of practice applies, by failing to comply with the regulation, ministerial notice or code of practice. It is, however, unnecessary to resolve that question in the present case" @47 - "the first dot-point of the particulars is a particular of an omission constituting the offence charged by the complaint under s24(1) and 30(1)(b) of the WHSA … [F]ailure to allege a particular of a relevant act or omission constituting the offence does not render the complaint invalid and incapable of cure by amendment" @58-59)

FAIR WORK AUSTRALIA 2009 ACT (COMMONWEALTH)

ANNOTATIONS TO FAIR WORK ACT & REGULATIONS

S.389 – Meaning of Genuine redundancy

S.389 - Acceptable/suitable alternative employment

See *Redeployment* sub-heading below

S.389 - Amalgamation/Merger

[2010] FWA 6205 **Vic** *Nichols v Hoad Fabrics* (A's new position as assistant showroom manager **not considered to be sufficiently similar** to her previous job as showroom manger - however, this was a genuine redundancy as the **operational requirements of R's business had changed due to amalgamation and consequent restructure**)

S.389 - Articles

Catanzariti J, '*Fair Work Australia Clears "Genuine Redundancy" Minefield*' (2010) 48(5) Law Society Journal 42

Ierodiaconou & Harrison-Smith, *'Redundancy: Consequences of Failing to Adequately Consult'* (2013) 18(9) Employment Law Bulletin 138

S.389 - Consultation

[2010] FWA 5146 **Vic** *Camilleri v Sunbury Bowling Club* (R genuinely restructured its business and needed one less supervisor - R could have consulted with A earlier and A might have been able to retrain for the new higher supervisor's position, but **A was not covered by an award or EA, and hence no duty to consult arose** - A argued unsuccessfully that she could have been redeployed to take up the hours performed by casuals - genuine redundancy found), [2010] FWA 6280 **WA** *Di*

Masi v Coastal Fisheries (genuine redundancy due to change in operational requirements - **R did not satisfy its consultation obligations**, but found that even if it had this would have made no difference given there were **no reasonable measures R could have taken to avoid A losing his job**), [2011] FWA 4239 **NSW** *Maswan v Escada* (the A's "**dismissal does not fall within the definition of a genuine redundancy in the Act because of the failure of Escada to comply with its obligations to consult** over proposed terminations arising from changes at the workplace. … [T]he termination of his employment is not harsh, unjust or unreasonable as the decision was the result of a soundly based business decision to restructure the operations and merge two positions. The failure to consult did not lead to a different conclusion to that which would have, in all likelihood, been reached had consultation occurred. Therefore this failure does not render the dismissal unfair" @41-42), [2011] FWA 6193 **Vic** *Librio v Engineering Plastics* (no genuine redundancy when R **failed to consult with worker on sick leave about impending redundancies** - R did not comply with consultation provisions of award - dismissal harsh etc - see further decision on remedy and costs at [2011] FWA 7854), [2011] FWA 6872 **NSW** *Wang, Xiu … v Specialty Fashion Group* ("a definite decision to make 21 redundancies … was made on or about 1 June. … [M]anagement then met … to select the employees to be made redundant. They then planned an announcement to the workforce and made the announcement on 23 June. On that day **they individually notified each of the redundant employees that they were redundant effective that day**. … [Contended] that the 'one on one' discussions with the employees were an opportunity for employees to raise selection issues and are properly viewed as an adequate consultation process. … The **employees were told of the decisions without any invitation for matters relevant to the decision to be raised** so that they could be considered by SFG. There was no indication of an opportunity for input or the SFG's open mind on issues such as selection, redeployment, payments and alternatives to redundancy. It **may be that consultation was unlikely to alter the situation, but that is not the question I need to consider**" @28-31 - inadequate consultation - no genuine redundancy), [2012] FWA 5322 **Vic** *Crema, Edwards, Comley & Allan v Abi Group Contractors* (clause of collective agreement said that "**Voluntary terminations will be encouraged as a first step**" - such clause held not to contain or infer an obligation to consult - Appeal allowed in [2012] FWAFB 8453 and matter remitted so further evidence can be considered), [2012] FWA 6453 **Vic** *Monks v John Holland Group* (A was a personal assistant - the operational requirements of R's business changed and R required an executive assistant rather than a personal assistant - A was **not adequately consulted as she was not given an opportunity to persuade R that she could fulfil the role of executive assistant** - A agreed to take redundancy package - "[w]hile the Applicant was not notified of the reason her position was made redundant prior to that decision being made, she was advised of the reason prior to the decision to terminate her employment was made" @53 - "there was valid reason to terminate the Applicant's employment when she declined the Respondent's offer to remain employed while it looked at redeployment options and advised the Respondent that she wished to accept the offer of redundancy" @52 - dismissal not harsh etc), [2012] FWA 7729 **Vic** *Ball v Metro Trains Melbourne* ("The **failure to consult was unreasonable** and is sufficient in the circumstances of this case to lead me to conclude Mr Ball's dismissal was harsh … [etc], notwithstanding the valid reason for his dismissal, namely the fact that his **job was no longer required to be performed for operational reasons**, and the due weight I have given to that valid reason" @64), [2012] FWA 8416 **Vic** *Murrihy v R Mechanical Services* (the A was **made redundant, but was not consulted** - **dismissal not harsh etc** though, "given the valid reason for the dismissal [several other workers were also put off due to **change in operational requirements**] and proper regard to the effect of the size of the enterprise and the absence of human resource management specialists or expertise on the processes applied (or not applied) by the respondent" @40), [2012] FWA 10846 **Qld** *Horn v Mastermyne Engineering* (**award consultation requirements met** when A "was informed of the right sizing review the Respondent had embarked upon before it was completed, and he was invited to proffer any suggestions he may have to reduce costs so that the operations need not be restructured. He was given two days to proffer such advice or information" @44), [2013] FWC 1134 **Vic** *Thomas v Info Trak* (R "felt after a short period of dissatisfaction that he was not getting value for money from the Applicant's position and so decided without consultation or warning to abolish it. … **[I]f consultation had occurred it is possible that it might have led to Mr Bruyns changing his mind about the need to abolish the position** because a satisfactory and productive way for the relationship to proceed may have been found. I do not consider this to be a probability but it is not a remote possibility. … I also consider that **consultation could have led to alternative options for redeployment**. However, given the skills of the Applicant, the size of the business and the matters I discussed earlier when considering the issue of redeployment **I do not consider that**

redeployment was very likely" @43-45 - **termination was unjust and unreasonable**), [2013] FWC 1299 **NSW** *Noronha v Dept. of Veterans' Affairs* ("DVA was not required to personally consult with Mrs Noronha about the reorganisation but to **consult the class of employees** 'whose positions may be affected by change' in a similar manner as Ulan Coal Mines was require to consult with mineworkers" @55 - A was on leave at time her class of employees was consulted - nevertheless, in ongoing discussions about her rehabilitation etc A was adequately consulted), [2013] FWC 2455 **SA** *Habets v Baker & Partners Accountants* ("the termination of Ms Habets' employment was harsh in that she was **purportedly made redundant but that the consultation obligations and redundancy payments due to her were not met**. The termination of her employment was unreasonable in that Ms Habets **was told that she could apply for the revised position** before her employment concluded, that she was not given the realistic opportunity to do so and clearly could not meet the requirements now specified by Mr Frost" @50), [2013] FWC 4697 **WA** *Keating v Ausco Engineering* (the A was an employee of R, a labour hire company, and he was placed with KML - "The practice was that KML would instruct the Respondent by advising the numbers and various trades required for the mobilisation and demobilisation of employees" @3 - A's employment was covered by the *Karara Iron Ore Construction Project (Mine and Other Infrastructure) Ausco Pty Ltd & AMWU & CFMEU Greenfields Agreement 2011* - agreement had **clause headed 'Consultation' stating** "**Where a business decision by the Company is likely to have a significant effect on Employees, the Company will consult relevant Employees as to how the decision may impact Employees**, as early as practicable after a definite decision has been made by the Company. Further, the Company will give prompt consideration to matters raised by Employees in relation to the changes" @29 - "the dismissal of the Applicant was in the context of an ordinary, or customary or usual turnover of labour for work of this type on projects of this nature. In those circumstances **I do not consider that the demobilising of employees and the Applicant in particular involved 'a business decision' …** I also do not consider that compliance with a direction by KML that they did not require certain numbers and types of employees to be supplied to be a business decision by the Respondent" @31-32 - no requirement to consult - genuine redundancy, or, in the alternative, there was a valid reason for dismissal), [2013] FWC 6838 **Vic** *Papathanasiou v HBS Group* (R "**advised employees in a general way that the GPO job was coming to an end and discussed with them, relocation** to other sites to mitigate the impact of the change. However there was **no consultation, once a definite decision had been made**, to reduce the number of employees on the GPO site and to terminate Mr Papathanasiou's employment" @24 - "The failure to consult is serious. However in this case **consultation would not have changed the outcome**. The work that Mr Papathanasiou was doing was coming to an end. All the employees would either have their employment terminated or they would be relocated. Mr Papathanasiou would not accept a change in his conditions of employment so that he could work on other commercial sites" @46 - termination not harsh etc), [2013] FWC 8097 **Vic** *Andronicou v Cooke & Dowsett* ("A **reduction in the overall requirement of the Respondent for plumbers could … result in a genuine redundancy whether or not it was the Applicant's particular position that was no longer required** or some other position" @20 - "On the basis of a **lack of sound evidence to support its claims of staff reductions** at the period of time relevant to this application I cannot find that the Respondent no longer required the job done by the Applicant to be done by anyone due the operational needs of the business" @32 - "**Whilst projects ending (and starting) are part of the normal operations of the business this does not mean that the end of a project is not a <u>major change</u>** in the organisation of the work of the Respondent" @48 - "If … there was a reduction of 21% of employees in April, I am satisfied that this will have come about by some major change in its business. That being so there is a positive obligation on the Respondent to consult with the Applicant … about that change in those requirements. The requirements on the Respondent are to notify the employees affected and then consult on those matters set out in clause 10.6 and give consideration to matters raised by the employees. This did not occur, at least with respect to the Applicant who was clearly affected by the change" @52 - consultation obligations not met - no genuine redundancy - Appeal dismissed 16/1/14 in [2014] FWCFB 447), [2013] FWC 8889 **NSW** *Haynes v Chubb Security Services* (a "bona fide opportunity was provided to the Applicants to influence Chubb's decision making process on 28 May 2013. … **Applicants [advised] that if they could not work morning shifts they would be made redundant**. Chubb considered what was put on behalf of the Applicants and made a decision, while unfavourable to the Applicants' interests, it did not diminish the fact that the discussion process required to be undertaken had occurred. In considering whether the Agreement provisions have been complied with it is not to the point whether the consultative process adopted by Chubb could have been better, **mere compliance is all that is required**" @63-64), [2013] FWC 8020 **NSW** *Fisher & Ors v Downer EDI*

Mining (**consultation process involving several hundred employees** - "material provided in the PowerPoint presentations omitted reference to anticipated redundancy for maintenance employees and specifically only mentioned anticipated redundancies for operators. There was further evidence that maintenance management staff erroneously suggested to maintenance employees that the anticipated redundancies would be confined to operator positions. There was also evidence that at least one of the applicants who was a maintenance employee, had not been provided with any advice via the PSI … An examination of the totality of the evidence regarding **important omissions in respect to anticipated redundancies applying to maintenance employees**, has been a most troubling aspect for consideration … Downer Mining **acted in good faith and with every intention to comply with the consultation obligations** arising from the provisions of the Agreement. Consequently … the consultation obligations have been met" @60-64), [2014] FWC 988 **Qld** *Stewart v Amcor Excavations (*the A, **a labour hire employee, was placed with a client who no longer wanted him - A was surplus to R's needs**. "The Applicant's skill profile was not in demand at any other site, it was powerless to return the Applicant to the original client and its work site, and the Employer at the same time was reducing its employment levels significantly in other areas in which it had direct employees" @46 - R "no longer required the Applicant's job to be performed by anyone because of changes in the operational requirements of the Employer's enterprise, as it is broadly conceived" @47 - R claimed that the decision to make A redundant could not be regarded as a 'major change' under the relevant Modern Award's consultation provision arguing "that the redundancy of a single employee alone does not constitute a major change" @19 - the plural 'employees' was used in the award, but such held not to negate the application of the award to one employee - R also argued that a "major change is 'where an employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology" @26 - according to R, "there was no decision taken by the Employer to introduce a major change that had any significant effects. The Employer encountered a set of circumstances imposed upon it by an external event, and responded at a discrete level, but this could not amount to a major change of the type the consultation clause envisages" @31 - held that **"consultation provisions in modern awards (from which small businesses are not excluded) are - in their standardised origins - intended to capture redundancies however they might arise and on whatever scale (despite the conditionality expressed by the adjectives in the phrases 'major change' and 'significant effects'"** @42 - R failed to comply with consultation provisions of applicable modern award - dismissal found), [2014] FWC 9311 **WA** *MacLeod v Alcyone Resources* (this case involved a **genuine redundancy**, but **R failed to meet its consultation obligations** under Clerks Award - A was an executive assistant - after restructure, the only position A might have been redeployed to was a junior receptionist position - the disparity between A's former role and the junior position and A's failure, in the face of **opportunity to express interest in the new role**, contributed to finding that A's **dismissal not harsh** etc), [2014] FWC 2046 **Vic** *Roberton v Car Stackers International* (the A reacted badly during one on one consultation to the news there would be redundancies - **consultation with A was left incomplete due to his intimidating, aggressive and threatening reaction** - R decided A would therefore be the one made redundant - dismissal harsh etc as no valid reason and lack of procedural fairness), [2014] FWC 3235 **SA** *Lassiter v Ford Dynasty* (after the A was told by R was it was looking at making his position redundant and that it wanted to discuss options with A, A absented himself from work on various forms of leave for an extended period - A's position was then made redundant - **in light of A's deliberate unavailability for consultation, R had met its consultation obligations**), [2014] FWC 4514 **WA** *Wessels v Midwest Vanadium* (a **destructive fire forced R to shut down a large part of its operations and A was made redundant along with 47% of R's workforce** - A claimed R did not meet its consultation obligations under the award - award required consultation when employer had made **"definite decision to introduce major change in production"** - FWC satisfied this "was a ruinous event forced on the Employer rather than the Employer being the architect of the change in production" and that therefore there was no "definite decision" - in any event there were general discussions with employees about redundancies - genuine redundancy found), [2014] FWC 4564 **Qld** *Collie v Metropolitan Caloundra Surf Life Saving Club Inc* ("At the point that the intention to make his position redundant was discussed with Mr Collie, it was a ***fait accompli*** and the only possible option open to Mr Collie was a casual coaching position with uncertain hours. While it was open to the Club to discuss this option with Mr Collie, the casual position was presented as the only option. The manner in which the discussions occurred does not fulfil the obligations under the Award to consult. There was no discussion with Mr Collie about relevant skills and whether he could perform work other than coaching. While I accept that the Club's capacity to redeploy Mr Collie into an administrative role was limited, there were casual employees performing work which could have been used to

supplement the casual coaching role. This option was not discussed with Mr Collie, and had a proper consultative process been followed this subject could and should have been discussed" @28-29 - **R's lack of knowledge about A's qualifications hindered it in considering redeployment options** - R **failed to consider redeploying A to an associated entity** - see précis at Associated entities), [2014] FWC 5275 **WA** *Salisbury v McKay Drilling* ("The **change in this case was to make one position redundant**. The context relevant at the time the change was made there were approximately 60 employees employed by the respondent. Whether a change has significant effects on particular employees affected is not determinative of **whether or not it is a major change**. There was not in this case a major change in the respondent's production, program, organisation, structure or technology. Consequently there was no obligation under the Award for the respondent to consult with Mr Salisbury in these circumstances" @81), [2013] FWC 9972 **SA** *NTEIU v UniLife Inc.* (**in mitigation of pending redundancy R deployed worker to new role until February 2014** - R argued worker was now employed on a fixed term basis and that it had no **further obligations re consultation and redeployment** - the A argued worker's employment was continuing and it was reasonable he be redeployed to an advertised position - A succeeded), [2014] FWC 6606 **Vic** *Zito v Goulburn Valley Imaging Group* (on balance, genuine operational reasons found - **A, a long standing employee, was told at a meeting (that took her unawares), that her position was to be made redundant** - at the meeting the A was not provided "all the relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees ... Because Mr Dodos did not comply with his obligations to provide relevant information, Ms Zito was prevented from having any discussion with Mr Dodos that could have caused him to adopt a different course of action. She was denied the opportunity to have a discussion which may have, in the words of the clause, averted or mitigated the impact of the changes on her" @65-66 - **R's failure to consult in circumstances where it had an HR manager weighs in favour of dismissal being harsh etc** - unfair dismissal found), [2014] FWC 5606 **NSW** *Chang v Mega International Commercial Bank* (manager made decision that A "could be made redundant purely on the basis that she filled in for Ms Chang for two weeks whilst she was on annual leave. The fact that she did not have to work overtime during these two weeks whilst performing both roles led her to believe that the Assistant Manager's role was not a full time role" @35 - R "had determined that Ms Chang would be the employee to be made redundant before any consultation process had commenced. In the Full Bench Decision in *UES (Int'l) Pty Ltd v Leevan Harvey* the majority concluded that the **selection process in identifying the redundant employee was not a relevant consideration** in determining whether a dismissal was a genuine redundancy. I agree with this rationale **as long as there is a transparent process** in place. **Such a process, examining each employee's skill, competence and training did not occur**. If it had, then Ms Chang may have been found to have superior knowledge and competency then some of her colleagues" @49-50 - **A not treated in accordance with award and R's policies** - "By **failing to consult in an appropriate manner**, Mega ICBC has failed to meet the tests associated with the genuine redundancy provisions" @52 - A was a senior, long standing employee - A has not found other work - dismissal harsh etc)

Full Bench decisions

[2012] FWAFB 5241 *UES (Int'l) v Harvey* (Commissioner erred in finding that A's dismissal related to his capacity - the A's dismissal **would have been a case of genuine redundancy if adequate consultation pursuant to the award had occurred** - such consultation would have taken about two weeks - A entitled to two weeks remuneration - see commentary below at s389 commentary (generally))

Commentary

"[57] Logan J in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited* provided a detail summary of the meaning to give to consultation. 31 I have adopted that reasoning in this decision.

[58] In that decision Logan J referred to the much cited statement of Commissioner Smith. 'Consultation is not perfunctory advice on what is about to happen. This is common misconception. **Consultation is providing the individual, or other relevant persons, with a bona fide opportunity to influence the decision maker**.'" 32 … **[67]** … [W]here an employer plans to restructure its leadership team and create an entirely different reporting structure all employees' work or jobs may be affected by the decision and the obligation to consult is with all employees. At Mowbray this meant the relevant employees in relation to the restructure were all employees. **IEU Aust. V Mowbray College** 6/7/10 [2010] FWA 4824 Comm. Gooley Vic

S.389 - General (genuine redundancy found)

[2009] FWA 1676 **SA** *Mr M v LD P/L* (a **genuine redundancy found when LD no longer required the same number of staff on its housing provider work as a result of the reduced demand** on the part of that housing authority. This constitutes a **changed operational requirement** and meets the requirements for a genuine redundancy" @36), [2010] FWA 203 **Qld** *McAlister v Bradken* (redundancy found genuine due to economic downturn and need to restructure - W's position was a specialised one and not many such positions existed - W "contended that there was a positive obligation to identify positions … [he] was capable of performing other than in relation to the position … [he] held at the time of the redundancy … I cannot discern from where such an obligation might arise**. The meaning of a genuine redundancy at s389(1)(a) of the FW Act is in relation to 'a person's job' at the time of the alleged redundancy and evidences no intention to take on a wider meaning** for the purposes of s389(2) of the FW Act. … [I]f the FW Act intended that an employer was required by virtue of s389(2) of the FW Act to identify any position at all that an employee may be able to perform it would have expressly so directed, and perhaps with some conditionality as to the range of such alternative positions which might be so identified. … [I]t is most unlikely that at the time of the redundancy when, as the evidence showed, so many of the [R's] businesses were reducing employee numbers that such an opportunity might have been available" @38-41), [2010] FWA 674 **NSW** *Kekeris v A Hartrodt Aust* (**new structure in Sydney office meant R only needed three leaders, not four** - A was the leader to miss out - **restructure due to operational requirements** found and there was no evidence of other positions A could be redeployed to - explanatory memo on cl. 389 discussed), [2010] FWA 1471 **WA** *Brooks v The Gowrie* (A, a **general manager, was offered a similar position, as a manager**, upon being told that her position was to be made redundant - the new position involved less responsibility, less pay, less autonomy and less skill - FWA considered the positions were sufficiently different and brought about by genuine financial needs - genuine redundancy found), [2010] FWA 3125 **Vic** *Iannello v Motor Solutions Aust* (**A was seeking to return from maternity leave to her full-time position, but was only offered part-time work** - R was suffering from the economic downturn and had another employee (Mr Hennessy) doing her job in addition to his own - **A's position could no longer support full-time work** - A terminated when she was not prepared to come back part-time - **not a genuine redundancy, as it would have been reasonable to redeploy A to Mr Hennessy's position, even though he may have had to be made redundant**), [2010] FWA 3535 **Vic** *Reichman v PG Lion Resources* (R had a **surplus of labour** and FWA considered that it appropriately re-allocated the work - **genuine redundancy** found - leave to appeal refused in [2010] FWAFB 5431)

S.389 - Last on/first off principle

[2010] FWA 2945 **Vic** *McNay & Humphreys v Campbell's Australasia* (R had a **skills/experience exception to the last on/first off rule - R failed to apply it appropriately when it did not redeploy A's** - dismissal harsh etc- reinstatement appropriate for these long serving employees - Appeal dismissed in [2010] FWAFB 6048)

S.389 - Operational requirements

[2010] FWA 5659 **Vic** *DL v BKC* (**meaning of 'operational requirements'** discussed from para 30), [2013] FWC 31 **Vic** *Reid v Quayclean* ("**tasks and functions performed by the Applicant continue to be required to be carried out**. However, the business has been structured in a different way, including through greater involvement with an existing sub-contractor" @16 - genuine redundancy), [2013] FWC 8097 Vic *Andronicou v Cooke & Dowsett* ("A **reduction in the overall requirement of the Respondent for plumbers could … result in a genuine redundancy whether or not it was the Applicant's particular position that was no longer required** or some other position" @20 - "On the basis of a lack of sound evidence to support its claims of staff reductions at the period of time relevant to this application I cannot find that the Respondent no longer required the job done by the Applicant to be done by anyone due the operational needs of the business" @32 - no genuine redundancy - **stay of decision granted** on 26/11/13 in [2013] FWC 9174 - "insofar as the Commissioner considered the question of remedy, she placed some reliance on a finding that the Appellant contravened the provision of the AC Act and relied in paragraphs [93] and [94] of her decision, on that contravention as a guide for determining the period that the Respondent would have continued to be employed, but for the termination. It seems to me arguable that, in so doing, the Commissioner relied upon that contravention in assessing the remuneration that the Respondent would have received, or would

likely to receive, if he had not been dismissed. Therefore the Appellant had made out a sufficiently arguable case with some reasonable prospect of success that the Commissioner's conclusion that there had been a contravention of the AC Act was erroneous based upon a proper and alternative construction of section 194 of the AC Act." @10-11), [2013] FWC 8020 **NSW** *Fisher & Ors v Downer EDI Mining* ("Subsection 389(1)(b) of the Act does not establish any requirement that when an employer decides that it no longer requires a person's job to be performed by anyone, it must make that **decision based on sound and well defensible management practices**" @55), [2014] FWC 5604 **WA** *Fisher v Association for The Blind* (part-time position abolished - "the fact that the **Employer wishes to have the activities/tasks of the abolished position carried out on a casual basis** in the future, does not annul the Employer's submission that there are good and proper operational reasons to abolish the position" @44)

S.389 - Out-sourcing work

[2010] FWA 167 **NSW** *Howarth & Ors v Ulan Coal Mines* (FWA considered whether there were genuine redundancies when an employer outsources work to contractors, and, after considering the authorities, concluded that "the customary usage and application of **the term redundancy extends to where the job is no longer needed to be performed by the employees of an employer, even if the work is to be provided in future by a contractor**" @19 - R also decided to increase the proportion of mineworkers possessing trade qualifications - FWA found "that **jobs made surplus to requirements as a result of Ulan's desire to increase the proportion of mineworkers with trade qualifications and to reduce such proportions of non-trade qualified mineworkers are not jobs which could be described as ones no longer required to be performed by anyone** … In all the circumstances, including the increased engagement of eleven more mineworkers (albeit with trade qualifications), … [FWA] not … satisfied that the termination of any of the ten applicants was because the jobs in question were no longer required to be performed by anyone because of changes in the operational requirements" @31-34 - **not genuine redundancies** - see discussion from para 35 indicating that R generally did adequately consult re the redundancies as per EA requirements - however, it **did not adequately consult with those employees 'directly affected' as per the EA** because it failed to have discussions directly with them - but **see Full Bench Appeal commentary below** in Markac),

Commentary

[Markac] **[10]** In *Ulan Coal Mines Limited v. Henry Jon Howarth* 3 a Full Bench considered these new provisions in the context of a matter in which 38 mineworker positions and others were determined to be surplus to requirements, although non-trades mine work was still done by someone, and there was reallocation of work. The Bench said:

'[14] The changes in the operational requirements at the mine included changes in the composition of the workforce, in the tasks and functions that would be performed by contractors and employees, and in the number and skills mix of mineworkers required to be employed. As a consequence of the changes it was determined that there were a number of non-trades mineworker positions that were surplus to requirements as they were no longer needed for the Company's operations. Ultimately it was decided that 14 permanent non-trades mineworkers would have to be retrenched. The basis on which mineworkers were selected for redundancy was seniority, as provided under the Agreement. They were not selected according to any individualized approach based on the particular position or work being performed by them whether in underground crews or in surface functions. The need to reduce the overall number of non-trades mineworkers, together with the application of the seniority principle for selection, meant that mineworkers from different parts of the operations would be retrenched and that other mineworkers might need to be reallocated into available mineworker jobs.

[15] These were the circumstances in which it was necessary to consider the meaning and application of the relevant statutory provisions and, in particular, the expression "the person's employer no longer required the person's job to be performed by anyone" in s389(1)(a) of the Act. …

[17] It is noted that the reference in the statutory expression is to a person's "job" no longer being required to be performed. As Ryan J observed in Jones v Department of Energy and Minerals (1995) 60 IR 304 a job involves "a collection of functions, duties and responsibilities entrusted, as part of the scheme of the employees' organisation, to a particular employee" (at p. 308). His Honour in that case considered a set of circumstances where an employer might rearrange the organisational structure by breaking up the collection of functions, duties and

responsibilities attached to a single position and distributing them among the holders of other positions, including newly-created positions. In these circumstances, it was said that:

> "What is critical for the purpose of identifying a redundancy is whether the holder of the former position has, after the re-organisation, any duties left to discharge. If there is no longer any function or duty to be performed by that person, his or her position becomes redundant…" (at p.308)

This does not mean that if any aspect of the employee's duties is still to be performed by somebody, he or she cannot be redundant (see Dibb v Commissioner of Taxation (2004) FCR 388 at 404-405). The examples given in the Explanatory Memorandum illustrate circumstances where tasks and duties of a particular employee continue to be performed by other employees but nevertheless the "job" of that employee no longer exists.

[18] In Kekeris v A. Hartrodt Australia Pty Ltd [2010] FWA 674 Hamberger SDP considered whether a dismissal resulting from the restructure of a supervisory team was a case of genuine redundancy. As a result of the restructure, four supervisory team leader positions were replaced by three team leader positions. The Senior Deputy President said:

> "When one looks at the specific duties performed by the applicant prior to her termination they have much in common with those of two of the new positions in the new structure. **The test is not however whether the duties survive. Paragraph 1548 of the explanatory memorandum makes clear that it can still be a 'genuine redundancy' where the duties of a previous job persist but are redistributed to other positions. The test is whether the job previously performed by the applicant still exists."** (at par [27])

[19] In the present case, the Commissioner appears not to have drawn an appropriate distinction in his reasoning between the "jobs" of the mineworkers who were retrenched and the functions performed by those mineworkers or take proper account of the nature of the restructure at the mine which led to an overall reduction in the size of the non-trades mineworker workforce. The Company restructured its operations in various ways including by outsourcing certain specialised, ancillary and other work and increasing the proportion of trade-qualified mineworkers in underground development and outbye crews. As a result, it was identified that there were 14 non-trades mineworker positions which were surplus to the Company's requirements. The mineworkers whose employment was to be terminated were determined according to the seniority principle as provided in the Agreement. This did not mean that the functions or duties previously performed by the retrenched mineworkers were no longer required to be performed. It also did not mean that the positions of some of these mineworkers (e.g. in underground crews) did not continue, although those positions might after the restructure be filled by more senior non-trades mineworkers transferred from other parts of the operations or by trade-qualified mineworkers. However fewer non-trades mineworker jobs were required overall at the mine as a result of the operational changes introduced and, for this reason, the jobs of the 14 mineworkers selected for retrenchment could be said to no longer exist.

[20] These circumstances readily fit within the ordinary meaning and customary usage of the expression in s389(1)(a) of the Act where a job is no longer required to be performed by anyone because of changes in the operational requirements of the employer's enterprise.' "
Markac v CSR Ltd 2/7/10 [2010] FWA 4548 Hamilton DP

S.389 - Positions relocated

[2010] FWA 2571 **Vic** *Manoor & Prasad v United Petroleum* (genuine redundancy found in a case when workers' **positions were relocated interstate** - cost considerations relevant - **no absolute obligation to consult** about a redundancy unless award or agreement requires such)

S.389 - Post-redundancy advertisements for workers

Full Bench decisions

[2012] FWAFB 7675 **NSW** *Shepherdson v Binders Compendiums Menu Covers …* (A was made redundant as **sales manager** due to R's financial situation - decision that redeployment within business was not reasonable in the circumstances confirmed on appeal - R's **advertisement for sales manager 11 months after FWA decision** in this matter not sufficient to alter decision that redundancy was not a sham)

S.389 - Procedures for implementing redundancy examined

[2010] FWA 1781 **Vic** *Tyszka v Sun Health Foods* (**genuine redundancy found due to R losing some major contracts** - appropriate consultation and selection process for redundancy evidenced including the use of a **skills matrix** and the involvement of the union - however **R did not put the proposed changes in writing to employees or the union as per industrial agreement**), [2010] FWA 2571 **Vic** *Manoor & Prasad v United Petroleum* (genuine redundancy found in a case when workers' **positions were relocated interstate** - cost considerations relevant - **no absolute obligation to consult** about a redundancy unless award or agreement requires such), [2010] FWA 3498 **Vic** *Chand v Sypharma* (**genuine redundancy** in case where FWA "satisfied that the employer did consider measures to minimise the redundancies and the effect of the redundancies to some extent and advised the Applicant that there were no alternatives. … [There were] some doubts about the adequacy of the consultations with the affected employees and the Applicant in particular … [and] the process by which the Applicant was **informed about the redundancy by telephone** was unfortunate. However, in the **absence of any evidence or submissions** to the contrary … the evidence of the employer that **consultation** which met the requirements of the Agreement and the Award did occur [was accepted]" @26), [2014] FWC 5275 **WA** *Salisbury v McKay Drilling* ("the **process for selecting employees for redundancy** it is not relevant to whether the dismissal was a genuine redundancy" @76)

S.389 - Redeployment

[2009] FWA 357 **WA** *McDade v Mills Charters* (R no longer required A's services as a full-time skipper due to changes in operational requirements - redeployment of A into the **casual pool** of skippers, which A was not prepared to accept without a guarantee as to hours and future earnings, **would not have been a redeployment as per s389(2)** - this was a **case of genuine redundancy**), [2010] FWA 675 (2) **Qld** *Wright v Cheadle Hume t/as Macedon Spa* (held that it was **not a case of genuine redundancy** as it was "more probable than not that it would have been reasonable in all the circumstances for Ms Wright to be redeployed within the respondent's enterprise. It is clear that **there were various hours of work available for chefs within the enterprise**, and that such hours have been performed by various employees, some of them new employees since the termination of Ms Wright's employment" @15), [2010] FWA 5150 **SA** *Taylor v Tatiara Meat* (new business owners did not see a need for the position A occupied - A showed disinterest towards continuing in another position, rudeness to the new owners, and A's **redeployment options were only to significantly lower levels** - genuine redundancy found), [2010] FWA 4817 **NSW** *Howarth etc v Ulan Coal Mines* (**meaning of 'redeployment'** considered - "[T]o suggest that redeployment equates to employment elsewhere is not to take an expansive view of the word redeployment. It is to alter its meaning … If the Parliament had meant section 389(2) to be about employment within an associated entity, it would have said so. … **Any action of Ulan to make some job vacancies known to employees, taking steps to have associated entities delay closing employment opportunities and then with those associated entities offering employment following an open selection process is not redeployment.** It is merely assisting in the gaining of employment" @39-41 - found that it would have been reasonable for R to have redeployed several of its employees in its associated mining enterprises - Appeal dismissed [2010] FWAFB 7578), [2010] FWA 6452 **Qld** *Aleckson v Tewantin Noosa RSL* (A's job was no longer required to be performed by anyone due to changes in operational requirements - R failed to meet its consultation obligations - A, who was a **long standing employee with experience in various positions at her work place**, could have been redeployed - termination harsh etc), [2010] FWA 8789 **Qld** *Harrison v QUT* (R no longer offered the units a senior lecturer (A) taught and so no longer required his job to be done by anyone due to a change in operational requirements - **s389(1)(a) met** - "I have great difficulty accepting that there can be any real consideration of options for redeployment in the sense required by s389(2) of the Act, and a conclusion that no reasonable redeployment options are open, in circumstances where there has been **no consultation or discussion with the person concerned about these matters, before the decision to terminate the person's employment has been made** - hence, not a genuine redundancy - dismissal not harsh etc though as A's position was redundant and there were no reasonable opportunities for redeployment), [2011] FWA 4078 **WA** *Lindsay v Dept. Finance & Deregulation* (an MP decided to restructure his electoral office post-election due to certain deficiencies - change to operational requirements established - the restructure was a **'spill and fill' scenario whereby each of his staff members lost their jobs and had to reapply for new positions** competing against each other and outside applicants - A's higher grade position no longer existed, but he could have worked in the new positions if he had desired - he did not apply - A was on sick leave, but despite arguing to the contrary, he was sufficiently consulted - **A found to have been unfairly dismissed as he could have been redeployed to one of the new positions**), [2011] FWA 1267 **NSW** *Peart v Allianz Australia Services* (the A's role as National Customer Development Manager was made redundant and she was **given 24 hours to accept what R regarded to be a comparable role** in underwriting, schemes and facilities at the same rate of pay - A's failure to take up the role was taken by R to end the employment relationship - there were detailed provisions in the *Allianz Australia Business Partnership Agreement 2010* concerning redeployment and the duty to provide comparable employment - despite A not being keen on underwriting (which she had the skills for) R found to have offered her a comparable position - other **cases interpreting the meaning of 'comparable' considered**), [2011] FWA 5215 **Vic** *Margolina v Jenny Craig Weight Loss Centres* (s389(1)(a) met - however, the R made A redundant after presuming she would not be interested in **redeployment to a lower paid position** when it was later shown that she was - **prudence required R to consult** A about this - after considering various redeployment cases FWA concluded there was no genuine redundancy as it would have been reasonable for A to be redeployed - Appeal dismissed in *Jenny Craig Weight Loss Centres v Margolina* [2011] FWAFB 9137), [2012] FWA 1711 **NT** *Anderson v RSPCA Tasmania Inc.* (the A was made redundant from his position as marketing manager - **genuine redundancy found due to declining fundraising revenue** and hence there were clear operational reasons for the restructure - A claimed he should have been redeployed to newly created position of fundraising manager - **marketing manager and fundraising manager**

positions quite similar but the latter found to be a new position due to its strong focus on the development and implementation of a new fundraising strategy and calendar of events - "[A's] main areas of expertise and experience were in strategic marketing which focused on advertising, graphic design and brand development" @67 - A had the qualifications for new position - "incomplete and somewhat unfair assessment of whether or not the [A] should be redeployed into the Fundraising Manager position" @63 - however, redeployment of A would not have been appropriate as A lacked experience in fundraising and his communication skills were not at the requisite level - **conditions of s389(2) not met**), [2012] FWA 4477 **NSW** *Broughton v Gold Buyers Qld* (due to business losses, R for operational reasons needed to restructure its business and A's managerial job was no longer required to be performed - A was a good worker - **A was not offered a lower paying position with several similarities to the job he had been performing** - A was not consulted - despite R thinking it was beneath A to take up the lower paid position, R should have offered it to A - dismissal harsh and unfair), [2012] FWA 5322 **Vic** *Crema, Edwards, Comley & Allan v Abi Group Contractors* ("The **applicants had experience ranging upwards from two years working in the CWI [labourer] classification** and for the company. I have not been persuaded that it would not have been reasonable for the applicants to have been redeployed into four of the 16 vacancies and, if necessary, for the applicants to have undertaken the 10 week training course, as four of the successful applicants were required to do. **Any perceived inadequacies on the part of the applicants would be likely to have been remedied by the training**. It would seem **unreasonable for four current employees to have been dismissed when four other people, who are not employees of the company, are offered employment** and a 10 week training course with on the job support and supervision after the course" @160 - Appeal allowed in [2012] FWAFB 8453 and matter remitted so further evidence can be considered), [2012] FWA 3126 **SA** *Suridge v Boral Window Systems* ("where an employer had no ongoing or predictable requirements for some direct employment within its operations, it would not generally be required as a reasonable measure to create a position in order to redeploy a redundant employee. However in this case, there is an **ongoing and generally predictable level of demand for the supplementary labour** including the regular backfilling of on-going permanent positions; the applicant was an existing permanent employee who had been made redundant and Dowell was under an obligation to genuinely consider mitigation of the consequences; the **applicant had stated his willingness to undertake a production role in the knowledge that it would be supplementary** (but not casual) in nature; and he had stated his willingness to take individual days of annual leave to cover any days when there was no requirement … Importantly, the redeployment of the applicant could have been accommodated at the time without requiring the employer to restructure its approach to staffing and the use of labour hire more generally" @121-122), [2012] FWA 6453 **Vic** *Monks v John Holland Group* (see précis above at Consultation sub-heading), [2012] FWA 8289 **Vic** *Aldred v J Hutchinson Pty Ltd* (**approach to considering issue of redeployment in large national enterprise considered - geographical considerations canvassed** - "simply because an employee does not expressly raise the possibility of redeployment to another position at some different or distinct location does not mean that it will not be reasonable to redeploy such an employee to that location. Rather … the question of what will constitute a redeployment which would be reasonable in all the circumstances will be more complex and entirely dependent on the particular factual circumstances or each case" @39 - "To confine the consideration to a particular geographic zone or division of an employer's enterprise or those of associated entities … would unjustifiably limit the words used in the statute which encompass the *whole* of an employer's enterprise and the *whole* of any associated entity" @44 - redeployment would have been reasonable here), [2012] FWA 10846 **Qld** *Horn v Mastermyne Engineering* (**s389(2) does not oblige an employer to "retrain a redundant employee to any alternative position for which they are not immediately qualified or experienced** … However, in some cases, the redeployment of an employee into a new field of work may only require a modest retraining requirement to reorient or supplement the employee's skill set to a new position. Such measures would ordinarily, in my view, fall with the notion of redeployment. This is because redeployment is not always in respect of like for like positions as such, but between positions where the underlying skills set are largely comparable or transferable " @32-33 - the retraining of A to work underground would have required far more than modest retraining), [2013] FWC 1054 **Vic** *Haar v Cardboard Cartons* (see for a discussion of **when it would be appropriate to redeploy a worker in a genuine redundancy situation to perform work performed by labour hire workers** - insufficient evidence to decide in this case - no obligation to consult in relevant award), [2013] FWC 4982 **NSW** *Pykett v TAFE NSW* (the A was given the option of voluntary redundancy or to remain in employment and seek redeployment during a three month retention period - A chose the latter - due to the **constrained nature of R's**

redeployment policy, including there being a freeze on certain permanent appointments R had not met its obligations under **s389(2)(a)** - FWC concluded that it would "have been reasonable in all the circumstances for the respondent to redeploy or to consider redeploying the applicant within its enterprise other than to an advertised, permanent vacancy. I do not consider it necessary in the circumstances of this case to determine which position, specifically, would have been appropriate for redeployment of the applicant. **That the respondent did not allow for any consideration of the redeployment of the applicant within its enterprise other than under the artificial confines of the *Managing Excess Employees*-conditioned understanding of 'redeployment', in and of itself, leads me to the conclusion the dismissal was not a genuine redundancy** within the meaning of the Act" @33 - A was unfairly dismissed - on remittal in [2014] FWC 3177 Comm. McKenna was satisfied "there was a job or a position or other work within the respondent's enterprise of a Technical Officer Scientific Grade 1/2 level at the Ultimo campus to which it would have been reasonable in all the circumstances to redeploy the applicant - even if, for example, the redeployment would not have had the greater security of tenure of redeployment to a permanent, advertised position of the type contemplated in the *Managing Excess Employees* policy" @50 - requirements of **s389(2)** canvassed), [2013] FWC 6490 **Vic** *TWU v Linfox Australia* (what is **'acceptable alternative employment'** must be determined on an objective basis, and the onus is on the employer to show that the employment is acceptable - interim decision made finding that redeploying tanker drivers to a lower grade of driving work with significantly lower rates of pay and lesser conditions was not acceptable, despite a compensation package and despite ongoing efforts by employer to find tanker work), [2013] FWC 7309 **Qld** *Roy v SNC-Lavalin Australia* (s389(2) and **reasonableness of international redeployment considered** - not reasonable in circumstances), [2013] FWC 8905 **Qld** *Beach v Ansaldo STS Australia* ("There is **no ongoing obligation in s389(2)** for an employer to continually assess redeployment options for an employee after they have been dismissed on the basis of a genuine redundancy. This is confirmed by the inclusion of the words 'would have' being the test prescribed by the legislation. That is, would it have been reasonable, at the time of the person's redundancy for that person to be redeployed" @54), [2014] FWC 748 **Qld** *Eames v Orrcon Operations* ("The Full Bench in *Ulan Coal Mines* noted at [28]: *… **the question posed by s389(2), whether redeployment would have been reasonable, is to be applied at the time of the dismissal**.* The subsequent actions of Orrcon, apparently in response to changed circumstances, cannot be determinative of whether a position existed for Mr Eames at an earlier date. I place **no weight on whether Orrcon later employed or replaced POs or whether temporary staff or contractors were engaged**" @28-29), [2013] FWC 9609 **Vic** *Evered v CFD … AHD Ltd* (R needed to make redundancies for operational reasons - **R's various dealerships had a high degree of integration** - FWC "satisfied that given the skills and experience of the Applicant he could have been successfully redeployed to vacant spare parts, fleet sales, new car retail sales and used car sales jobs in any of the dealerships. Of course some of the potential jobs may not be suitable for geographical reasons. I am not satisfied that the Respondent took its obligations to consider redeployment of the Applicant seriously enough. **Mr Baker should have contacted all of the dealerships directly and should have followed up initial requests. Mr Baker should have ensured that he was aware of the full range of the Applicant's skills and experience.** The Respondent should not have taken the attitude that it was purely a matter for local managers to determine if the Applicant was suitable for a job. There should be no requirement for a potentially redundant employee to apply for a vacant position in competition with other persons. **Options for redeployment should have been the subject of consultation with the Applicant.** The range of redeployment options and the opportunities for redeployment could have been greatly enhanced through such consultation" @44-45 - A could have been redeployed to vacant retail car sales position - **FWC did "not accept that there is a general principle that if the consultation was highly unlikely to have changed the outcome this means that the dismissal was not unfair**" @54 - "in the circumstances of this case the process was a denial of natural justice in that adequate information was not provided and there was inadequate opportunity to respond. … [C]onsultation could well have made a difference to the outcome" @55 - R's failure to let A, a longstanding employee, work through notice period had harsh consequences - termination harsh etc), [2013] FWC 1993 **Vic** *Stephanou v Taffcorp* (it would be **unreasonable to dismiss an employee to create a position** for a redundant employee to be redeployed to - however, Commissioner Lewin stated that "Such a consideration might apply where casual employees or labour hire employees are filling a vacant position on a temporary basis or an employee is yet to commence employment when a position becomes redundant and redeployment comes under consideration" @31), [2014] FWC 516 **Vic** *Murray v Ventyx* (redeployment to an **overseas position** would have been reasonable - see [2014] FWCFB 2143 where **appeal upheld** on various grounds - in relation to redeployment Full Bench stated: "Absent

a properly evidenced finding that there was a position to which Mr Murray could have been re-deployed, the Deputy President was not jurisdictionally positioned to determine whether it would have been reasonable in all the circumstances to redeploy Mr Murray" @87 - "the cost to relocate a staff member overseas was significant (approximately $15,000 - $30,000) and … Mr Murray had not indicated to the employer that he was prepared to relocate to Atlanta at his own cost … [A]ll the recruitment processes (interviewing etc) for overseas positions took place locally (in the USA) … We do not consider that it was unreasonable (or otherwise) for Ventyx to proceed to terminate Mr Murray's employment on grounds of redundancy instead of providing an overseas redeployment. In the circumstances, **we consider it reasonable that on the evidence before us that Ventyx did not consider such an alternative to be practical**. There was no established or articulated policy for overseas redeployment in redundancy situations, and international relocations were more the exception than the rule. Ventyx's redundancy policy, referred to earlier, makes no reference to such an option or process. Mr Murray could have had no reasonable expectation that international relocations were available in redundancy situations" @155-158 - dismissal not harsh etc), [2014] FWC 1578 **NSW** *Teterin & Ors v Resource Pacific* (several employees were made redundant by R which was part of the large Glencore Xstrata Group of Companies - they were grieved over R's failure to redeploy them - options of the R **reducing overtime of other workers and its use of contractors**, amongst other things, considered - insufficient evidence to support reasonable redeployment options - **excellent summary of redeployment la**w provided), [2014] FWC 2500 **Qld** *Khawaja v Queensland Tissue Products* (R "considered that **the nature of the Applicant's long standing previous work was too far removed from the available positions in the business to provide a productive accommodation**. The Applicant's own view of his skills and knowledge compared to others in the Company add to this conclusion. The Applicant had also informed Mr Johnson that he was not disposed to shift work" @37 - no failure re re-deployment), [2014] FWC 3382 **NSW** *Fisher, Davis & Shaw v Downer EDI* ("The **dismissals of the applicants were for operational reasons which were created by a decision to decrease production** at the Boggabri Coal Mine (the Mine)**. Two months after the retrenchments, a decision was made to increase production at the Mine**. The employer then commenced to employ persons in the roles that the applicants had previously performed" @6 - "evidence of the **conscious decision for the divisions of Downer EDI to operate with a level of autonomy which severely restricts any prospect for redeployment across the divisions**, has operated to confirm and reinforce the Jurisdictional Decision. Further, in circumstances where qualified, skilled individuals are being made redundant in one division and **redeployment into another division is not contemplated or promoted in any meaningful way**, there would be strong prospect that the various divisions are likely to implement dismissals that will be found to be cases of non-genuine redundancy **...** *'Where an employer decides that, rather than fill a vacancy by redeploying an employee into a suitable job in its own enterprise, it will advertise the vacancy and require the employee to compete with other applicants, it might subsequently be found that the resulting dismissal is not a case of genuine redundancy and* "*...subjecting a redundant employee to a competitive process for an advertised vacancy in an associated entity may lead to the conclusion that the employee was not genuinely redundant*" @50-51 - non-genuine redundancies found - each A was unfairly dismissed), [2014] FWC 1578 **NSW** *Teterin & Ors v Resource Pacific* (several employees were made redundant by R which was part of the large Glencore Xstrata Group of Companies - they were grieved over R's failure to redeploy them - options of the R **reducing overtime of other workers and its use of contractors**, amongst other things, considered - insufficient evidence to support reasonable redeployment options - **excellent summary of redeployment la**w provided - permission to appeal refused 2/7/14 in [2014] FWCFB 4125 - legal versus **evidentiary onus** discussed in relation to redeployment issues)

Full Bench decisions

[2012] FWAFB 7675 **NSW** *Shepherdson v Binders Compendiums Menu Covers …* ("**s.389(2) … is not contingent upon an applicant for relief having raised the possibility of redeployment with their employer**" @23 - A was made redundant as **sales manager** due to R's financial situation - decision that redeployment within business was not reasonable in the circumstances confirmed on appeal - R's **advertisement for sales manager 11 months after FWA decision** in this matter not sufficient to alter decision that redundancy was not a sham), [2014] FWCFB 1542 **NSW** *MacLeod v Alcyone Resources* (the A was **executive assistant to the managing director** and was made redundant - "it was open to the Deputy President to conclude that s389(2) was not satisfied as it was **reasonable for the employer to assume that the junior receptionist position was not an appropriate position to consider for redeployment** due to its nature, as well as the lack of indication from Ms MacLeod that she was interested in the position" @32), [2014] FWCFB 1043 *Mackay Taxi Holdings Ltd v Wilson* (the R worked as a bookkeeper for A, but was made

redundant as **A had decided to have a qualified bookkeeper fill a new position incorporating about 70% of R's previous tasks** - R did not have the requisite qualifications for this position - "The job, however, was not the same job. The requirement for a formal qualification was not added to a job as if a mere administrative initiative. The qualifications required were reflective of new and higher level duties which were to be carried out by an appropriately qualified bookkeeper" @34 - "the Commissioner, because she took the view that because a certain volume of duties and tasks remained to be carried out and that as a result the position or job itself had not changed or been restructured to a sufficient degree to achieve another operational purpose, fell into error. In this regard, the Commissioner too narrowly construed the scope of s389(1)(a) of the Act" @47 - see further proceeding re issue of redeployment in [2014] FWC 2425 - **reasonableness of retraining discussed** - "there is a significant difference between an employer paying for a short course that is specific to a particular job and paying for a nominally 12 month Certificate IV TAFE Course which is transferable" @34 - unreasonable burden on a small business employer - R's conduct not unreasonable)

Article I. Commentary

[Ulan] "**[25]** … We turn first to the interpretation of s389(2) and to the **meaning of the term 'redeployed'**. …

[26] First, s389(2) must be seen in its full context. It only applies when there has been a dismissal. An employee seeking a remedy for unfair dismissal cannot succeed if the dismissal was a genuine redundancy. In other words, if the dismissal is a case of genuine redundancy the employer has a complete defence to the application. Section 389(2) places a limitation on the employer's capacity to mount such a defence. The defence is not available if it would have been reasonable to redeploy the employee. The exclusion poses a hypothetical question which must be answered by reference to all of the relevant circumstances.

[27] Secondly, it is implicit in the terms of s389(2)(b) that it might be reasonable for an employee dismissed by one employer to be redeployed within the establishment of another employer which is an entity associated with the first employer. It follows that **an employer cannot succeed in a submission that redeployment would not have been reasonable merely because it would have involved redeployment to an associated entity**. Whether such redeployment would have been reasonable will depend on the circumstances. The degree of managerial integration between the different entities is likely to be a relevant consideration.

[28] Thirdly, **the question posed by s389(2), whether redeployment would have been reasonable, is to be applied at the time of the dismissal**. If an employee dismissed for redundancy obtains employment within an associated entity of the employer some time after the termination, that fact may be relevant in deciding whether redeployment would have been reasonable. But it is not determinative. The question remains whether redeployment within the employer's enterprise or the enterprise of an associated entity would have been reasonable at the time of dismissal. In answering that question a number of matters are capable of being relevant. They include the nature of any available position, the qualifications required to perform the job, the employee's skills, qualifications and experience, the location of the job in relation to the employee's residence and the remuneration which is offered.

[29] … It was submitted that an employer will not usually have the power or right to transfer an employee to employment by another employer, except in the unusual case where it is provided for in the terms of employment. Accordingly, the use of the term 'redeployment' is directed at a broader concept, one which would include employment with the employer or an associated entity at some time after termination for redundancy. It was said that it is appropriate to regard an employee as having been redeployed if the employee is subsequently employed in a different or alternative position by their former employer or by an entity associated with their former employer. While this submission has a number of other implications, it is sufficient to say that it is not consistent with the clear words of the section and would lead to a great deal of uncertainty in its application. As we have already indicated, if an employee is terminated for redundancy but subsequently employed within an entity related to the employer, that might be an indication that the employee could have been reemployed at the time of the termination. But this will not always be the case. Subsequent employment within an associated entity may occur because circumstances have materially altered since the termination. For example, vacancies may have arisen.

[30] … Ulan submitted that the Commissioner's decision was wrong because he did not identify the particular positions in a particular enterprise to which each of the six applicants could have been redeployed. He also erred in not taking into account the failure of the employees to pursue job opportunities with the related entities after Ulan had publicised those vacancies. The

Commissioner was influenced in this regard by the fact that the employees would have been competing for positions rather than being given some kind of preference. Further, it was submitted that the evidence indicated that the evidence given by four of the applicants did not indicate that at the relevant time they were interested in and ready and willing to take employment away from Mudgee.

[31] The Commissioner found that entities associated with Ulan had vacancies for jobs which were potentially suitable for the dismissed employees and there was no evidence that redeployment from Ulan to the mines operated by these associated enterprises would have any impact on operational efficiency. While the Commissioner decided that some of the employees dismissed by Ulan were encouraged to apply for vacancies at mines operated by associated entities, he also found that neither Xstrata nor its associated entities had a policy of employing persons who might be redundant in other enterprises in the group. In Xstrata's case, this is despite the fact that it had overall managerial control in relation to the mining operations of the associated entities. These findings were open to him. The Commissioner also found no evidence that any of the relevant employees would have been unwilling to be redeployed to one of the other mines. It must be said that all of the evidence was not one way on this issue and, as Ulan's submissions indicate, some of the employees in particular did not display a great deal of energy in following up on vacancies which Ulan brought to their attention. Nevertheless we think it was open to the Commissioner to find that if offered redeployment they would have accepted it.

[32] We have concluded that the Commissioner's decision was open on the evidence and other material before him and did not involve any error in interpretation of the section.

[33] In relation to the appeal by Messrs Murray, M. Butler and C. Butler, we note that in each case the Commissioner found that the employees were not interested in taking up a job far from where they lived. Accordingly he found that it would not have been reasonable for them to have been redeployed to any of the associated entities. These findings also were open on the evidence and did not involve any error in interpretation of the section.

[34] It may be appropriate to make some concluding remarks about the operation of s389(2). It is an essential part of the concept of redeployment under s389(2)(a) that a redundant employee be placed in another job in the employer's enterprise as an alternative to termination of employment. Of course the job must be suitable, in the sense that the employee should have the skills and competence required to perform it to the required standard either immediately or with a reasonable period of retraining. Other considerations may be relevant such as the location of the job and the remuneration attaching to it. Where an employer decides that, rather than fill a vacancy by redeploying an employee into a suitable job in its own enterprise, it will advertise the vacancy and require the employee to compete with other applicants, it might subsequently be found that the resulting dismissal is not a case of genuine redundancy. This is because it would have been reasonable to redeploy the employee into the vacancy. In such a case the exception in **s385(d)** would not apply and the dismissed employee would have the opportunity to have their application for a remedy heard. The outcome of that application would depend upon a number of other considerations.

[35] Where an employer is part of a group of associated entities which are all subject to overall managerial control by one member of the group, similar considerations are relevant. This seems to us to be a necessary implication arising from the terms of **s389(2)(b)**. While each case will depend on what would have been reasonable in the circumstances, subjecting a redundant employee to a competitive process for an advertised vacancy in an associated entity may lead to the conclusion that the employee was not genuinely redundant." **Ulan Coal Mines v Honeysett, Oldfield** 12/11/10 [2010] FWAFB 7578

S.389 - Skills (increased skills required)

[2011] FWA 478 **Vic** *Pitceathly v Diona* (**R wanted someone with higher skills than A to perform the same job** -"the Respondent made a conscious decision to replace Mr Pitceathly with an engineer on the basis that the Respondent had engineers perform the procurement job in other states and because the Respondent was of the view that engineers provided a better skill set for the performance of the job … [A]t the time of the termination of Mr Pitceathly the job in which Mr Pitceathly was employed was the same job as the Respondent required to be done immediately after the termination of Mr Pitceathly" @54-55 - **R did not consult A** in relation to his termination - no redundancy, and termination unfair)

S.389 - Students taken on (relevance of)

[2010] FWA 2650 SA TG v SF P/L (A made redundant, and his **work was distributed amongst other workers** due to changes in operational requirements to R's **construction business** - the fact of two **university students being taken on** did not mean that R erred by failing to redeploy A - genuine redundancy found)

S.389 - Sudden operational change

[2013] FWC 8949 **Qld** *Dowrick v We Can Transport* (dismissal by reason of an **unanticipated and sudden operational change** not harsh etc - R had lost a major contract)

S.389 - Test (relevant)

See commentary below

[2010] FWA 4460 **Tas** *O'Grady v Royal Flying Doctor Service* (**the "test the Tribunal needs to consider is whether the position held by the applicant still exists not whether the tasks and duties are still being performed**"@54 - the new position here found to be a different one - genuine redundancy found - **Appeal allowed** in [2010] FWAFB 6177 - "**the proper application of the legislative tests for a genuine redundancy is a matter which attracts the public interest**. … [A]s the **[EA] was not brought to the [DP's] attention**, its application to Ms O'Grady's employment was not determined and the consequences for the [DP's] conclusions in the event that the Agreement applied were not considered" @13 - the EA was relevant to the issue of **consultation**)

S.389 Commentary (generally)

Commentary

Explanatory Memorandum

"Clause 389 – Meaning of genuine redundancy

1546. This clause sets out what will and will not constitute a genuine redundancy. If a dismissal is a genuine redundancy it will not be an unfair dismissal.

1547. Paragraph 389(1)(a) provides that a person's dismissal will be a case of genuine redundancy if his or her job was no longer required to be performed by anyone because of changes in the operational requirements of the employer's enterprise. Enterprise is defined in clause 12 to mean a business, activity, project or undertaking.

1548. The following are possible examples of a change in the operational requirements of an enterprise:

• a machine is now available to do the job performed by the employee;

• the employer's business is experiencing a downturn and therefore the employer only needs three people to do a particular task or duty instead of five; or

• the employer is restructuring their business to improve efficiency and the tasks done by a particular employee are distributed between several other employees and therefore the person's job no longer exists.

1549. It is intended that a dismissal will be a case of genuine redundancy even if the changes in the employer's operational requirements relate only to a part of the employer's enterprise, as this will still constitute a change to the employer's enterprise.

1550. Paragraph 389(1)(b) provides that it will not be case of genuine redundancy if an employer does not comply with any relevant obligation in a modern award or enterprise agreement to consult about the redundancy. This does not impose an absolute obligation on an employer to consult about the redundancy but requires the employer to fulfil obligations under an award or agreement if the dismissal is to be considered a genuine redundancy.

1551. Subclause 389(2) provides that a dismissal is not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within the employer's enterprise, or within the enterprise of an associated entity of the employer (as defined in clause 12).

1552. There may be many reasons why it would not be reasonable for a person to be redeployed. For instance, the employer could be a small business employer where there is no opportunity for redeployment or there may be no positions available for which the employee has suitable qualifications or experience.

1553. Whether a dismissal is a genuine redundancy does not go to the process for selecting individual employees for redundancy. However, if the reason a person is selected for redundancy is one of the prohibited reasons covered by the general protections in Part 3-1 then the person will be able to bring an action under that Part in relation to the dismissal." [quoted from para 15 of **McAlister v Bradken Ltd** [2010] FWA 203]

[Markac] **[10]** In Ulan Coal Mines Limited v. Henry Jon Howarth 3 a Full Bench considered these new provisions in the context of a matter in which 38 mineworker positions and others were determined to be surplus to requirements, although non-trades mine work was still done by someone, and there was reallocation of work. The Bench said:

> '[14] The changes in the operational requirements at the mine included changes in the composition of the workforce, in the tasks and functions that would be performed by contractors and employees, and in the number and skills mix of mineworkers required to be employed. As a consequence of the changes it was determined that there were a number of non-trades mineworker positions that were surplus to requirements as they were no longer needed for the Company's operations. Ultimately it was decided that 14 permanent non-trades mineworkers would have to be retrenched. The basis on which mineworkers were selected for redundancy was seniority, as provided under the Agreement. They were not selected according to any individualized approach based on the particular position or work being performed by them whether in underground crews or in surface functions. The need to reduce the overall number of non-trades mineworkers, together with the application of the seniority principle for selection, meant that mineworkers from different parts of the operations would be retrenched and that other mineworkers might need to be reallocated into available mineworker jobs.
>
> [15] These were the circumstances in which it was necessary to consider the meaning and application of the relevant statutory provisions and, in particular, the expression "the person's employer no longer required the person's job to be performed by anyone" in s.389(1)(a) of the Act. …
>
> [17] It is noted that the reference in the statutory expression is to a person's "job" no longer being required to be performed. As Ryan J observed in Jones v Department of Energy and Minerals (1995) 60 IR 304 a job involves "a collection of functions, duties and responsibilities entrusted, as part of the scheme of the employees' organisation, to a particular employee" (at p. 308). His Honour in that case considered a set of circumstances where an employer might rearrange the organisational structure by breaking up the collection of functions, duties and responsibilities attached to a single position and distributing them among the holders of other positions, including newly-created positions. In these circumstances, it was said that:
>
> > "What is critical for the purpose of identifying a redundancy is whether the holder of the former position has, after the re-organisation, any duties left to discharge. If there is no longer any function or duty to be performed by that person, his or her position becomes redundant…" (at p.308)
>
> This does not mean that if any aspect of the employee's duties is still to be performed by somebody, he or she cannot be redundant (see Dibb v Commissioner of Taxation (2004) FCR 388 at 404-405). The examples given in the Explanatory Memorandum illustrate circumstances where tasks and duties of a particular employee continue to be performed by other employees but nevertheless the "job" of that employee no longer exists.
>
> [18] In Kekeris v A. Hartrodt Australia Pty Ltd [2010] FWA 674 Hamberger SDP considered whether a dismissal resulting from the restructure of a supervisory team was a case of genuine redundancy. As a result of the restructure, four supervisory team leader positions were replaced by three team leader positions. The Senior Deputy President said:
>
> > "When one looks at the specific duties performed by the applicant prior to her termination they have much in common with those of two of the new positions in the new structure. **The test is not however whether the duties survive. Paragraph 1548 of the explanatory memorandum makes clear that it can still be a 'genuine redundancy' where the duties of a previous job persist but are redistributed to other positions. The test is whether the job previously performed by the applicant still exists."** (at par [27])
>
> [19] In the present case, the Commissioner appears not to have drawn an appropriate distinction in his reasoning between the "jobs" of the mineworkers who were retrenched and the functions performed by those mineworkers or take proper account of the nature of the restructure at the mine which led to an overall reduction in the size of the non-trades mineworker workforce. The Company restructured its operations in various ways including by outsourcing certain specialised, ancillary and other work and increasing the proportion of trade-qualified mineworkers in underground development and outbye crews. As a result, it was identified that there were 14 non-trades mineworker positions which were surplus to the Company's requirements. The mineworkers whose employment was to be terminated were determined according to the seniority principle as provided in the Agreement. This did not

mean that the functions or duties previously performed by the retrenched mineworkers were no longer required to be performed. It also did not mean that the positions of some of these mineworkers (e.g. in underground crews) did not continue, although those positions might after the restructure be filled by more senior non-trades mineworkers transferred from other parts of the operations or by trade-qualified mineworkers. However fewer non-trades mineworker jobs were required overall at the mine as a result of the operational changes introduced and, for this reason, the jobs of the 14 mineworkers selected for retrenchment could be said to no longer exist.

[20] These circumstances readily fit within the ordinary meaning and customary usage of the expression in s.389(1)(a) of the Act where a job is no longer required to be performed by anyone because of changes in the operational requirements of the employer's enterprise.'"

Markac v CSR Ltd 2/7/10 [2010] FWA 4548 Hamilton DP

[Harvey] **"[27]** The terms of s389 of the FW Act suggest the process for selecting individual employees for redundancy is not relevant to whether a dismissal was a case of genuine redundancy. The relevant Explanatory Memorandum confirms as much. Setting aside jurisdictional pre-requisites and the matters in s.396(a) to (c), FWA only needs to consider s.387(a) concerning whether there was a valid reason for a person's dismissal related to the person's capacity or conduct if one or more of the criteria in s.389 of the FW Act, which sets out the meaning of genuine redundancy, have not been met. The criteria in s.389 which have not been met can be taken into account in FWA's consideration as to whether the dismissal was harsh, unjust or unreasonable as part of s.387(h), being 'any other matters that FWA considers relevant'. 16

[28] We think it unlikely that it was intended that FWA's consideration of whether there was a valid reason for the dismissal related to the person's capacity or conduct would extend to the process for selecting the person for redundancy when:

(i) the process for selecting a person for redundancy is not relevant to FWA's determination of an unfair dismissal remedy application if the s.389 criteria for a case of genuine redundancy are met, and

(ii) any unmet criteria in s.389 of the FW Act can be taken into account as part of s.387(h) in FWA's consideration as to whether the dismissal was harsh, unjust or unreasonable.

[29] To conclude otherwise would mean that where an employer met the s.389 criteria for a genuine redundancy the process for selecting the person for redundancy would not be a matter FWA would consider in respect of an unfair dismissal remedy application. However (unless the application was otherwise determined) an employer who did not meet the s.389 criteria because, for example, they failed to consult as required by s.389(b) of the FW Act would have both the failure to consult *and* the process for selecting the person for redundancy considered in any unfair dismissal remedy application." **UES (Int'l) v Harvey** 14/8/12 [2012] FWAFB 5241

S.389(1)(a) - Job no longer required to be performed

[2010] FWA 6205 **Vic** *Nichols v Hoad Fabrics* (A's new position as assistant showroom manager **not considered to be sufficiently similar** to her previous job as showroom manger), [2011] FWA 5698 **NSW** *Gordon v Newtrain Inc* (**the job the A had performed in Tamworth now to be performed in Lismore** - "a job is redundant even if it is shared among other employees or if it is transferred to other locations where it may be performed by someone" @19 - s389(1)(a) satisfied - A was not adequately consulted about the change - she might have been willing to work in Lismore - A unfairly dismissed), [2011] FWA 6482 **Qld** *Curtis v Djarragun College* (the **A's position of Assistant Principal, Head of VET and Senior School was divided into two positions**, one of which attracted a higher salary - A was not consulted and was not considered for either of the positions - no misconduct was involved on A's part - R's finances were not in a good state and A's employment was therefore unlikely to have extended for a significant period into the future in any event - no genuine redundancy - A did not mitigate his loss adequately - A awarded 15 weeks pay minus tax), [2012] FWA 2495 **NSW** *Purdon v The Ascent Group Australia* (the A's **job was combined into two** - A was a manager but the award covered her - consultation with her was reasonable - redeployment to a suitable position was offered - genuine redundancy found), [2012] FWA 1708 **Vic** *Marshall v UBS AG Australia Branch* (R was downsizing due to world financial downturn - A, a **client advisor, was made redundant, despite new client advisors being taken on** - A's duties had been distributed among existing client advisors - these **new client advisors brought with them their own existing extensive client bases** - "process of redundancies does not preclude bringing in a new area of business with the potential to grow, or similar restructuring or reorientation of the business, while eliminating a job which is no longer needed and is no longer to be done by anyone because of the operational requirements of the business to reduce costs of servicing existing customers" @30 - consultation requirements of award met - genuine redundancy - Appeal dismissed [2012] FWAFB 6852), [2012] FWA 3126 **SA** *Suridge v Boral Window Systems* ("**The reference to having the job no longer performed by anyone, must mean by anyone employed by the business** … and to extend that to include an independent contractor supplying services would produce unintended consequences including that employees displaced in this way would not be entitled to severance pay" @74), [2012] FWA 9662 **Vic** *McIlwraith v Toowong Mitsubishi* (R argued that A's job as financial controller was no longer available as it was expanding its business and **needed a more highly qualified accountant** for a 'Dealership Accountant' position - R never specified the qualifications it required in its job advertisement - it **could not "be said that the company no longer requires the Financial Controller's job to be performed by anyone as the duties of that position are now being performed by the Dealership Accountant**" @53 - not a case of genuine redundancy), [2013] FWC 2144 **SA** *Ricketts v Boart Longyear Australia* (R "no longer required Mr Ricketts to undertake his Credit Manager duties because of its restructure of that function arising from a downturn in trade. This **downturn generated a requirement for an operational change**" @21), [2014] FWC 3633 **Vic** *Angwin v Dimmeys Stores* (redundancy not genuine where A's role as general manager replaced by position of CEO - role was the same, just different name)

Full Bench decisions

[2014] FWCFB 1043 *Mackay Taxi Holdings Ltd v Wilson* (the R worked as a bookkeeper for A, but was made redundant as **A had decided to have a qualified bookkeeper fill a new position incorporating about 70% of R's previous tasks** - R did not have the requisite qualifications for this position - "The job, however, was not the same job. The requirement for a formal qualification was not added to a job as if a mere administrative initiative. The qualifications required were reflective of new and higher level duties which were to be carried out by an appropriately qualified bookkeeper" @34 - "the Commissioner, because she took the view that because a certain volume of duties and tasks remained to be carried out and that as a result the position or job itself had not

changed or been restructured to a sufficient degree to achieve another operational purpose, fell into error. In this regard, the Commissioner too narrowly construed the scope of s389(1)(a) of the Act" @47 - see further proceeding re issue of redeployment in [2014] FWC 2425 - **reasonableness of retraining discussed** - "there is a significant difference between an employer paying for a short course that is specific to a particular job and paying for a nominally 12 month Certificate IV TAFE Course which is transferable" @34 - unreasonable burden on a small business employer - R's conduct not unreasonable)

Article II. Commentary

"**[24]** In regards to the job no longer being required to be performed by anyone because of changes in the operational requirements of the employer's enterprise, the term operational requirements is a term not defined in the Act. However, Lee J in *Nettleford v Kym Smoker Pty Ltd* (1996) 69 IR 370, at 373, provides the following guidance:

> 'Obviously it is a broad term that permits consideration of many matters including past and present performance of the [employer's] undertaking, the state of the market in which it operates, steps that may be taken to improve the efficiency of the undertaking by installing new processes, equipment or skills, or by arranging for labour to be used more productively, and the application of good management to the undertaking. In general terms it may be said that a termination of employment will be shown to be based on the operational requirements of an undertaking if the action of the employer is necessary to advance the undertaking and is consistent with management of the undertaking that meets the employer's obligations to employees.' "

Maurer v S.U.M.M.S. T/A Elite Automotive Engineering 11/4/13 Comm. Spencer [2013] FWC 1661

S.389(1)(b) Commentary

Commentary

"Section 389(1)(b) '…does not impose an absolute obligation on an employer to consult about the redundancy but requires the employer to fulfil obligations under an award or agreement if the dismissal is to be considered a genuine redundancy'. Furthermore at Paragraph 1553 the Explanatory Memorandum confirms that 'Whether a dismissal is a genuine redundancy does not go to the process for selecting individual employees for redundancy,' unless the reason for selection was for a prohibited reason covered by the General Protections in Part 3-1 of the Act." **Camilleri v Sunbury Bowling Club** 13/7/10 [2010] FWA 5146 Comm. Roe