DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Santos WA Energy Ltd
v
Darren Whittaker
(C2024/1408)

DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT ANDERSON
COMMISSIONER TRAN

MELBOURNE, 29 APRIL 2024

Appeal against decision in transcript of Deputy President O'Keeffe at Perth on 29 February 2024 in matter number U2023/11631

Background

[1] The appellant, Santos WA Energy Ltd, dismissed the respondent, Darren Whittaker, on 17 November 2023 on misconduct grounds. Earlier, the appellant received a report that the respondent engaged in sexual harassment of a 22-year-old female apprentice (hereafter referred to by the pseudonym "AB") during her first period of duty at the appellant's Varanus Island facility in March 2023. The conduct alleged included unwelcome and unjustifiable physical contact as well as inappropriate comments and other behaviour. AB did not report the conduct until June 2023, when she saw that her roster would align with the respondent's roster, and she explained that she feared a backlash amongst the small Varanus Island community and was concerned for her safety given the respondent's background as a former member of the Coffin Cheaters outlaw motorcycle gang.[1]

[2] The respondent continues to deny the allegations. The appellant engaged Allens Linklaters, a law firm, to investigate the allegations. During the investigation, the respondent was found to have personal photographs, some of which are said to be explicit, saved on his work issued computer,[2] which he admitted but he disputed that this conduct justified dismissal.[3]

[3] Fourteen particularised allegations relating to the respondent's interactions with AB and the stored digital photographs were put to the respondent and 12 were found to be substantiated.[4] The Allens investigator interviewed AB and eight other persons as well as the respondent.[5] The interviews were transcribed, and most were recorded by video and/or audio.[6] The witnesses interviewed were told, prior to any discussion of substantive matters, that the investigation was confidential and they were directed not to disclose the details of the interview or any of the matters discussed in it.[7]

[4] The investigation methodology and findings were set out in an investigation report.[8] The investigation report was considered by the appellant's decision maker, Massimo Bergomi, who ultimately decided to terminate the respondent's employment.

[5] The respondent applied under s 394 of the *Fair Work Act 2009* (Cth) (Act) for an unfair dismissal remedy on 23 November 2023.[9] The application was allocated to Deputy President O'Keeffe.

[6] On 21 February 2024, the appellant applied for orders under s 594 of the Act prohibiting or restricting the publication and disclosure of any details which name or identify AB and certain exhibits annexed to a statement of the Allens investigator lodged by the appellant, which are video and audio recordings of the interviews with AB and eight other persons interviewed by the Allens investigator.[10] In sum, orders prohibiting disclosure and publication of AB's name or identity were said to be desirable because, *inter alia*, AB was not being called to give evidence, did not want to be involved in the proceedings and was concerned identification would negatively affect her career and subject her to vilification. The other orders were sought because parts of the exhibited audio and video recordings contained irrelevant or confidential matters on which the appellant did not rely. The appellant produced transcripts containing redactions of the material it said was irrelevant or confidential.

[7] During the interviews, three witnesses - AB, Mr Scott and Ms Wych - are said to have provided personal information, such as personal phone numbers or residential information. The personal information, imparted by an employee to an employer in confidence, is said to be confidential.[11] The transcripts and recordings also contain other material which is said to be irrelevant to these proceedings including comments identifying other workers alleged to have engaged in or been subject to improper workplace behaviour, and comments about the investigation process and witnesses' participation in it, comments about the respondent, and concerns relating to workplace management.[12]

[8] On 1 March 2024, the Deputy President refused the application for the orders sought by the appellant (Decision).[13] The Deputy President had earlier indicated he would provide written reasons for refusing the appellant's application in his decision determining the respondent's unfair dismissal remedy application. The appellant lodged a notice of appeal against the Decision on 7 March 2024 by which it sought permission to appeal and, if granted, to appeal the Decision. The Deputy President issued reasons for his Decision on 14 March 2024 (Reasons),[14] prompting the appellant to lodge an amended notice of appeal on 26 March 2024 and a further amended notice of appeal on 12 April 2024, which corrected omissions in the grounds of appeal set out in the earlier amended notice, but which were addressed in its submissions filed with the earlier amended appeal notice. On 26 March 2024, the appellant also applied for permission to adduce further evidence on appeal in the form of a witness statement of Amelia Peters, the appellant's Principal ER Partner.

[9] We granted leave to the appellant to amend and further amend the appeal notice[15] and we admitted the further evidence set out in Ms Peters' statement and annexures,[16] taking into account the considerations articulated in *Akins v National Australia Bank*[17] and the fact that the respondent did not at the hearing oppose the admission of the evidence.[18]

Consideration

Permission to appeal

[10] The Decision, the subject of the further amended notice of appeal, is unquestionably an interlocutory decision and appeals from such decisions, at least those of a discretionary nature, are to be deprecated.[19] Appeals from such decisions will rarely be the subject of the grant of permission to appeal.[20] The Decision was a refusal by the Deputy President to exercise power under s 594 of the Act to issue the orders sought by the appellant in connection with a matter under Part 3-2. The more stringent[21] permission to appeal requirement in s 400 therefore applies[22] and the only basis on which permission to appeal may be granted is if it is in the public interest to do so. Although not an exhaustive indication, the grant of permission to appeal may be in the public interest if the appeal raises issues of importance and general application, or if there is a diversity of decisions at first instance for which guidance from an appellate Full Bench is required, or if the decision at first instance manifests an injustice, or the result is counter-intuitive, or the legal principles applied appear disharmonious.[23]

[11] For the reasons which will become apparent, we consider that it is in the public interest to grant permission to appeal because we are satisfied the Deputy President erred in two material respects. *First*, in concluding that orders of the kind could "only [be] granted in exceptional circumstances" at [34] of the Reasons. *Second*, in concluding that "almost all of the evidence [in support of the application for orders] has come from the bar table" at [38] of the Reasons. The first caused the discretion involved in evaluating whether it was "desirable" to make the orders because of the confidential nature of any evidence, or for any other reason, to miscarry as the Deputy President asked the wrong question. That is a jurisdictional error. The second meant that the evidence before the Deputy President on which the appellant relied was not considered. In the result, we consider the Decision is attended by jurisdictional error and manifests an injustice. We also consider the appeal raises a question of law about the proper construction and application of s 594 of the Act and so engages the public interest.

Appeal grounds and other matters

[12] By its further amended notice of appeal, the appellant advances 7 appeal grounds. The first (ground 1A) contends that the Deputy President erred because he failed to consider relevant evidence and did not afford the appellant procedural fairness by failing to warn it that he did not intend to take that evidence into account. The second, third and fourth grounds (grounds 1, 2A and 3) are concerned with the Decision refusing to make a non-publication order in respect of AB's name and identifying details, and variously contend that the order sought was desirable and ought to have been made, that findings that the failure to make an order would act as a disincentive for sexual harassment complainants to come forward and that the Decision was unreasonable or plainly unjust. The fifth, sixth and seventh grounds (grounds 4,5 and 8) are concerned with the Deputy President's Decision refusing to make confidentiality orders in respect of the confidential exhibits to the investigator's witness statement and variously contend error because the order sought was desirable and ought to have been made, a failure to take into account certain relevant considerations and that the Decision was unreasonable or plainly unjust.

[13] The respondent represented himself at the hearing. His oral submissions were directed to assurances that he was not a threat to AB, that he left the bike club 18 years ago, that he has

no convictions since 1990 and has a 13 year unblemished record at Varanus Island and positive peer reviews and that the social media posts by AB were sent to him by "concerned people" and "are very relevant to show a person's character".[24] The respondent also contended that the orders sought were "just trying to take away any form of accountability".[25] He also made submissions directed to the strength of his unfair dismissal remedy case and his desire for "a fair and transparent open day in court".[26] The oral submissions did not engage with the grounds of appeal or the appellant's submissions on appeal. Similarly, the earlier filed written submissions, while organised under headings relating to the grounds of appeal, barely engage with them and we have garnered little assistance from those submissions.

The decision below

[14] As we earlier have noted, the Decision was made on 1 March 2024 and the Reasons were subsequently issued on 14 March 2024. In the Reasons, the Deputy President sets out the nature of the application and the background at [1]-[4]. At [5]-[32] of the Reasons, the Deputy President summarises the parties' submissions, including some of the authorities to which the parties referred. The analysis begins at [34] of the Reasons. There, the Deputy President sets out that which he understood to be the relevant threshold for the grant of an order under s 594 of the Act prohibiting or restricting publication and disclosure of certain material. The Deputy President relevantly reasoned that:

> "[34] It is very clear from the case precedent that the starting point for any hearing before the FWC must be that the hearing be open and transparent, and that any exception to this must be very carefully considered and only granted in exceptional circumstances . . ." [Emphasis added]

[15] That the Deputy President regarded the test to be one of exceptional circumstances is reinforced in the next sentence of [34]. The Deputy President writes:

> "[34] . . . Before I consider the submissions made by the parties regarding whether the current case warrants being regarded as exceptional, I will deal with two issues that I do not regard as being relevant to my deliberations." [Emphasis added]

[16] At [35]-[37] of the Reasons, the Deputy President deals with the respondent's complaint that the appellant had delayed making its application for confidentiality orders and the appellant's submission that if orders were not made it would need to withdraw some of the evidentiary material on which it intended to rely.

[17] At [38] of the Reasons, the Deputy President accepts the respondent's submission that an application for confidentiality orders must be supported by evidence and he then relevantly finds that:

> "[38] . . . In this matter, almost all of the evidence has come from the bar table."

[18] At [39] of the Reasons, the Deputy President accepts the respondent's submission that embarrassment and distress for AB are not grounds for granting a confidentiality order. At [40], the Deputy President observes that there was no evidence suggesting that AB was at risk of psychological harm, other than once again an assertion from the bar table. At [41]-[44], the

Deputy President rejects the appellant's contention that a failure to grant confidentiality orders could act as a disincentive for other potential sexual harassment complainants, who may not come forward due to concerns about public identification and examination because the appellant did not advance any evidence in support of this contention and because public scrutiny operates as a disincentive to false allegations and as a powerful incentive to honest evidence.

[19] At [44] of the Reasons, the Deputy President relevantly said:

> "[44] . . . The principle of open and transparent proceedings is, in my view, fundamental to our system of justice and has been for a very long time. While such a principle may cause discomfort and reticence in complainants in most if not all jurisdictions, it has, as it were, stood the test of time and should only be set aside in the most exceptional of cases."

[20] At [45] of the Reasons, the Deputy President relevantly concluded:

> "[45] . . . Given the importance of open justice and the public benefits that it provides, any departure from the principles of open justice should be made cautiously, and with appropriate reasons supported by evidence. In this matter, I cannot find that the Respondent has made out any evidentiary case in support of the reasons it has advanced for confidentiality orders and on that basis, I will not grant the order sought."

Analysis

[21] It is not necessary for us to deal with all the particularised appeal grounds raised by the appellant. It is evident from the Reasons that the Deputy President erred by applying the wrong test – one of exceptional circumstances – in determining whether to make the orders sought under s 594 of the Act.[27] Indeed, it is clear from the Reasons that the only reference to "desirable" appears in an extracted passage from *Day v Smidmore (No 2)*,[28] a decision of the NSW Industrial Relations Commission in Court Session, which is embedded in a longer extract from a decision of Commissioner Lewin in *Peter Hankin v Plumbers Supplies Co-Operative Ltd T/A Plumbers Supplies Co-Op and Ors*.[29] [30] It is also clear that the Deputy President did not have regard to all the evidence – had the Deputy President done so, he could not have concluded that almost all the evidence in support of the application for orders had come from the bar table.[31]

[22] Section 594 of the Act provides:

> **"594 Confidential evidence**
>
> (1) The FWC may make an order prohibiting or restricting the publication of the following in relation to a matter before the FWC (whether or not the FWC holds a hearing in relation to the matter) if the FWC is satisfied that it is desirable to do so because of the confidential nature of any evidence, or for any other reason:
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> (a) evidence given to the FWC in relation to the matter;
>
> (b) the names and addresses of persons making submissions to the FWC in relation to the matter;

(c) matters contained in documents lodged with the FWC or received in evidence by the FWC in relation to the matter;

(d) the whole or any part of its decisions or reasons in relation to the matter.

(2) Subsection (1) does not apply to the publication of a submission made to the FWC for consideration in an annual wage review (see subsection 289(2)).”

[23] Self-evidently, s 594(1) of the Act vests the Commission with the power to make an order prohibiting or restricting the publication of certain things in relation to matters before the Commission if satisfied that it is desirable to do so “because of the confidential nature of any evidence, or for any other reason…”. The test is one of satisfaction as to the desirability of a confidentiality order because of the confidential nature of the evidence in respect of which the order is sought or for any other reason. Unlike other jurisdictions or at common law, the test is not one of necessity. For example, s 37AG(1) of the *Federal Court of Australia Act 1976* (Cth) (FCA Act) empowers the Court to make a suppression or non-publication order on the ground that the order is necessary to prevent prejudice to the proper administration of justice or to the interests of the Commonwealth or a State or Territory in relation to national or international security, to protect the safety of any person, or to avoid causing undue distress or embarrassment to a party to or a witness in a criminal proceeding involving an offence of a sexual nature. Moreover, s 37AE of the FCA Act provides that in deciding whether to make a suppression order or non-publication order, the Court “must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice”.

[24] Section 594 of the Act imposes a very different standard of satisfaction for the making of a suppression or non-publication order than that imposed by the FCA Act in relation to evidence and information put before the Court.[32] Although a course of action that is “desirable” can include a necessary course of action, the adjective is not so confined and is apt to include a course that is useful, wise, sensible, prudent or worth doing.

[25] Considerations of open justice and the administration of justice are clearly relevant to the exercise of power to make an order under s 594(1) of the Act. But these considerations are not applied in a vacuum. The principle of open justice and its importance to the administration of justice are to be considered in the statutory context of the express power to prohibit or restrict publication of certain material if it is desirable to do so, because of its confidential nature or for any other reason, and the circumstances of a particular case.

[26] The Deputy President applied *Mac v Bank of Queensland*[33] in relation to the principle of open justice to the exercise of power – *Mac* was concerned with s 593(3) of the Act, the test for which is relevantly the same. It is clear from *Mac* that those principles were derived from the summary in *Seven Network (Operations) Limited & Ors v James Warburton (No 1)*.[34] But the source of and test for the exercise of power for making the orders in *Seven Network* is different to ss 593(3) and 594(1), and so those principles must be treated cautiously when seeking to apply them to the statutory regime in s 594, particularly those directed to whether an order is “really necessary” to secure the proper administration of justice and the discussion of the limited exceptions to the principle of open justice. The statutory power should be applied according to its terms.

[27] The chapeau to s 594(1) of the Act is, in substance, the same as the since repealed s 164A(2) of *Industrial Relations Act 1996* (NSW) (IR Act). That section provided:

> "(2) The Commission in Court Session may make any non-disclosure order if it is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason."

[28] In *Smidmore*,[35] the Court considered the operation and effect of s 164A(2) of the IR Act and said:

> "Section 164A(2) provides that: The Commission in Court Session may make any non-disclosure order if it is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason. The test in s 164A(2) is to be contrasted with that to be applied by the Commission, other than in Court Session, in making non-disclosure orders in relation to proceedings other than those under the *Child Protection (Prohibited Employment) Act 1998 (NSW)*, which is that the Commission may only make such orders if "it is satisfied that it is necessary to do so in the interests of justice." The latter test is based on the common law test: *John Fairfax & Sons Pty Limited v Police Tribunal (NSW)* at 476-477 per McHugh JA; *John Fairfax Group Pty Ltd v Local Court (NSW)* (1991) 26 NSWLR 131 at 161B per Mahoney JA; *Attorney-General (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342 at 345F per Mahoney JA; A (No 4) at [49].
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> We should say immediately that if the test to be applied here were the common law test it is highly likely the respondent's motion would fail. We can see no basis for the proposition that the non-disclosure orders are necessary to attain justice in this particular case. Mere embarrassment or distress would not be sufficient to justify a non-disclosure order: See A (No 4) at [12], [14], [16] and [48] and the cases referred to therein.
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> The test we are obliged to apply provides that the Court may exercise its discretion to make any non-disclosure order if we are satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason. The application of that test must be approached on the basis that the legislature intended to give the Court a much wider scope for exercising its discretion to make non-disclosure orders than the common law test."[36]

[29] The Court also observed, without defining the boundaries of the provision with precision, ordinarily it would not be desirable to make a non-disclosure order only because a person was embarrassed or distressed by allegations made in proceedings and that orders merely to protect persons from injury, hurt, embarrassment or distress would be inimical to the ordinary rule that Courts should conduct their proceedings "publicly and in open view".[37]

[30] We also consider that the application of s 594(1) of the Act should be approached on the basis that the Parliament intended to give the Commission a wider scope for exercising its discretion to make non-disclosure orders than the common law test. The statutory power should be applied according to its terms. The proper test is whether the orders sought are desirable because of the confidential nature of any evidence, or for any other reason. It is not whether the orders are necessary, nor is the approach to the grant of such orders to be applied by

presumptively requiring an applicant for orders to show exceptional circumstances, as appears to have been the approach taken here.

[31] We mentioned earlier that while the principle of open justice and the administration of justice are clearly relevant to the exercise of power under s 594(1) of the Act, the considerations are not applied in a vacuum. The statutory context is one consideration but there are others. For example, the significance that might attach to the consideration may be relevantly assessed by reference to the identity of the person, the extent to which the person is to be involved in the proceeding, or the nature of the interest that is to be protected by the orders sought. It is to be remembered that it is the parties to a proceeding which subject themselves to the open justice principle by bringing or defending the proceeding,[38] rather than avoid that consequence by choosing to litigate their disputes by private arbitration.[39] However, not all who are otherwise involved or who might be mentioned in litigation can be said to do so – witnesses who will give evidence and persons who are unwilling to give evidence but whose allegations may be agitated in the litigation come to mind. The weight of the principle of open justice on the question whether it is desirable to make an order protecting the identity of a person who will be mentioned in proceedings but who refuses and is not compelled to participate in them, take on a different complexion when it is understood that such a person did not opt to subject themselves to the litigation process nor the open and transparent processes involved in open court or before a tribunal conducted publicly.

[32] A further relevant circumstance when considering orders under s 594(1) of the Act, in the context of an unfair dismissal remedy application conducted under Part 3-2, is that such applications will be conducted in a conference unless the Commission decides to hold a hearing having determined that it was appropriate to do so.[40] If a conference is conducted in relation to an unfair dismissal remedy application, the conference must be conducted in private.[41] The notion that the default position that an unfair dismissal remedy application will be determined in a private conference rather than an open hearing suggests that, at least in respect of unfair dismissal remedy applications, the principle of open justice has been legislatively watered down in its application to the conduct of a matter. How much weight is then to be given to the open justice principle when an order is sought prohibiting publication of information identifying a person who made allegations, but who will not participate in an unfair dismissal remedy proceeding where the information is or is likely only to be disclosed in a confidential conference environment?

[33] The test applied by the Deputy President for the grant of an order under s 594(1) of the Act sets too high a bar - one that is not justified by the text, context or evident purpose of the provision, which is to give the Commission greater latitude to make orders of the kind dealt with in the section than might otherwise be the case at common law or in another statutory context where necessity of the orders sought is the test to be applied. For these reasons, the Deputy President erred.

[34] By the time the Deputy President came to hear the application for orders under s 594(1) of the Act, the appellant filed and served, *inter alia*, a witness statement of the Allens investigator and various annexures thereto,[42] a statement of Clint Irvine, the appellant's Maintenance Supervisor of the Frontline Team at the Varanus Island facility and various annexures thereto[43] and a bundle of media articles and other documents.[44]

[35] It is not apparent on the face of the Reasons that the Deputy President had regard to any of this material. It is apparent that he thought, wrongly, that the "evidence" to support the application for orders came largely from the bar table. We agree with the Deputy President that an application for orders needs to be supported by appropriate evidence, but we disagree with his finding that "almost all of the evidence [came] from the bar table". To the contrary, the appellant's contention below that AB was reluctant to make a complaint was made by reference to the evidence.[45] Moreover, as counsel for the appellant made clear before the Deputy President, he intended in support of the application for orders to "refer in rather broad terms to some of the broader evidence and not merely the application itself which [he accepted] did not itself attach any evidence" and that "the Commission now when it comes to decide the matter has the benefit of the [appellant's] evidence and, of course, the [respondent's] evidence".[46] Plainly, the appellant was relying on the material it had filed in opposition to the respondent's unfair dismissal remedy application to support its application for confidentiality and non-publication orders. The material before the Deputy President disclosed that:

- AB was reluctant to make a complaint fearing a "backlash", retaliation, the relationships on site, and the consequences to her professional reputation;[47]
- AB only raised her complaint when she realised that she was rostered with the respondent again, and she did so not for the purpose of sparking a disciplinary investigation but rather to ensure the matter was "recorded" and so that she would not have to work with the respondent;[48]
- AB initially refused an invitation to take the complaint further;[49]
- it was the appellant's officers who determined it was necessary to formally investigate the complaint and treat the matter as a disciplinary matter, ultimately resulting in the respondent's dismissal and the unfair dismissal remedy proceedings; [50]
- the respondent, both during the disciplinary investigation and in submissions to the Commission, sought to impugn AB's character by reference to her social media posts;[51]
- the Varanus Island workplace was tight-knit and factional.[52] The factions were, in the respondent's view, so hostile that it was conceivable one faction would enlist a young apprentice to make false allegations against a member of the other, or otherwise provide unfavourable and unreliable evidence against him;[53]
- the respondent was described as a "very tall and intimidating person";[54] and
- at least some witnesses were fearful or otherwise concerned, including because of the respondent's past membership of an outlaw motorcycle gang.[55]

[36] All this evidence supports the contentions advanced by the appellant below.[56] None of it is mentioned or assessed in the Reasons. The Deputy President erred by not dealing with this probative and relevant evidence and by concluding instead that almost all the evidence came from the bar table.

[37] As to that part of the orders which concerned the video and audio recordings, the appellant contended below that the portion of material it sought to protect (as shown in the redacted transcripts) was material that was either irrelevant or confidential information imparted during a confidential interview. The respondent did not contend below that the material was relevant, nor did he suggest that the redaction of the transcripts of interviews was inappropriate or too broad. Instead, the respondent's main concern related to the task of reviewing the video and audio recordings, which he contended would cast too onerous a burden

on his lawyers considering the impending hearing.[57] This concern would have been ameliorated by the adjournment the Deputy President was contemplating.[58]

[38] Apart from the generalised references to the open justice principle, the Deputy President does not explain why the orders sought in respect of this material was not desirable. The Deputy President had the video and audio recordings before him when deciding the application, and he made no finding that the parts of them the subject of the transcript redactions were relevant, nor that there was any reason the respondent (as opposed to his lawyers) needed to see them. The respondent's lawyer appearing before the Deputy President did not contend otherwise. It must be said that we fail to see how the protection by order against publication and disclosure of material that is not relevant to any question before the Commission or is confidential but not material could be said to run counter to the principle of open justice or be otherwise contrary to the proper administration of justice. On the orders sought below, witness names would not be suppressed, nor would the redacted transcripts of the recordings. The proceeding (subject to ss 398(2) and 399 of the Act) can be conducted in open court. The Commission's decision for its reasons will be published. The proceedings and the decision will therefore be open to public scrutiny.

[39] The Deputy President did not have regard to the evidence or explain why the order affecting the video and audio recordings was not desirable. Accordingly, the Deputy President erred.

[40] It follows that the appeal should be upheld and the Deputy President's Decision, quashed. Although we had allowed the admission of further evidence on the appeal, we did not need to rely on it to determine the appeal. We will however refer to the further evidence in rehearing the application.

[41] On a rehearing, we will grant the orders sought by the appellant in an amended form. The orders will deal with two discrete issues. The first concerns the name, telephone number, address or any other information identifying AB in connection with these proceedings, including this appeal and ascribing a pseudonym. The second concerns the unredacted transcripts of interview and the audio and video recordings of same. Our reasons may be shortly stated.

[42] *First*, although the principle of open justice and the administration of justice are clearly relevant, these do not weigh so heavily against the making of the orders in this case, taking into account the text and scope of s 594(1) of the Act and for the reasons earlier stated. The power in s 594(1) is exercisable if it is desirable to do so because of the confidential nature of any evidence, or for any other reason. It is not limited to necessity or exceptional circumstances.

[43] *Second*, we are persuaded by the evidence recounted at [35] above that the orders directed to restricting publication and disclosure of AB's identity are desirable because she is not a party to the proceedings, will not be participating in them, is likely to have her reputation attacked during the proceedings and will not be able to respond, and holds a legitimate concern for her career prospects should she be identified in connection with the proceedings. The character issues the respondent evidently proposes to raise would not only likely cause AB genuine distress but plainly could harm her career.

[44] *Third*, the evidence of Ms Amelia Peters shows that AB has been negatively impacted both in terms of her apprenticeship and her personal life by her experience on the assignment, the investigation and subsequent events and demonstrates concern that AB's association and identification with the proceedings will likely negatively impact her ongoing career in the sector.[59]

[45] *Fourth*, we hold serious reservations whether the evidence the respondent proposes to lead about the AB's character could serve any legitimate forensic purpose. AB's activities depicted on the social media posts in the evidence appear to serve no other purpose than to scandalise the out of work hours behaviour of the young AB and there can be little public interest in the public knowing her identity.

[46] *Sixth*, during the interviews, some people provided personal information, including their personal phone numbers or residential information. Personal information of this kind, imparted in the circumstances in confidence, is confidential.[60] The people who disclosed personal and private details to the Allens investigator during interviews or who disclosed other matters irrelevant to an issue in the proceeding in a confidential setting are entitled to expect the confidence will be maintained. People have a right to privacy regarding their personal information disclosures and weight should be afforded to the private rights of persons who are not parties to the proceeding nor called to give evidence.

[47] *Seventh*, a non-publication and non-disclosure order attaching to material that is not relevant to any issue before the Commission or is confidential but not material to the proceedings does not in our opinion run counter to the principle of open justice nor would it otherwise be contrary to the proper administration of justice.

[48] *Eighth*, while it must be accepted that it will not ordinarily be desirable to make a non-publication order if only to avoid embarrassment or distress, the concerns of AB are not so confined. When combined with the matters we discuss above and in determining whether to make an order, the avoidance of embarrassment or distress is considered alongside other relevant considerations.[61]

[49] *Ninth*, there is a public interest in ensuring that complainants like AB are encouraged to speak up, not discouraged. More so when considered in the wider context of workplace sexual harassment in male-dominated workplaces such as this industry. We agree with the appellant that it is a matter of common sense and experience, that complainants in sexual harassment complaints are often subjected to harrowing scrutiny, character attacks, or other negative consequences. And although many organisations are adopting policies and practices to encourage complainants to come forward and speak out, it remains the case that, for many, the prospect of a public and permanent record identifying them by name acts as a disincentive to come forward, and so hinders rather than enhances the administration of justice.

[50] *Tenth*, the respondent will not be prejudiced by the orders of the kind sought.

[51] For completeness, the appellant contended that the Decision under appeal was not a discretionary decision. It maintained that a decision under s 594(1) of the Act permits of only one correct outcome, even though the outcome is to be reached by an evaluative process as to the application of a value-laden criterion – deciding whether an order is desirable. We earlier

noted s 37AG of the FCA Act and the requirement that the Court determine whether a confidentiality order was necessary. In *Country Care Group Pty Ltd v CDPP (No 2)*[62] a Full Court of the Federal Court of Australia said:

> "Suppression or non-publication orders should only be made in exceptional circumstances: *Rinehart v Welker* (2011) 93 NSWLR 311; [2011] NSWCA 403 at [27]; *Rinehart v Rinehart* (2014) 320 ALR 195; [2014] FCA 1241 at [23]. That is both because the operative word in s 37AG(1)(a) is "necessary" and because the court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice: *Rinehart v Welker* at [32]; *Rinehart v Rinehart* at [25]. The paramount consideration is the need to do justice; publication can only be avoided where necessity compels departure from the open justice principle: *Rinehart v Welker* at [30]; *Rinehart v Rinehart* at [26].
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> The critical question is whether the making of a suppression or non-publication order is "necessary to prevent prejudice to the proper administration of justice". The word "necessary" in that context is a "strong word": *Hogan v Australian Crime Commission* (2010) 240 CLR 651; [2010] HCA 21 at [30]. It is nevertheless not to be given an unduly narrow construction: *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52; [2012] NSWCCA 125 at [8], citing Hodgson JA in *R v Kwok* (2005) 64 NSWLR 335; [2005] NSWCCA 245 at [13]. The question whether an order is necessary will depend on the particular circumstances of the case. Once the court is satisfied that an order is necessary, it would be an error not to make it: *Hogan* at [33]. There is no exercise of discretion or balancing exercise involved: *Australian Competition and Consumer Commission v Air New Zealand Limited* (No 3) [2012] FCA 1430 at [21]."[63]

[52] There are differences between s 594 of the Act and s 37AG of the FCA Act, not least of which is the standard for making the order - "desirable" compared to "necessary". The appellant maintained that as with s 37AG of the FCA Act, s 594 of the Act provides that the Commission "may" make such an order if the prescribed standard is met, and s 594 does not contemplate a refusal to make an order notwithstanding the Commission's conclusion that an order was desirable. The appellant contends that although determining whether an order is desirable will, as with determining whether an order is necessary, involve a significant evaluative element, nonetheless, the provision requires a determination according to that criterion, and then requires the Commission to implement that determination.

[53] The propositions advanced are not without merit but we have found it unnecessary to determine the issue for several reasons. *First*, the Deputy President did not determine that an order was desirable but for other discretionary reasons did not make the order. Instead, he made an evaluative assessment, albeit by reference to an incorrect criterion. The issue does not directly arise on appeal. *Second*, the respondent was unrepresented at the hearing and the earlier filed submissions did not engage with the issue. There was no effective contradictor. In this regard we note that in *Smidmore*, the Court appeared to proceed on the basis that the similarly worded s 164A(2) of the IR Act was discretionary.[64] *Third*, as we propose to make the orders sought as we are satisfied the orders are desirable because of the confidential nature of some of the evidence and for the reasons stipulated, the issue whether we are compelled to do so is not material.

[54] We should make clear that this decision is concerned only with whether the Deputy President erred in declining to make orders under s 594(1) of the Act and whether we should do so, *inter alia*, to protect the identity of AB. It should not be assumed that the material will ultimately be admissible in the hearing and determination of the respondent's unfair dismissal remedy application. Although the Commission is not strictly bound by the rules of evidence, it is required to ensure fairness in the conduct of its proceedings, and we harbour concerns about the prejudice that may be visited upon the respondent in circumstances where AB's allegations as recorded in interviews are admitted, but the respondent is unable to test the veracity of the allegations directly.

Orders

[55] We order:

1. Permission to appeal is granted.
2. The appeal is upheld.
3. The decision of Deputy President O'Keeffe made on 1 March 2024 refusing the application for the orders sought by the appellant is quashed.
4. On a rehearing we grant the application for orders under s 594(1) of the *Fair Work Act 2009* (Cth).
5. Except by order of the Commission:
    a. no person may publish, by any means, the name, telephone number, address, or any other information identifying AB (Complainant) in connection with these proceedings, including this appeal; and
    b. in any publication in connection with these proceedings, including this appeal, and these orders, the Complainant is to be referred to using the pseudonym "AB".
6. Within 7 days of this order, the appellant is to file with the Commission and provide to the respondent's solicitors an unredacted copy of Exhibits BS-22, BS-25, BS-28, BS-31, BS-34, BS-55, BS-58, BS-74A, BS-74B, BS-77 and BS-81 to the statement of Ms Brooke Silcox dated 21 February 2024 (Confidential Transcripts).
7. The Confidential Transcripts must not be published and must not be disclosed other than to the persons referred to in order 10 below.
8. Within 7 days of this order, the appellant is to file with the Commission and provide to the respondent's solicitors any video and audio recordings of the interviews conducted by Ms Silcox on which it seeks to rely at the hearing of the respondent's unfair dismissal application (Proceeding).
9. The following portions of exhibits to the statement of Ms Brooke Silcox dated 21 February 2024 (Confidential Recordings) must not be published, and must not be disclosed other than to the persons referred to in order 10 below:

Confidential portions of recordings	
Interview	**Time stamps (with 3 sec buffer)**
Complainant 26 June 2023 (Annexure BS-23 and BS-24)	19:42 – 20:41
	22:59 – 24:02
	1:16:31 – 1:33:13
Daimon Mackean 10 July 2023 (Annexure BS-26 and BS-27)	30:54 – 36:50
Jeremy Goss 10 July 2023 (Annexures BS-29 and BS-30)	21:30 – 22:33
	25:33 – 30:02
Dale Ambrose 13 July 2023 Annexures BS-32 and BS-33	31:03 – 33:24
	34:25 – 35:10
Clinton Irvine 13 July 2023 (Annexures BS-35 and BS-36)	32:15 – 32:46
	34:58 – 38:20
Mike Buckles 28 August 2023 (Annexures BS-56 and BS-57)	18:33 – 18:54
Complainant 25 August 2023 (Annexures BS-59 and BS-60)	19:44 – 24:40
Adam Scott (Transcript A) 2 October 2023 (Annexure BS-75)	13:26 – 13:40
	13:42 – 14:06
Adam Scott (Transcript B) 2 October 2023 (Annexure BS-76)	10:37 – 10:48
Wendy Wych 2 October 2023 (Annexures BS-78 and BS-79)	03:28 – 04:30
	13:34 – 13:44
	13:52 – 14:01
	22:27 – 27:04
	33:19 – 34:16
	37:54 – 38:27

Confidential portions of recordings	
Interview	**Time stamps (with 3 sec buffer)**
Damien Arundel 3 October 2023 (Annexures BS-82 and BS-83)	41:41 – 47:39

10. The Confidential Recordings and Confidential Transcripts (together the Confidential Exhibits) can be disclosed or published to:
    a. the solicitors retained by the respondent in the Proceeding; and
    b. counsel instructed by the respondent's solicitors in the Proceeding.
11. No persons other than those set out in order 10 above shall be permitted access to the Confidential Exhibits, except on direction issued by a Member of the Commission.
12. Any person who is permitted access to the Confidential Exhibits in accordance with order 9 is prohibited from disclosing or publishing the Confidential Exhibits to any other person, except on direction issued by a Member of the Commission.
13. All copies of the Confidential Exhibits held by the persons set out in order 10 above must be destroyed within 28 days of the conclusion of the Proceeding, or, if any appeal is commenced, within 28 days of the conclusion of such appeal.
14. There be liberty to apply to vary orders 5-13 in the event that the respondent is no longer legally represented in the Proceeding.

DEPUTY PRESIDENT

Appearances:
H Blattman KC with *S Pack* of counsel for the appellant
D Whittaker (self-represented)

Hearing details:
Hearing via Microsoft Teams
17 April 2024

Final written submissions:
Appellant, 26 March 2024
Respondent, 11 April 2024

Printed by authority of the Commonwealth Government Printer

<PR773875>

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[1] See Appeal Book (AB) AB345, AB347, AB358-AB359, AB366, AB368, AB375, AB393-AB394, AB397, AB458-AB459, AB527, AB534, AB541, AB554, AB564-AB565, AB571, AB586 and AB661-AB698

[2] See for example AB508-AB511

[3] See AB204-AB212

[4] AB248-AB251

[5] AB323-AB333

[6] Ibid

[7] AB343, AB365, AB373, AB380, AB390, AB399, AB427 and AB436

[8] AB450-AB523

[9] AB46

[10] AB292

[11] See for example *Irwin v Director General, Department of Health* [2021] WAIRC 00468 at [50]-[51]

[12] AB404, AB427, AB343, AB365, AB373, AB380, AB390 and AB436

[13] *Darren Whittaker v Santos WA Energy Ltd*, AB3

[14] AB5

[15] Transcript PN47

[16] Exhibit 1, Transcript PN55

[17] [1994] 34 NSWLR 155 at 160 setting out that in general three conditions need to be met before fresh evidence can be admitted. These are: (1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; (2) The evidence must be such that there must be a high degree of probability that there would be a different verdict; (3) The evidence must be credible.

[18] Transcript PN46

[19] *Smith v Reward Interiors Pty Ltd* [2021] FWCFB 6031 at [8]

[20] *New South Wales Bar Association v McAuliffe* [2014] FWCFB 1663, 241 IR 177 at [28]; *Hutton v Sykes Australia Pty Ltd* [2014] FWCFB 3384 at [3]; *Clermont Coal Operations Pty Ltd v Brown and Others* [2015] FWCFB 2460 at [18]; *Singh v Sydney Trains* [2020] FWCFB 884 at [29]; *You v CSIRO* [2020] FWCFB 3804 at [23]

[21] *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78, 90 at [43]

[22] Decisions of the Commission suggests s 400 applies to interlocutory decisions where the substantive matter is an unfair dismissal application. See *Kennedy v Qantas Ground Services Pty Ltd* [2018] FWCFB 4552; *Capital Maintenance Solutions v Fraser* [2022] FWCFB 8; *Jayasundera v Electricity Networks Corporation (t/a Western Power)* [2022] FWCFB 149 at [37]-[38]

[23] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343, 197 IR 266 at [24]-[27]

[24] Transcript PN244-250

[25] Ibid PN268

[26] Ibid PN270-PN280

[27] *Darren Whittaker v Santos WA Energy Ltd*, AB3 at [34] and [44]

[28] (2005) 149 IR 80

[29] [2014] FWC 8402

[30] See *Darren Whittaker v Santos WA Energy Ltd*, AB3 at [34]

[31] Ibid at [38]

[32] *Australian Rail, Tram and Bus Industry Union v Busways Northern Beaches Pty Ltd* [2021] FCAFC 188 at [12]

[33] [2015] FWC 774

[34] [2011] NSWSC 385 at [2]-[5]; see *Mac v Bank of Queensland* [2015] FWC 774 at [6]

[35] (2005) 149 IR 80

[36] Ibid at 88, [29]-[31]

[37] Ibid at 88-89, [32]

[38] See *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board* [2017] FWCFB 2500 at [43]; *Seven Network (Operations) Limited & Ors v James Warburton (No 1)* [2011] NSWSC 385 at [5]

[39] *Seven Network (Operations) Limited & Ors v James Warburton (No 1)* [2011] NSWSC 385 at [5]

[40] *Fair Work Act 2009* (Cth), s 399

[41] Ibid, s 398(2)

[42] AB318-AB524

[43] AE525-AB539

[44] AB540-AB698

[45] AB24 at PN38

[46] Ibid at PN37

[47] AB345, AB347, AB358-AB359, AB366, AB368, AB375, AB393-AB394, AB397, AB458-AB459, AB527 and AB534

[48] AB345, AB391, AB459, AB527 and AB534

[49] AB345, AB347

[50] AB392-AB393, AB531-AB532, AB533 and AB534-AB535

[51] AB86-AB87, AB164-AB165, AB175-AB183, AB215, AB225-AB226, AB234, AB239-AB240, AB243 and AB247

[52] AB383, AB392-AB393, AB456-AB457, AB163 and AB186

[53] AB392-AB393, AB456-AB457, AB163 and AB186

[54] AB526

[55] AB345, AB347, AB358-AB359 and AB524

[56] AB23-AB27 at PN37-PN57

[57] AB31 at PN85

[58] *Darren Whittaker v Santos WA Energy Ltd*, AB3 at [35]

[59] Exhibit 1 at [18] and attachment AP-6

[60] See *Irwin v Director General, Department of Health* [2021] WAIRC 00468 at [50]-[51]

[61] See *Day v Smidmore (No 2)* (2005) 149 IR 80 at [30]-[32] and [41]

[62] [2020] FCAFC 44 at [9]

[63] Ibid at [8]-[9]

[64] *Day v Smidmore (No 2)* (2005) 149 IR 80 at 88, [31]