DECISION

Fair Work Act 2009
s.604—Appeal of decision

Construction, Forestry and Maritime Employees Union & Others
v
UGL Rail Services Pty Ltd
(C2024/5463)

JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT ASBURY
DEPUTY PRESIDENT EASTON

SYDNEY, 23 DECEMBER 2024

Appeal against order PR777942 of Deputy President Boyce at Sydney on 7 August 2024 in matter number C2024/5313.

Introduction

[1] The Construction, Forestry and Maritime Employees Union (CFMEU) and a number of individual employees of UGL Rail Services Pty Ltd (UGL) have jointly appealed against an order (Order)[1] made by Deputy President Boyce on 7 August 2024 under s 418 of the *Fair Work Act 2009* (Cth) (FW Act). Permission is required for the appeal. The order was made on the application of UGL and requires employees of UGL working on the Cross River Rail Project (CRR Project) in Brisbane to stop, not engage in and not organise certain specified types of unprotected industrial action (Order). The Deputy President gave reasons for his decision to make the Order *ex tempore* on 7 August 2024, and subsequently published his perfected reasons on 12 August 2024[2] (decision).

[2] The operative part of the Order provides:

> **4. INDUSTRIAL ACTION MUST STOP, NOT OCCUR AND NOT BE ORGANISED**
>
> **4.1** From the time of this Order:
>
> The Employees must stop, and must not engage in or organise the following types of unprotected industrial action:
>
> (a) an Employee failing or refusing to enter a CRR Construction Site at which the Employee has been rostered for the performance of work;
> (b) an Employee failing or refusing to attend for work at a workplace located within a CRR Construction Site where the Employee has been rostered for work; and
> (c) an Employee engaging in the conduct in paragraph (a) or (b) above at a CRR Construction Site because of an alleged health and safety concern arising out of:
> (i) the existence of a picket at that site, or

(ii) crossing the picket at that site; and

(d) a ban, limitation or restriction on the performance of work:
(i) underneath a point of entry to a CRR Construction Site;
(ii) underneath a picket outside a CRR Construction Site; or
(iii) otherwise.

4.2 For the purposes of this order, the expression 'industrial action' does not include:

4.2.1 protected industrial action within the meaning of s.408 of the *Fair Work Act 2009*;
4.2.2 action by an Employee/s that is authorised or agreed to by or on behalf of UGL; or
4.2.3 action by an Employee if:
4.2.3(i) the action was based on a reasonable concern by the Employee about an imminent risk to his or her health or safety; and
4.2.3(ii) the Employee did not unreasonably fail to comply with a direction of UGL to perform other available work, whether at the same or another workplace, that was safe and appropriate for the Employee to perform.

[3] The notice of appeal, as filed on 9 August 2024, identified five employees of UGL, in addition to the CFMEU, as appellants. The appellants ultimately proceeded upon a further amended notice of appeal which identifies the CFMEU and 90 individual employees as appellants. The appellants did not press grounds 1, 2(a), 2(b) or 4 of this further amended notice of appeal. The remaining appeal grounds are:

2. It was not open to the Commission to make the orders which it made because:
. . .
c. the orders are ambiguous.

3A. The Commission erred, as a matter of law, when assessing whether the conduct amounted to industrial action by failing to approach the question on the basis that once there was any evidence which suggested that the conduct fell within s. 19(2)(c), it was for the respondent to prove that the conduct did not fall within s. 19(2)(c) of the Act.

3B. The Commission erred, as a matter of law, by wrongly construing s. 19(2)(c) as requiring an objective imminent risk to health and safety rather than whether the evidence revealed that the employees had a reasonable concern about an imminent risk to their health or safety.

3. It was not open to the Commission to find as a matter of fact in respect of all of the respondents, or any of them [that]:

a. industrial action was threatened, impending or probable;
b. industrial action was being organised; and/or
c. industrial action of the kind described at order 4.1(d) had occurred.

5. The Commission did not find that industrial action was threatened, impending or probable or was being organised and there was therefore no basis for any order other than an order that the alleged industrial action stop.

Statutory framework

[4] Part 3-3 of the FW Acts deals with the subject matter of industrial action. In broad terms, the FW Act makes provision for the taking of 'protected industrial action', which is defined in ss 408–411. Section 415 provides that no action lies under any law in force in a State or Territory in relation to protected industrial action (unless it involves or is likely to involve personal injury, wilful or reckless destruction of or damage to property, or the unlawful taking, keeping or use of property).

[5] Part 3-3 provides for various prohibitions and restrictions on the taking of industrial action which is not protected. Section 417 provides that employees, employers and unions must not organise or engage in industrial action during the period from which an enterprise agreement is approved or a workplace determination comes into operation until its nominal expiry date has passed. Section 418, pursuant to which the Deputy President made the Order, empowers the Commission to make orders in respect of non-protected industrial action. Relevantly, it provides:

> **418 FWC must order that industrial action by employees or employers stop etc.**
>
> (1) If it appears to the FWC that industrial action by one or more employees or employers that is not, or would not be, protected industrial action:
> (a) is happening; or
> (b) is threatened, impending or probable; or
> (c) is being organised;
> the FWC must make an order that the industrial action stop, not occur or not be organised (as the case may be) for a period (the stop period) specified in the order.
>
> Note: For interim orders, see section 420.
>
> (2) The FWC may make the order:
> (a) on its own initiative; or
> (b) on application by either of the following:
> (i) a person who is affected (whether directly or indirectly), or who is likely to be affected (whether directly or indirectly), by the industrial action;
> (ii) an organisation of which a person referred to in subparagraph (i) is a member.
>
> (3) In making the order, the FWC does not have to specify the particular industrial action.
> . . .

[6] For the purposes of Part 3-3, including s 418, s 19 relevantly defines 'industrial action' in the following terms:

> **19 Meaning of industrial action**
>
> (1) Industrial action means action of any of the following kinds:
> (a) the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;

(b) a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee;
(c) a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;
(d) the lockout of employees from their employment by the employer of the employees.

. . .

(2) However, industrial action does not include the following:
(a) action by employees that is authorised or agreed to by the employer of the employees;
(b) action by an employer that is authorised or agreed to by, or on behalf of, employees of the employer;
(c) action by an employee if:
(i) the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety; and
(ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.

. . .

Factual background

[7] The factual background to this appeal may be summarised as follows. The CRR Project involves the construction of a new 10.2-kilometre rail line in Brisbane which includes 5.9 kilometres of tunnels running under the Brisbane River and central Brisbane, and four new underground stations. The head contractor on the CRR Project is CPB Contractors Pty Ltd (CPB). In the months prior to the date of the making of the order, CPB had been engaged in bargaining for two new enterprise agreements covering its employees working on the project, some of whom are represented by the CFMEU. As part of this bargaining process, employees of CPB represented by the CFMEU have, since 30 April 2024, embarked upon a campaign of protected industrial action. Associated with this campaign, the CFMEU has organised pickets at various CRR Project construction sites.

[8] UGL is a subcontractor for CPB on the CRR Project and employs about 192 employees performing work on the project. There are three enterprise agreements which apply to these employees, all of which have a nominal expiry date of 31 January 2025. As a consequence, the UGL employees are prohibited by s 417 of the FW Act from engaging in industrial action prior to this date.

[9] The CFMEU pickets initially involved employees, including UGL employees, being physically obstructed from attending their usual work locations. This caused the UGL employees not to enter the CRR Project sites from 30 April to 3 May 2024. On 1 May 2024, CPB obtained an interlocutory order from the Federal Court of Australia prohibiting, relevantly, the CFMEU and its delegates, office holders, employees or other representatives from:

- physically obstructing or physically impeding the free movement of goods or people to and from points of entry at CRR Project worksite;

- abusing, threatening, harassing or intimidating any person entering or leaving a CRR Project worksite; or
- aiding, abetting, counselling, procuring or inducing any person to engage in the above conduct.

[10] On 18 July 2024, the Federal Court made a further interlocutory order restraining the CFMEU and its delegates, office holders, employees or other representatives from

- photographing, recording by any means, or creating or maintaining a record of the identity of, any person or vehicle entering or leaving a CRR Project worksite; or
- coming within 15 metres of points of entry to a CRR Project worksite or going or remaining within 15 metres of any such point of entry.

[11] There is no suggestion that the above orders have not been complied with. Notwithstanding this, there has been a continued pattern of UGL employees regularly not attending for work, or attending but not performing their work duties, up to and including 7 August 2024, the day the Deputy President heard UGL's application.

The proceedings at first instance and the decision

[12] The application for an order under s 418 was made by UGL on 5 August 2024, after working hours. The order sought by UGL would only apply to its employees working on the CRR Project. UGL did not seek an order applying to any union representing its employees. The matter was listed for mention/directions by the Deputy President at 1:45 pm on 6 August 2024, at which time the Australian Manufacturing Workers' Union (AMWU) and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) appeared in response to the application.[3] The Deputy President made directions for the filing of evidence, and UGL filed statements of evidence, together with annexures, made by a number of its managers and supervisors, namely Christopher Newitt, Branko Prica, Ryan Farrell and Terence Prior. This evidence recounted the circumstances of the picketing and the non-attendance at work by UGL employees. It also described communications from employees, including by text message, alleging health and safety concerns about crossing the CFMEU picket lines to attend work. The AMWU and CEPU filed statements made by their officials Daniel Lacey and Chris Lynch which described, in general terms, concerns expressed by their members employed by UGL about crossing the CFMEU picket lines.

[13] On the morning of 7 August 2024, the CFMEU sent correspondence to the chambers of the Deputy President indicating that it wished to be heard in the matter. The hearing occurred on the afternoon of 7 August 2024. The AMWU, CEPU and CFMEU appeared at the hearing to oppose the making of the order sought by UGL, but no individual employee to whom the order would apply appeared or gave evidence. Mr Newitt, Mr Prika and Mr Prior gave additional oral evidence at the hearing, and Mr Prika and Mr Prior were cross-examined by the CEPU. At the conclusion of the hearing, the Deputy President made the Order (which was in the terms sought by UGL) and gave his reasons for doing so. As earlier stated, the Deputy President published his reasons in edited form on 12 August 2024.

[14] In his decision, the Deputy President referred to the evidence of Mr Farrell, Mr Prior, Mr Newitt and Mr Prica. He noted at [32] the evidence that:

> … 'some' UGL Employees today [that, is, the day of the hearing on 7 August 2024] attended work, and in doing so walked past the picket lines (or past the same area or entrance where picket lines were previously taking place), signed on to work, raised various concerns or grievances, and then left work without UGL's approval.

[15] The Deputy President also observed (at [35]) that many of the text messages from UGL employees conveying health or safety concerns were 'in identical form with the same or similar wording' and said (at [23]) in relation to the individual employee respondents to UGL's application:

> None of the individually named UGL Employees filed any evidence, or made any submissions (in writing or orally) about their own specific individual circumstances. For example, confirming that they had been unfit for work on a particular date/s, advising that they were too scared to come to work, setting out their reasons for not attending work on particular date/s, or giving evidence (that could be tested by way of cross-examination) that they individually held a concern (of a health and safety risk, or of any other kind) about entering CRR Project sites, or working at CRR Project sites, especially post 3 May 2024, and/or post 18 July 2024 (when Federal Court orders were made clearing illegal obstructions to CRR Project site entry points).

[16] At [37], the Deputy President made a finding that, leaving aside the s 19(2) exceptions, industrial action had been occurring in the form identified in UGL's submissions. He then dealt with the submissions advanced by the unions, and the evidence in support thereof, that the actions of each of the UGL employees fell within the exception to the definition of 'industrial action' in s 19(2)(c) of the FW Act, namely that they were based upon 'a reasonable concern of the employee about an imminent risk to his or her health or safety'. The Deputy President rejected this submission as follows:

> [43] I note that those words, 'if it appears' to the Fair Work Commission (at s 418(1) of the Act), identify that the relevant finding as to industrial action only be apparent, not essentially definitive. Notwithstanding that, in this case I consider (and find on the evidence before me) that the action (or conduct) by UGL Employees disclosed on the evidence, and as specified or summarised in UGL's submissions, is 'industrial action' within the meaning of s 19 of the Act, being action (or conduct) that is not to be excused on the basis of it being in response to an imminent risk to health and safety.
>
> [44] I am comforted in that later view (about the exception concerning an imminent risk to health and safety not being sustained on the evidence), having regard to the fact that issues as to imminent risk to health and safety were not raised or properly articulated by any named UGL Employees, at least on the evidence, with the management of UGL at the various times or sites, at least prior to the on-site meeting today (7 August 2024), i.e. beyond what is said or otherwise blandly or broadly asserted in text messages.
>
> (footnotes omitted)

[17] The Deputy President concluded:

> [48] It follows that given my findings that industrial action by UGL Employees is occurring, and it is not protected industrial action, and that it is occurring right up to the date of this hearing today (especially notwithstanding relevant employees have been notified of these proceedings

> before the Commission), I consider that it is appropriate to make the orders sought in the terms set out by UGL…

Stay decision

[18] The appellants sought a stay of the Order pending the hearing and determination of their appeal. The stay application was heard by the presiding member on 14 August 2024 and determined in a decision published the following day.[4] A stay of the entire Order was refused having regards to the appeal's prospects of success and the balance of convenience. However, the Order was partially stayed as follows:

> [40] I am, however, satisfied that the Order should be, in two respects, partially stayed. The first is that, insofar as the Order prohibits the organisation of the identified forms of industrial action, it should be stayed. As earlier stated, the appellants have a strong case that a 'not organise' order was beyond power. Since UGL did not even contend that the relevant industrial action was being organised (presumably explaining why it did not seek that the order apply to any of the unions), it would be unconscionable in my view for this aspect of the Order to continue in operation.
>
> [41] Second, I consider that clause 4.1(c) should be stayed. For the reasons earlier stated, it is ambiguous and its purpose is not apparent. Its continuation is likely to cause confusion about compliance with the Order. The Order serves its purpose without the inclusion of clause 4.1(c).

Appeal submissions

Appellants' submissions

[19] In respect of ground 2(c), the appellants submitted that clause 4.1(c) was not authorised by s 418 because it only requires orders to be made about the jurisdictional fact of 'industrial action' as defined in s 19 of the FW Act. It is the industrial action that is either happening, threatened, impending, probable or being organised that must be the subject of the order and, in connection with a failure or refusal to attend work which enlivens that part of the definition in s 19(1)(c), an employee's motive is irrelevant. It was submitted that clause 4.1(c) of the Order is therefore not permitted by s 418 because it goes beyond what is necessary to order that the industrial action stop or not occur. Alternatively, the appellants submitted, the inclusion of clause 4.1(c) and its interrelationship with clauses 4.1(a) and (b) was ambiguous and confusing and robbed clauses 4.1(a) and (b) of meaning such as to render clause 4.1(c) beyond statutory power.

[20] The appellants contended that if appeal ground 2(c) were to be accepted, it was necessary for the appeal to be allowed, the decision and Order set aside, and for the discretion under s 418 to be re-exercised afresh on the basis of the factual circumstances now pertaining.

[21] The appellants submitted that appeal grounds 3A, 3B and 3 were interrelated and raised two legal questions. The first was said to be: who bore the onus for establishing that the relevant conduct constituted 'industrial action' within the meaning of s 19? The appellants submitted that s 19(2)(c) forms part of the definition of 'industrial action' in s 19 and, by reference to *ABCC v O'Halloran*,[5] that if the evidence in the proceedings raises the possibility of the application of s 19(2)(c), then it is for the applicant for an order under s 418 to prove that the action in question did not answer the description in s 19(2)(c). This meant that evidence had to

positively exclude the possible application of s 19(2)(c) for the action to be considered industrial action and this bore directly on the question of whether the Commission could form the relevant opinion that industrial action was happening.

[22] The appellants contended that the second question was: what conduct falls within s 19(2)(c)? In respect of this question, the appellants submitted that s 19(2)(c) only required that the relevant employees have a *reasonable concern* about an imminent *risk* to their health or safety. The requisite 'concern' referred to a subjective state of mind of solicitude or anxiety, although the concern had to be objectively reasonable. The reference to a 'risk' meant that the concern only had to be about exposure to a risk of injury.

[23] As to the evidence at first instance relevant to these questions, the appellants submitted that:

- prior to the application there had been substantial publicity about physical altercations with and/or abuse being levelled at persons who had crossed the picket line, with the principal contractor being able to secure interlocutory relief concerning access to the sites being blocked;
- numerous employees had repeatedly raised, by text message, concerns about whether it was safe to go to work when there was a picket, and these concerns had been raised at meetings of employees, by health and safety representatives, and by the CEPU and the AMWU on behalf of their members;
- UGL's witnesses accepted that employees were very distressed about the issue;
- there was no evidence that UGL had taken any steps to address these concerns or put measures in place to ensure safety;
- the AMWU had sought that UGL address the employees' concerns so that they could attend work, but the only response was to direct employees to seek compensation from the CFMEU; and
- the CEPU received no response to the concerns raised.

[24] In this context, the appellants submitted that the Deputy President erred in three respects. First, the Deputy President erroneously proceeded on the assumption that it was for the employees to have satisfied him that s 19(2)(c) applied, rather than it being for UGL to prove that s 19(2)(c) did not apply. There was sufficient evidence, it was submitted, to raise the issue of the application of s 19(2)(c) for determination, but there was no consideration of this. Second, the Deputy President implicitly approached the matter on the basis of whether there was an objective risk to health and safety rather than whether the employees had an objectively reasonable concern about a risk to their health and safety, in circumstances where it was not open on the evidence to find that the concern was not objectively reasonable. Third, it was not open for the Deputy President to find that each of the employees who were a respondent to the application had engaged in industrial action, since there was a dearth of evidence concerning the actions of each individual employee.

[25] As to appeal ground 5, the appellants submitted that although the order required that industrial action stop, not be organised, and not be engaged in, there was no finding in the decision to ground the last two parts of the order. In the absence of the requisite findings of jurisdictional fact, there was no power for the Deputy President to make these parts of the order.

[26] It was submitted that permission to appeal should be granted in the public interest because the appeal raises important questions as to the proper construction of s 418 of the FW Act and the decision was attended by error which it was necessary to correct. The appellants submitted that the appeal should be upheld and the matter should be redetermined on the basis that, since there was no evidence that industrial action is presently happening, that the industrial dispute is continuing or that there is a likelihood of any further pickets at the sites, UGL's application should be dismissed.

Respondent's submissions

[27] The respondent submitted that the appellants' submissions that clause 4.1(c) of the Order was beyond power did not properly arise from appeal ground 2(c), had not been argued at first instance, and constituted a new appeal ground for which leave had not been given. The respondents otherwise submitted that clause 4.1(c) was clear on its face and within the Commission's jurisdiction under s 418 given the Deputy President's factual findings.

[28] In respect of appeal grounds 3A, 3B and 3, the respondent submitted that the case law is clear that, in an application for orders under s 418, the respondent has the evidential burden under s 19(2), with the applicant bearing the legal onus of proving that the conduct engaged in by the relevant employees is 'industrial action' as defined in s 19. At first instance, the direct evidence relevant to s 19(2)(c) consisted of text messages from employees in near-identical terms about their concern for their safety if they crossed the picket lines. UGL submitted that the evidence was silent about what the precise risk was, from where the risk emanated, and whether the risk was imminent. On this basis, it was submitted, the Deputy President was correct to conclude that the appellants had failed to discharge the evidential onus under s 19(2)(c) and, to the extent there was evidence of a concern, the concern was neither bona fide nor reasonable. As to the lack of bona fides and reasonableness of the employees' alleged 'concern', the Deputy President made findings of fact (unchallenged in the appeal) that some employees could and did attend for work notwithstanding the existence of pickets, that no employee gave direct evidence of an alleged health and safety concern, and that many of the text messages received by management from employees contained the same or similar wording.

[29] In relation to whether there was evidence that each individual employee had taken industrial action having regard to UGL's redaction of certain employee information, it was submitted that no point was taken by any of the appellants below about the redaction of identifying information in tables showing the absences of employees by date and site. It was submitted that the Deputy President's findings at first instance, and the evidence on which those findings were based, supported the making of the Order. As to the nature of the industrial action that was occurring (including on the very morning of the hearing), and (given the long-standing nature of the industrial action that had been occurring) that was threatened, impending or probable, the Deputy President accepted UGL's submissions and evidence in the decision, particularly in light of the finding that there was no undertaking given by any of the employees or their union representatives that their current actions or conduct would cease immediately or at any other time in the future.

[30] In relation to ground 5, UGL submitted that this was in substance the same as ground 3 and repeated and relied on its submissions concerning ground 3. Insofar as grounds 3 and 5 complain that the Deputy President did not make the necessary jurisdictional finding that

industrial action was being 'organised' by the relevant employees, UGL agrees that no such finding was made, but submitted that evidence existed on which basis such a finding could have been made and that, if this evidence was not accepted, that the Order could be amended by striking through the words 'or organise'. It was submitted that permission to appeal should otherwise be refused and the appeal dismissed.

Further correspondence

[31] At the conclusion of the hearing of this appeal on 14 October 2024, we reserved our decision. On 27 November 2024, we received correspondence from the lawyers acting for the appellants which relevantly stated:

> We act for the appellants in the above appeal proceeding, which is currently reserved for decision.
>
> This is joint correspondence sent on behalf of the parties.
>
> We are pleased to advise that the parties have reached an agreed position in relation to the disposition of the appeal, for the consideration of the Full Bench. The parties respectfully ask whether the Full Bench would be minded to make the following orders in C2024/5463, by consent:
>
> 1. permission to appeal be granted;
> 2. the appeal be upheld based on ground 5; and
> 3. upon a re-hearing of C2024/5313 by the Full Bench, noting that the applicant does not assert that there is any actual or threatened industrial action at this time, the application be dismissed.
>
> Further, whilst we of course acknowledge that it is a matter for the Full Bench, for their part the parties do not require written reasons for decision.
>
> This correspondence is copied to, and sent with the consent of, the solicitors for the respondent.

[32] We have considered the request in this correspondence and, for reasons to which we will return, we have decided to refuse it.

Consideration

[33] The jurisdictional fact which enlivens the duty under s 418(1) to make an order is that it 'appears' to the Commission that non-protected industrial action is happening, is threatened, impending or probable, or is being organised. That is, the jurisdictional fact is the formation of an opinion or the reaching of a state of satisfaction concerning the occurrence of non-protected industrial action.[6] A decision made pursuant to s 418(1) is one whereby 'the decision-maker is required to make a particular decision if he or she forms a particular opinion or value judgment' and may thus be characterised as discretionary in nature such that, on appeal, it is necessary for the appellant to demonstrate *House v The King* error.[7] The error necessary to be demonstrated is therefore an error of law or principle, a material error of fact, a failure to take into account a relevant consideration or the taking into account of an irrelevant consideration, or a determinative outcome that is not reasonably available.

[34] By ground 3A of their appeal, the appellants contend that the Deputy President erred in law by 'failing to approach' the question concerning the requisite non-protected industrial action on the basis that it was for UGL to prove that the relevant conduct on the part of the appellants did not fall within s 19(2)(c). The formulation of the appeal ground in this way reflects the fact that the Deputy President did not state any proposition of law or principle concerning the issue of onus contrary to that contended for by the appellants, or at all. The alleged error of law is therefore not apparent on the face of the Deputy President's decision but must be inferred from his process of reasoning. This renders this appeal ground problematic from the outset.

[35] The appellants cite the Federal Court Full Court decision in *ABCC v O'Halloran*[8] as authority for the proposition that, once the respondents to UGL's application below had adduced sufficient evidence to raise the issue of the applicability of s 19(2)(c), it was for UGL to prove that s 19(2)(c) did not apply to the conduct of those respondents the subject of the application. However, that decision must be placed in its proper context: it concerned proceedings brought in a court by a regulatory authority seeking the imposition of pecuniary penalties upon persons who were said to have contravened ss 417(1) of the FW Act by engaging in industrial action. This provision is a civil remedy provision, and its enforcement requires the court to positively find that the alleged industrial action has actually occurred. The principles stated by the Full Court concerning the question of onus in that context are not necessarily applicable to the quite different context of s 418. Section 418 has a number of distinguishing characteristics:

- The powers under the subsection are exercisable by a statutory tribunal, not a court.
- As earlier stated, the subsection requires the Commission to make an order of the requisite type once it reaches a state of satisfaction concerning the relevantly alleged industrial action. The actual occurrence or potential occurrence of industrial action is not the jurisdictional fact upon which the provision operates.
- An order may be made by the Commission acting on its own initiative without there being an actual applicant: s 418(2)(a).
- Section 420 imposes a qualified time constraint on the Commission's determination of an application for an order under s 418.

[36] More generally, it is also relevant that:

- s 577(1)(b) of the FW Act requires the Commission to perform its functions and exercise its powers in a manner that is quick, informal and avoids unnecessary technicalities;
- s 590(1) provides that the Commission may inform itself in relation to any matter before it in such manner as it considers appropriate (except as otherwise provided by the FW Act); and
- s 591 provides that the Commission is not bound by the rules of evidence and procedure in relation to a matter before it.

[37] These characteristics mean, in our view, that legal concepts of onus of proof, as articulated by reference to s 19 in *ABCC v O'Halloran*, cannot be applied without significant qualification to the consideration required by the Commission under s 418.[9] In relation to

administrative tribunals which are not required to apply the rules of evidence, it has generally been held that no party bears a formal onus of proof.[10] Here, given that proceedings under s 418 can be initiated on the Commission's own initiative without there being an applicant at all, and that the Commission may inform itself other than merely by reliance on the evidence adduced by the parties, it would be erroneous to constrain the Commission's consideration under s 418 by reference to notions of onus falling on particular parties. We consider the preferable view is that it is for the Commission, based on all the evidence and other material before it, to determine whether it can reach the requisite state of satisfaction regardless of which party, if any, may have been the source of that evidence and material. If, by whatever means, a serious issue of the applicability of s 19(2)(c) to the industrial action in question arises, that issue will necessarily form part of the Commission's consideration as to whether it can arrive at the state of satisfaction necessary to enliven the duty to make an order.

[38] An applicant for an order under s 418(1) will carry the risk of failure if the Commission is unable to reach the requisite state of satisfaction and, in that limited sense, bears the burden of persuasion. Beyond this, notions of onus have in our view no role to play in the consideration required by s 418(1). The same applies in an appeal from a decision to make an order under s 418(1), in which the principal question will be whether there was sufficient evidence and other material before the first-instance decision-maker to logically support and make reasonably available the state of satisfaction that has been reached.

[39] We will turn to the question of whether the Deputy President's finding concerning the occurrence of actual or potential industrial action within the meaning of s 19 was reasonably open in our consideration of grounds 3B and 3 of the appeal. It is sufficient to say that, in his decision, the Deputy President took into account the evidence adduced by the CEPU and the AMWU (and not by any of the appellants) that the failure of some employees to attend for work as normal was due to an apprehension of a risk to health and safety, and considered whether this evidence meant that s 19(2)(c) applied. The Deputy President's observation at [23] that no individual UGL employee gave any evidence concerning an apprehension of a risk to health and safety if they attended for work was one he was entitled to make in his assessment of whether s 19(2)(c) applied. The Deputy President concluded that s 19(2)(c) did not apply to the industrial action and gave his reasons for that conclusion. No error of law or principle is identifiable in the approach taken to the assessment of the evidence by the Deputy President. Ground 3A is therefore rejected.

[40] In respect of ground 3B, it may be accepted, consistent with the appellants' submissions, that s 19(2)(c) is to be construed and applied as follows:

- A 'concern', for the purpose of s 19(2)(c), is a subjective state of mind involving solicitude or anxiety.[11]
- A 'reasonable concern' with which s 19(2)(c) is concerned is one which is objectively reasonable — that is, it is one which might be held by an ordinary and reasonable person in the position of the employee at the relevant time and is not fanciful, illogical or irrational. It is not necessary to find that an actual risk existed at the relevant time.[12]
- The concern must be of a 'risk' — that is, an exposure to danger or a chance of harm or loss — to health or safety.

[41] The appellants contend that the Deputy President 'implicitly' departed from the above principles and approached the matter on the basis that the relevant question was whether there was an actual risk to health and safety rather than an objectively reasonable subjective apprehension of one. The characterisation of this error as implicit is revealing since nowhere in the decision does the Deputy President state that he was construing and applying s 19(2)(c) in this way. In fact, it is apparent that the Deputy President's rejection of the contention that s 19(2)(c) applied to the employees' non-attendance at work during the relevant period was founded on three additional propositions concerning the proper construction and application of s 19(2)(c):

- The alleged concern must actually and genuinely be held by the employees in question.[13]
- The risk the subject of the concern must be 'imminent' — that is, likely to occur at any moment.[14]
- The action in question must be 'based on' the concern — that it must be causally related to or be by reason of the concern.[15]

[42] On a fair reading of his decision, the Deputy President relied upon the following matters in his rejection of the application of s 19(2)(c) to the action taken by the employees. First, at [17], [23] and [33], the Deputy President placed weight on the fact that no employee gave evidence, or made a submission, as to holding any relevant concern or the basis of that concern. Second, at [35], he noted that many of the text messages sent by employees to UGL communicating an alleged concern were in identical form with the same or similar wording. Third, at [32] and [41], he referred to evidence that employees had in fact on occasions been prepared to cross the picket line without any apparent concern for their own safety. Finally, at [44], he found that no UGL employee had properly raised or identified what was said to be the imminent risk to health or safety beyond what was 'blandly or broadly asserted in text messages'. These findings made reasonably open, we consider, the conclusion that s 19(2)(c) did not apply because the evidence did not establish that the purported concerns were actually or genuinely held by any of the employees, nor that any apprehended imminent risk was ever specifically identified, nor that when the employees failed to attend for work, it was because of an apprehension of a risk to health and safety arising from the pickets.

[43] Indeed, a more detailed analysis of the evidence amply supports this conclusion. The unchallenged evidence given by Mr Branko Prica, a UGL Superintendent usually located at the Woolloongabba (Gabba) site, concerning the role of Mr Aaron Self, an ETU delegate, during the events of July 2024 is instructive. Mr Prica firstly gave evidence that on 16 July 2024, there were members of the CFMEU picket present at the entry to the Gabba site. No employees of UGL attended the usual prestart meeting at 6:00 am. Shortly afterwards, Mr Self rang Mr Prica and said that the employees did not feel safe and asked 'how are you managing our psychosocial wellbeing allowing us to access site safely[?]'. When Mr Prica responded to the effect that the Gabba site was open and that it would be 'No work No pay', Mr Self replied: 'Well if that's the case I'll let my members know and take it from there'. No work was performed at the Gabba site that day. On the following day (17 July 2024), the CFMEU picket was similarly present again at the Gabba site, nobody attended the prestart meeting, and Mr Self sent a text message in which he said that 'with the picket line still in action we don't feel safe crossing it, can you please let me know if you're able to relocate us to a different part of the job for the day, as we're

here ready, able, and willing to work?' Mr Prica called Mr Self to explain that this was not practicable and that it would again be a case of 'No work No pay'.

[44] The position was different on 18 July 2024, in that there was *no* CFMEU picket present at the site entry. Nonetheless, only eight of approximately 50 UGL employees attended for work. Mr Prica's evidence was that Mr Self, who did attend the prestart meeting, said at the meeting that workers 'shouldn't and won't' cross a 'virtual picket line in the tunnel' if there was a picket line at the surface worksite entrance point, as the picket line ran vertically. Mr Prica gave evidence that following the prestart meeting, he had the following conversation with Mr Self:

> [Prica] Aaron at prestart you mentioned that the picket line on the surface of a station extends from the gates being picketed vertically down to the tunnel Nth & Sth head walls, which means that UGL workers cannot cross past the headwalls into each station to continue works elsewhere on the project within the rail corridor. Surely this isn't the case, and can you please retract that statement.
>
> [Self]: We won't cross a picket line no matter where it is.
>
> [Prica] Confirm what you mean by an Invisible picket line, I cannot comprehend this comment, and wouldn't you agree that we are not working within a station precinct and are working in a rail corridor, so if you are to enter site for work at Gabba for instance and are directed to complete tasks within the Roma section of the tunnel, using the tunnel as your access to that specific location then there is no crossing a picket line.
>
> [Self] No I disagree, a picket line on the surface also runs vertically and is essentially at the head wall of the tunnel entering a cavern.

[45] On 26 July 2024, Mr Prica was sent a screenshot of a message exchange within a group called the 'Gabba ETU' group. The screenshot showed that, in the exchange, 'Arron Self Etu' said in response to an employee who said 'A full week be nice':

> 2 days is better that no days, still trying to get comms at Roma moved they've had 1 day in 2 weeks.
>
> Enjoy the weekend, it could be worse – you could be a scab crossing the line, turning shit on, fucking over your mates. Let's enjoy the weekend and I'll catch them next week.

[46] This evidence points firmly to a conclusion that, at least as far as Mr Self was concerned, his conduct was not based on any genuine concern about an imminent risk to health or safety as a result of the picket line and was rather motivated by industrial solidarity with the CFMEU in respect of its bargaining dispute with CPB. His role as spokesperson for other ETU members also likely infers that his position reflected that of other ETU members.

[47] In addition, the oral evidence given by Mr Prica concerning the events which occurred at the Gabba site on the morning of the hearing before the Deputy President (7 August 2024) is confirmatory of the lack of a causal relationship between the alleged health and safety concerns about crossing the picket line and employees' willingness to work. Mr Prica's evidence was that there was no CFMEU picket line at that site that morning. At the prestart meeting, a number

of employees who attended expressed distress about the fact that, in serving its s 418 application on the individual employees, UGL had disclosed the address of each employee to all other employees. After some delay, this resulted in the large majority of workers who had signed on not performing work and leaving the site. This incident is briefly referred to in the decision at [32]. Notwithstanding that employees may arguably have had a legitimate grievance about the disclosure of their addresses in this way, no credible explanation was ever advanced as to why this gave rise to an apprehension of an imminent risk to health or safety or how the departure of the employees from the worksite had any causal relationship with this.

[48] In relation to the evidence relied upon in the appellants' submission in respect of ground 3 as demonstrative of the position that s 19(2)(c) applied to the UGL employees' action and that it was not reasonably open for the Deputy President to find otherwise, it is sufficient to note, in addition to the evidence discussed immediately above, the following. First, the appellants fail to distinguish between the respective positions that applied before and after the interlocutory relief sought and obtained by UGL from the Federal Court and provide no explanation as to what apprehended imminent risk remained after the second interlocutory order was made on 18 July 2024. Second, the appellants do not explain why there were instances of refusal to work even when there was no picket line in place. Third, the acceptance by UGL witnesses of employee distress related to the issue of the disclosure of employees' addresses on 7 August 2024 and not to any issue raised by the picket line. As earlier stated, there was no picket line on that day but employees walked off the job nonetheless.

[49] Finally, in respect of ground 3, we reject the proposition that it was necessary for the Deputy President to have made a finding that each individual employee of UGL working on the CRR Project has engaged in industrial action. Section 418 requires that the Commission be satisfied as to the actual or potential occurrence of industrial action 'by one or more employees'. The evidence below demonstrated, and it was not in dispute, that UGL employees generally were, on various occasions, refusing to attend for or to perform work at the CRR Project. None of the unions responding to the application contended that any of the named employees was not engaging in this action. The evidence therefore plainly met the statutory prerequisite for the making of an order. It was not necessary in the circumstances for the Deputy President to have evidence directed to each named employee for him to reach the requisite state of satisfaction.

[50] For the above reasons, grounds 3B and 3 are also rejected.

[51] We uphold ground 2(c) of the appeal in respect of clause 4.1(c) of the Order. As stated in the stay decision, clause 4.1(c) of the Order is ambiguous and serves no purpose:

> Clause 4.1(c) neither operates as an exclusion from nor as an extension of the types of industrial action which the Order identifies in clauses 4.1(a) and (b). Its purpose is therefore obscure. It attempts to describe the prohibited industrial action in clauses 4.1(a) and (b) by reference to the employee's subjective motive for taking the action — a matter which, apart from the operation of clause 4.2.3, appears to me to be irrelevant to whether the employee is engaged in industrial action. To the extent that clause 4.1(c) may be read as attempting to pre-empt the operation of clause 4.2.3, it is clearly ineffective because, as earlier stated, the Order makes clear that action encompassed by clause 4.2.3 is not industrial action prohibited by the Order.[16]

[52] For the reasons in the stay decision stated above, we do not consider that clause 4.1(c) is authorised by s 418(1).

[53] As to ground 5 of the appeal, it is well-established that s 418(1) operates on a distributive basis, so that the Commission's satisfaction that industrial action is happening requires an order that the industrial action stop, satisfaction that industrial action is threatened, impending or probable requires an order that the industrial action not occur, and satisfaction that industrial action is being organised requires an order that the industrial action not be organised. Mere satisfaction that industrial action is happening does not authorise an order requiring that industrial action not occur or not be organised in addition to requiring that the industrial action stop.[17] By ground 5, the appellants contend that the Deputy President erred in that he ordered that the UGL employees 'must not engage in or organise' the industrial action identified in clauses 4.1(a)–(d) of the Order notwithstanding that the only finding he made was that industrial action was occurring.

[54] We agree that the Deputy President was not authorised to make a 'not organise' order. UGL did not contend that industrial action was being organised by anyone and, consistent with this, did not name any of the unions as respondents to its application. There was no evidence of organisation, and the Deputy President did not find that the industrial action was being organised (notwithstanding his speculative footnote to paragraph [34] of his decision). To this extent, we uphold ground 5 of the appeal.

[55] However, the position is different in respect of the 'not occur' aspect of the Order. It is true that the Deputy President did not, in terms, state a finding that industrial action was threatened, impending or probable. However, that is not the end of the matter. We consider that some latitude is required in respect of a decision made in response to a matter brought on at very short notice and subject to the qualified time constraint in s 420(1). By reason of the following considerations, we are not persuaded that the Deputy President failed to reach the requisite state of satisfaction in respect of industrial action being threatened, impending or probable such as to support the making of a 'not occur' order:

(1) UGL made an explicit submission to the Deputy President that the Commission was entitled to conclude that industrial action was threatened, impending or probable because:

- The picketing outside CRR Project sites had been occurring regularly since 30 April 2024 with no end in sight.
- The CFMEU had issued 14 notices of intention to take protected industrial action between 26 April and 30 July 2024, with the latest notice indicating an intention to take protected industrial action up to and including 12 August 2024.
- The pattern of employees' absences and other forms of industrial action had only arisen since the picketing began, and all forms of leave by employees had increased by 800 per cent since June 2024.
- If the picketing continued, it was reasonable to consider that the industrial action would also continue.

(2) The Deputy President referred to this submission, and to UGL seeking orders that the asserted unprotected industrial action 'stop, or not occur', at paragraph [27] of the decision. He did not subsequently indicate any rejection of this submission.

(3) The Deputy President made findings of fact consistent with UGL's submission in (1) above.

(4) The Deputy President made references to a number of matters indicative of a concern about the continuation of industrial action should an order not be made. In particular: industrial action was occurring up to the date of the hearing (at [48]); there had been no undertakings or other representations provided by or on behalf of any of the UGL employees that their current actions or conduct would cease either immediately or at any specific time into the future (at [49]); and the dispute between CPB and the CFMEU was ongoing and there was no evidence that it would be resolved in the near future (at [50]).

(5) The Deputy President indicated at [37], [43] and [47]-[48] general acceptance of UGL's case. This included explicit acceptance (at [43] and footnote 32) of paragraph 4 of UGL's written submission which identified 'four kinds of industrial action which are happening, threatened, impending and/or probable'.

[56] Accordingly we do not uphold this aspect of ground 5.

[57] The parties' correspondence of 27 November 2024 proposes that the appeal be upheld 'based on ground 5' and that, on a rehearing of the matter, UGL's application for an order under s 418 should be dismissed. It is necessarily implicit that this course would involve quashing the Order, by reason of the proposed upholding of ground 5, in its entirety. We do not intend to take this proposed course for the following reasons. *First*, in an appeal by way of rehearing, the identification of appealable error on the part of the primary decision-maker is the prerequisite for appellate intervention.[18] Such appealable error must actually have occurred; it cannot arise merely by agreement between the parties. *Second*, we have upheld ground 5 of the appeal only in part. Our limited conclusions as to ground 5, and ground 2(c), do not vitiate substantial operative parts of the Order and thus do not justify the Order being quashed in its entirety. *Third*, it is not the case that a finding of *any* appealable error, no matter how insignificant, requires the application the subject of the decision under appeal to be entirely redetermined. Section 607(3) of the FW Act sets out the Commission's powers in relation to an appeal, and while (under paragraph (b)) the Commission may 'make a further decision in relation to the matter that is the subject of the appeal', it may also vary the decision under appeal (paragraph (a)). *Fourth*, the limited success of the appellants in their appeal suggests that the appropriate course is to vary the Order to remove those parts of the Order not made in conformity with s 418.

[58] Accordingly, we grant permission to appeal on the basis of the errors we have identified, uphold the appeal as to ground 2(c) and, in part, ground 5, and vary the order to remove the words 'or organise' in the chapeau to clause 4.1 (with a concomitant correction to the title of clause 4) and to delete clause 4.1(c).

Orders

[59] We make the following orders:

(1) Permission to appeal is granted.

(2) The appeal is upheld in part.

(3) Order PR777942 is varied in the terms set out in the annexure to this decision.

PRESIDENT

Appearances:

C Massy, counsel, for the Construction, Forestry and Maritime Employees Union and the individual appellants.
S Moody, counsel, for UGL Rail Services Pty Ltd.

Hearing details:

2024.

Sydney:
14 October.

ANNEXURE

ORDER

1. TITLE

This Order shall be known as the *UGL Rail Services Pty Ltd Stop Action Order 2024* (**Order**).

2. APPLICATION AND PARTIES BOUND

2.1 This Order is binding and applies to:

(a) UGL Rail Services Pty Ltd (**UGL**); and

(b) the Employees of UGL named in the Schedule.

3. DEFINITIONS

CRR Project means the Cross River Rail Project.

CRR Construction Site means the construction sites established for the CRR Project at the date of this Order, being those at the following addresses in Brisbane:

(a) the project site known as the Albert Street Precinct (Lot 1, Lot 2, Lot 3), bound by Mary, Edward, Elizabeth and George Street, Brisbane City;

(b) the project site known as the Roma Street Precinct, bound by Roma Street, Countess Street and Parkland Boulevarde and the Queensland Rail Corridor, Brisbane City;

(c) the project site known as the Woolloongabba Precinct, bound by Stanley, Main, Leopard and Vulture Streets, Woolloongabba;

(d) the project site known as the Boggo Road Precinct, bound by Boggo Road, Peter Doherty Street and Boggo Road Busway/Queensland Rail Corridor in Dutton Park;

(e) the project site known as the Southern Area work area, bound by Cornwall Street, Kent Street and Queensland Rail Corridor;

(f) the project site known as the Northern Portal, bound by Queensland Rail Corridor, Bowden Bridge Road, Gregory Terrace and Kalinga Avenue;

(g) Hamilton Yard at 222 MacArthur Avenue, Hamilton;

(h) BlueWater Yard at 2-6 Bishop Drive, Port of Brisbane;

(i) 271 Gilchrist Avenue, Herston;

(j) 33 Lanham Street, Bowen Hills;

(k) 48 O'Connell Terrace, Bowen Hills;

(l) 58 Chale Street, Yeerongpilly;

(m) Corner of Nobel Street and Annerley Road, Dutton Park;

(n) Corner of Brooke Street and Pegg Road, Rocklea;

(o) Corner of Wilkie and Green Street, Yeerongpilly; and

(p) 19 Orient Avenue, Pinkenba.

Employees means the First Respondent and all other employees of UGL named in the Schedule to these Orders.

Point of Entry means any point of entry to (or exit from) a CRR Construction Site, and includes without limitation any gate, turnstile, entrance way, driveway or door.

4. INDUSTRIAL ACTION MUST STOP~~,~~ AND NOT OCCUR ~~AND NOT BE ORGANISED~~

4.1 From the time of this Order:

The Employees must stop, and must not engage in ~~or organise~~ the following types of unprotected industrial action:

(a) an Employee failing or refusing to enter a CRR Construction Site at which the Employee has been rostered for the performance of work;

(b) an Employee failing or refusing to attend for work at a workplace located within a CRR Construction Site where the Employee has been rostered for work; and

~~(c) an Employee engaging in the conduct in paragraph (a) or (b) above at a CRR Construction Site because of an alleged health and safety concern arising out of:~~

~~(i) the existence of a picket at that site, or~~

~~(ii) crossing the picket at that site; and~~

(d) a ban, limitation or restriction on the performance of work:

(i) underneath a point of entry to a CRR Construction Site

(ii) underneath a picket outside a CRR Construction Site; or

(iii) otherwise.

4.2 For the purposes of this order, the expression “industrial action" does not include:

4.2.1 protected industrial action within the meaning of s.408 of the *Fair Work Act 2009*;

4.2.2 action by an Employee/s that is authorised or agreed to by or on behalf of UGL; or

4.2.3 action by an Employee if:

4.2.3(i) the action was based on a reasonable concern by the Employee about an imminent risk to his or her health or safety; and

4.2.3(ii) the Employee did not unreasonably fail to comply with a direction of UGL to perform other available work, whether at the same or another workplace, that was safe and appropriate for the Employee to perform.

5. DISPLAY OF ORDER

5.1 UGL will place a copy of this Order on notice boards at all CRR Construction Sites where the Employees are rostered to work (which, at the present time, are Woolloongabba, Roma Street and Northern Portal) and any additional CRR Construction Site/s where the Employees may be rostered to regularly work in the future during the operation of this Order.

6. SERVICE OF ORDER

6.1 The method of service specified in paragraph 6.2 will be sufficient service of this Order.

6.2 Valid service may be effected on the Respondents by:

(a) Emailing a copy of this Order to the last known email address provided by the Employee to UGL; and

(b) UGL placing a copy of this Order on its noticeboard typically used for communicating with Employees at all CRR Construction Sites where the Employees work (which at the present time are Northern Portal, Woolloongabba and Roma St); and

(c) UGL placing the Order on its Intranet

7. TERM AND DATE OF EFFECT

7.1 This Order shall come into effect at 12.00pm on 8 August 2024 and will remain in force until:

(a) enterprise agreements are approved by the Fair Work Commission between CPB Contractors Pty Ltd (**CPB**) and relevant CPB employees working on the CRR Project in Queensland on both the Rail, Integration and Systems alliance ("RSI Works") and the Tunnel, Stations and Development public-private partnership ("TSD Works"); or

(b) in the absence of (a) taking place prior to midnight (12:00 pm) on 31 January 2025, then midnight (12:00 pm) on 31 January 2025; or

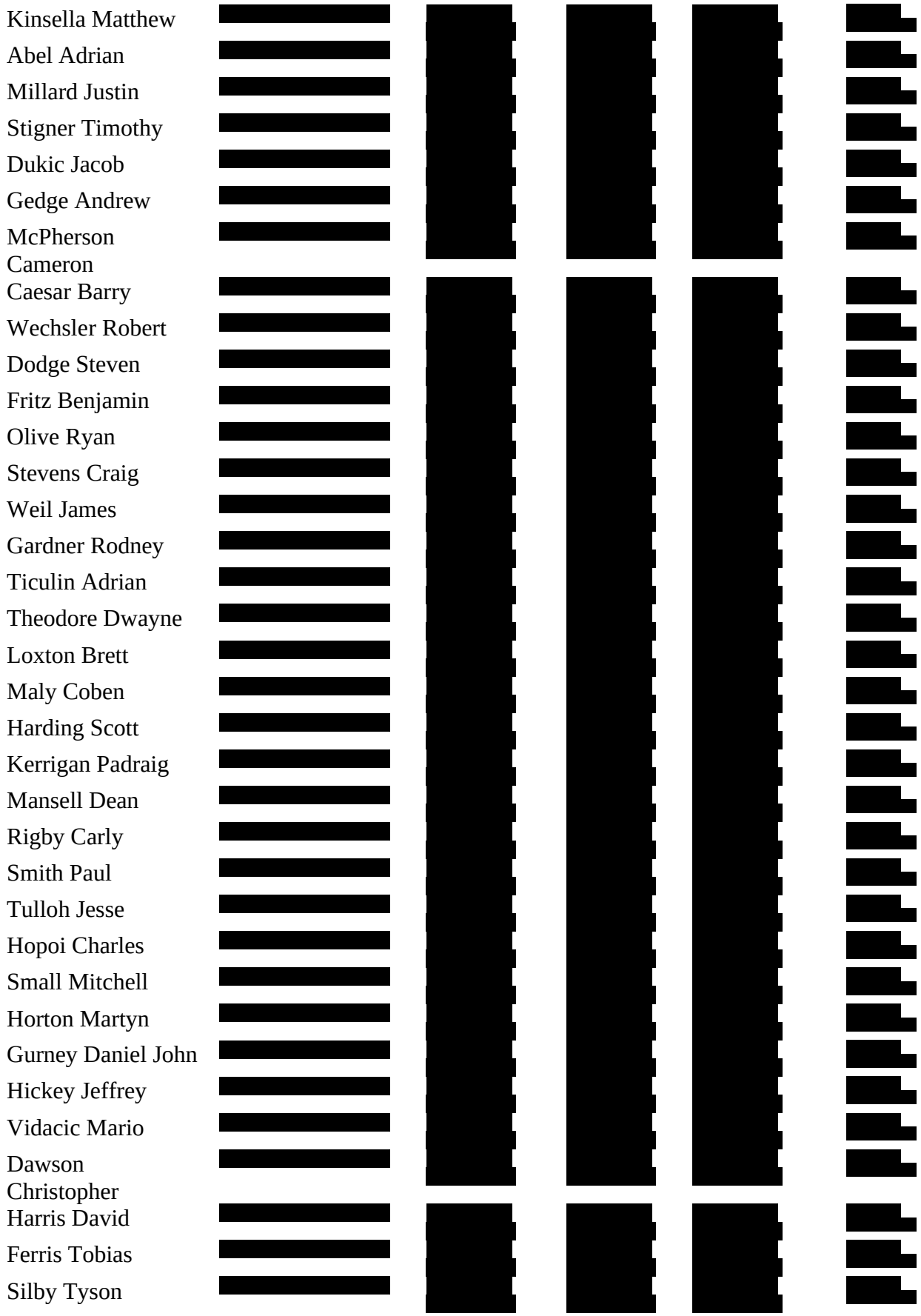
(c) until further Order of the Fair Work Commission.

Schedule

(Employee address details intentionally masked)

Employee Name	House Number and Street	Suburb	State	Country	Post Code
Self Aaron	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
White Paul	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Brown George	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Bourke Anthony	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Goodier Philip	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Liston Trevor	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Higgins Clayton	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Wright John	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Briese Scott	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Mathison David	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
O'Reilly Justin	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Clarke Grant	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Bain Mark	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Conley Damian	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Fitzsimon Liam	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Cameron-smith Joel	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Polkinghorne Shannon	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Elysee Jean-paul	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Smith Jason	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Summerland Andrew	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Lewis Craig	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Hill Tyrone	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Welman Jesse	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Murray Adam	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Viitkin Keit	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Baker Trevor	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Hynes John	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Dunne Joseph	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Fogarty Christopher	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Ferguson Bryce	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

Robinson Benjamin
Hall Callum
Williams Lindsay
Etter Clinton
Barter Benjamin
Holmes Lucas
Nguyen Huy
Rosenthal Ryan
Anderson Trent
Tisdell Haarlen
Coombes Joshua
Farr Travis
Gibb Brendon
Slater Tyson
Stockton William
Easton William
Rigby Samuel
Fowler Jeffrey
Lourigan Shane
Dall Adam
Smith Lionel
Paulden Dale
Chambers Baden
Duffy Daniel
De Plater Jason
Gaw Alister
Morgan Jed
Zandanel Terry
Brown Aaron
Blundell Richard
Haylock Benjamin
Brown Lachlan
Itsimaera Branson
Thompson Joshua
Kunst Cooper
Mahoney James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Dodge Steven
Fritz Benjamin
Olive Ryan
Stevens Craig
Weil James
Gardner Rodney
Ticulin Adrian
Theodore Dwayne
Loxton Brett
Maly Coben
Harding Scott
Kerrigan Padraig
Mansell Dean
Rigby Carly
Smith Paul
Tulloh Jesse
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Gurney Daniel John
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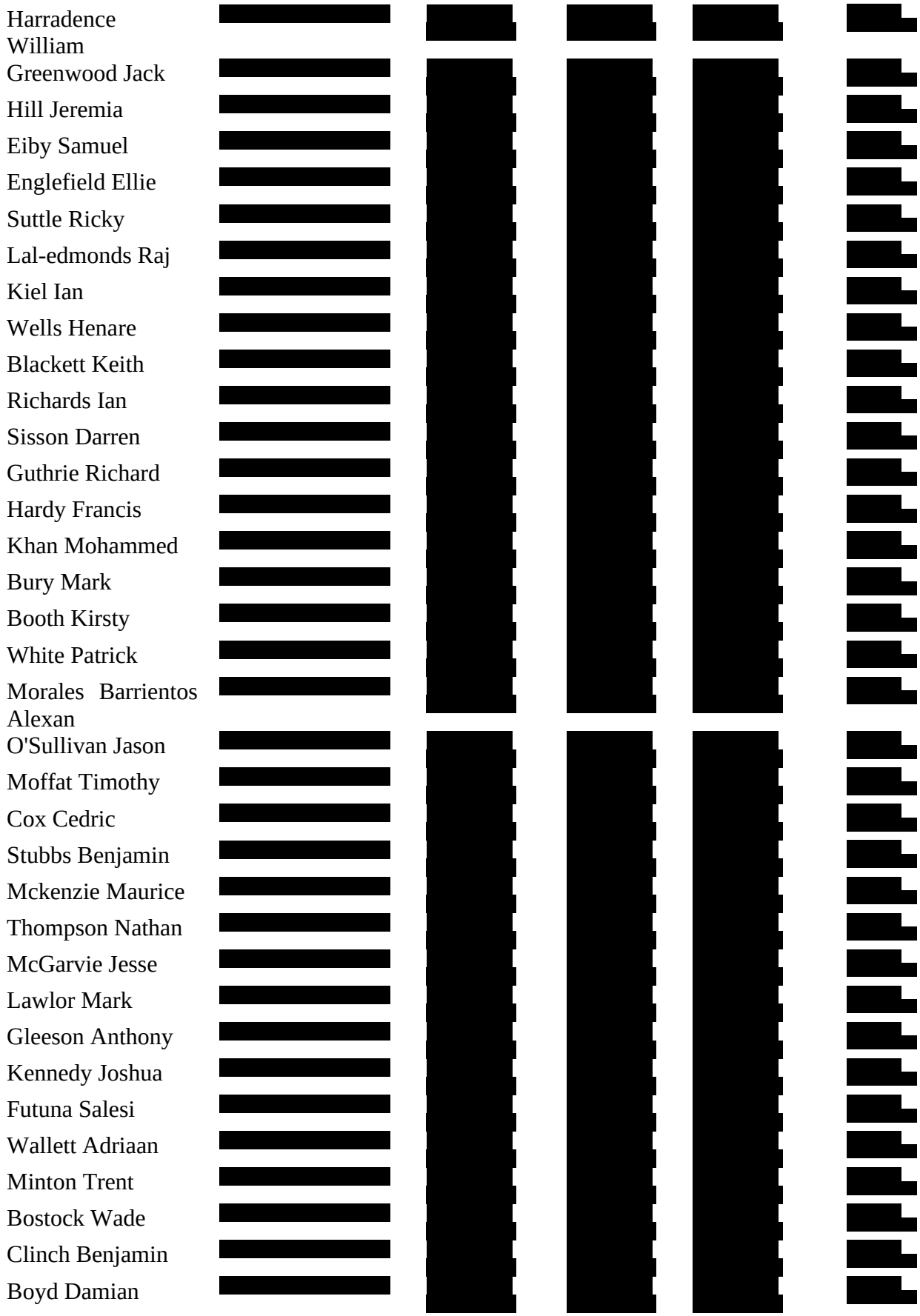
Vidacic Mario
Dawson Christopher
Harris David
Ferris Tobias
Silby Tyson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Greenwood Jack
Hill Jeremia
Eiby Samuel
Englefield Ellie
Suttle Ricky
Lal-edmonds Raj
Kiel Ian
Wells Henare
Blackett Keith
Richards Ian
Sisson Darren
Guthrie Richard
Hardy Francis
Khan Mohammed
Bury Mark
Booth Kirsty
White Patrick
Morales Barrientos Alexan
O'Sullivan Jason
Moffat Timothy
Cox Cedric
Stubbs Benjamin
Mckenzie Maurice
Thompson Nathan
McGarvie Jesse
Lawlor Mark
Gleeson Anthony
Kennedy Joshua
Futuna Salesi
Wallett Adriaan
Minton Trent
Bostock Wade
Clinch Benjamin
Boyd Damian

Gee Adam
Holcombe Murray
Cullen Alexander
Higgins Bender
Gallacher Paul
Lemmens Remus
Pitama Dean
Whittle Ryan
Maher Benjamin
Garton Mark
Murphy Andrew
Johnson Brendan
Pyne Glenn
McTaggart Luke
Pons Jordan
McCoombes Corey
McPhee Mitchell
Meier Timothy
Ferguson Jarrod
Pozzebon Jason
Lacey Trent
Nudd Quinton
Peckham William
Ganesh Ganesh
McMillan Adam
Dowling Jamie
De Pauw Glenn
Lawrence Peter
Findlay Christopher
Trotman Daniel
Frost Nathan
Johnston Bruce
Saunders Joel
Ayre Adam
Mc Anarney Ronan
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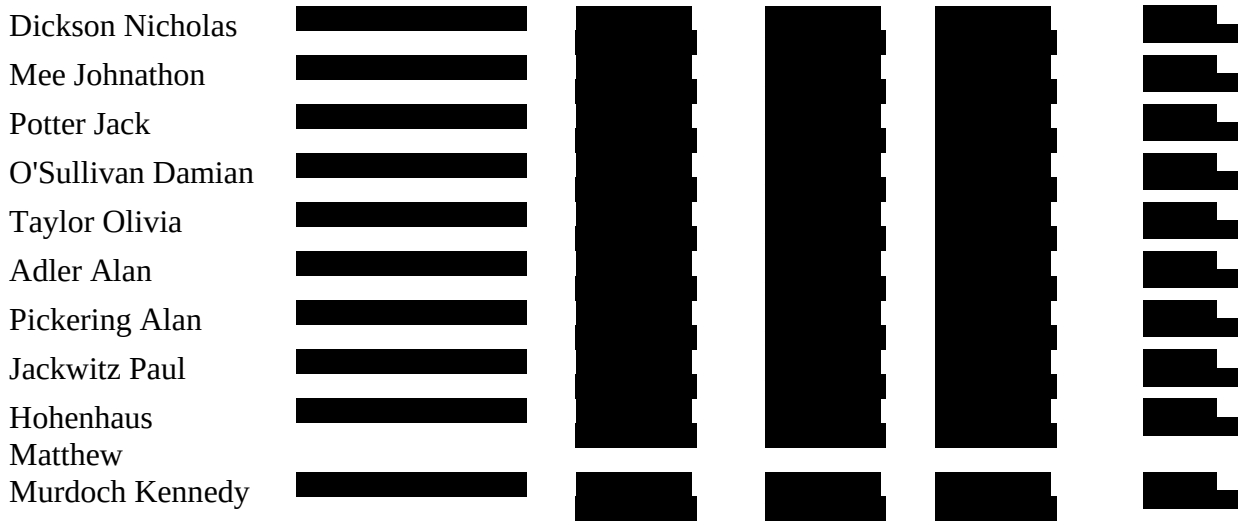

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[1] PR777942.

[2] [2024] FWC 2104.

[3] The Electrical Trades Union (ETU) and Plumbers Union divisions of the CEPU appeared separately.

[4] [2024] FWC 2167.

[5] [2021] FCAFC 185.

[6] *Maritime Union of Australia v Patrick Stevedores Holdings Pty Limited* [2013] FWCFB 7736, 237 IR 1 [5]-[7].

[7] Ibid [10]-[11].

[8] [2021] FCAFC 185.

[9] See *Teterin v Resource Pacific Pty Ltd* [2014] FWCFB 4125, 244 IR 252 [23]-[25]; *Coal & Allied Operations Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (1997) 73 IR 311, 317; *Re Chamber of South Australian Employers Inc (No 2)* (1991) 43 IR 424, 441-442.

[10] *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53, 231 CLR 1 [40] per Gummow A-CJ, Callinan, Heydon and Crennan JJ; *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93, 226 FCR 555 [115] per Flick and Perry JJ; *Le v Commissioner of Taxation* [2021] FCA 303, 390 ALR 132 [5] (Logan J).

[11] *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union & Ors (No 2)* [2023] FCA 1302 [226].

[12] *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2009] FCA 1092, 189 IR 165 [111]; *Labor Council of New South Wales v Axis Metal Roofing* [2004] NSWIRComm 53, 131 IR 272 [169]-[182].

[13] *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union & Ors (No 2)* [2023] FCA 1302 [226]; *Labor Council of New South Wales v Axis Metal Roofing* [2004] NSWIRComm 53, 131 IR 272 [167].

[14] *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2009] FCA 1092, 189 IR 165 [114].

[15] *Labor Council of New South Wales v Axis Metal Roofing* [2004] NSWIRComm 53, 131 IR 272 [163]-[164].

[16] [2024] FWC 2167 [27].

[17] *Transport Workers' Union of New South Wales v Australian Industrial Relations Commission and Others* [2008] FCAFC 26, 166 FCR 108 [15]-[20] per Gray and North JJ; *Australian Manufacturing Workers' Union v UGL Resources Pty Ltd* [2011] FWAFB 4777, 214 IR 237 [20].

[18] *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission* [2000] HCA 47, 203 CLR 194 [14] per Gleeson CJ, Gaudron and Hayne JJ.