Article
Major Court and Tribunal Decisions 2022

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This article examines a range of high-profile decisions in which aggressive employer strategy was either pursued in the Courts or placed on trial. Accordingly, it covers the redefinition of 'employment' and 'casual employment' by the High Court, along with the Federal Court litigation involving Qantas and the issue of adverse action. Industrial rights involving industrial action, trade union rights of entry and civil penalties are also addressed. Not to be forgotten are the work value and minimum pay cases, together with an array of cases on entitlements and underpayment class actions. The article concludes by considering an emerging caselaw on psychological injury.

Introduction

The year 2022 witnessed a series of landmark labour law decisions. Most significant were *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (*Personnel Contracting*)[1] and *ZG Operations Australia Pty Ltd v Jamsek (Jamsek)*[2] (a companion appeal) in which the High Court of Australia redefined the distinction between employment and independent contracting, having taken a similarly formalistic approach to the casual/ongoing employee distinction the previous year.[3] Another leading case involved the legality of outsourcing labour, pursued through the notion of 'adverse action' in *Qantas Airways Ltd v Transport Workers' Union of Australia* (*Qantas Case*),[4] currently the subject of a pending High Court appeal by the airline.[5] The case arose in the context of the COVID-19 pandemic, the effects of which continue to reverberate across most other major Court and tribunal decisions of 2022. As will become clear, the *Qantas Case* raises a general theme in which large employers have attempted to use the pandemic to justify reducing rights and entitlements at work. Similar employer tactics were seen in other 2022 cases involving lockouts by logistics company, Svitzer, as well as the continuation of wage caps in New South Wales (NSW) public sector employment, precipitating strikes by nurses, rail workers, teachers and bus drivers. These events and decisions might be contrasted with the newly elected Albanese Labor Government's Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth), which improves employee protections and is discussed elsewhere in this article.

In 2022, aggressive employer industrial strategy coincided with important decisions against trade unions, restricting rights of entry and encouraging maximum penalties for regulatory breaches. As concerning was a decision permitting Monash University the chance to retrospectively vary its enterprise agreement to avoid an underpayment claim.[6] The decision

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[1] (2022) 312 IR 1; [2022] HCA 1 (*Personnel Contracting*).
[2] (2022) 312 IR 74; (2022) 398 ALR 603; [2022] HCA 2.
[3] See *WorkPac Pty Ltd v Rossato* (2021) 271 CLR 456; 392 ALR 39; [2021] HCA 23 (*Rossato*).
[4] (2022) 292 FCR 34; 315 IR 1; [2022] FCAFC 71 (*Qantas Case*).
[5] *Qantas Airways Ltd v Transport Workers Union of Australia* [2023] HCATrans 54; [2023] HCATrans 56. [.
[6] *National Tertiary Education Union v Monash University* [2022] FCA 1368 (*Monash University Case*).

was made by the recently, and controversially, appointed Justice John Snaden.[7] Incidentally, the continuing shift towards individual enforcement of labour law through underpayment claims formed another major theme in the caselaw throughout 2022.

The effects of the pandemic continued to be felt in two significant Fair Work Commission (FWC) decisions on work value and minimum pay,[8] both leading to pay increases, prompted by submissions and encouragement from the newly elected Labor Government and Prime Minister, Anthony Albanese. The wage cases were heard amidst a deluge of COVID-19-related unfair dismissal and discrimination cases. The most significant termination case, however, was not COVID-19 related, instead relating to the academic freedom of former university lecturer and political activist Tim Anderson.[9]

These themes and decisions are addressed in this article in the following way. First, decisions relating to the definition of 'employment' and 'casual employment' will be briefly discussed. Extended discussion of these cases appears elsewhere in this Issue. Attention then switches to the *Qantas Case* litigation and other adverse action matters. Continuing the themes introduced in this section, focus shifts to the law of industrial action, trade union rights of entry and civil penalties. Next, the article analyses the impact of the work value and minimum pay cases, referring to an array of noteworthy decisions on statutory entitlements, awards and agreements. Relatedly, it discusses underpayment claims and class actions, including the *National Tertiary Education Union v Monash University*. After a brief overview of unfair dismissal and termination cases, including the *National Tertiary Education Industry Union v University of Sydney*, the article concludes by mentioning two minor constitutional matters,[10] along with an emerging caselaw on psychological injury. It must be noted that this paper presents a mere snapshot of significant industrial decisions throughout 2022. Word limitations do not permit full and complete discussion of all such decisions (cited here).[11]

Definition of 'Employment'

In *Personnel Contracting* and *Jamsek*, a majority of the High Court continued down the path it forged in *WorkPac Pty Ltd v Rossato* (*Rossato*)[12] the previous year. That is, it redefined the employment relationship exclusively by reference to the employer's written contract of

[7] P Begley, 'AG Christian Porter Appoints Junior Barrister He Knew at Uni as Judge', *The Sydney Morning Herald*, 9 March 2019.
[8] *Re Aged Care Award 2010* [2022] FWCFB 200 (4 November 2022) (*Aged Care Work Value Case*); *Re Annual Wage Review 2021–22* [2022] FWCFB 3500 (15 June 2022) (*Annual Wage Review 2021–22*). [Q: Please confirm the case title.] This is the case title.
[9] *National Tertiary Education Industry Union v University of Sydney* (2022) 318 IR 460; [2022] FCA 1265 (*Anderson Case*).
[10] *Unions NSW v New South Wales* (2023) 407 ALR 277; [2023] HCA 4 (*Unions NSW 2023*); *Lendlease Building Contractors Pty Ltd v Australian Building and Construction Commissioner [No 2]* (2022) 314 IR 378; [2022] FCA 192 (*Lendlease*).
[11] Other important cases include *Wong v National Australia Bank Ltd* (2022) 318 IR 148; [2022] FCAFC 155, regarding the identification of adverse action decision-makers within large employer organisations; *Tsikos v Austin Health* (2022) 314 IR 269; [2022] VSC 174, which held that unconscious bias reflected in different rates of pay between men and women may constitute unintentional discrimination under the Equal Opportunity Act 2010 (Vic); *Roman v Mercy Hospitals Victoria Ltd* [2022] FWC 711 (31 March 2022), holding that the covert recording of workplace conversations is employee misconduct.
[12] *Rossato*, above n 3.

employment.[13] In doing so, the decision swept away 70 years of precedent that had distinguished between an employee and an independent contractor by analysing both the written contract *and* the employment relationship.[14] Accordingly, it is no longer permissible for Courts to assess the existence of employment by appraising the worker's perception of the employment relationship or, indeed, by simply applying an objective appraisal of the relationship premised upon the economic, social and industrial reality of work. Nothing else matters but the employer's written description of the worker's 'rights and duties' in the contract.[15] And while the decision does not permit employers to merely 'label' workers as 'contractors',[16] it nevertheless hands employers' ultimate discretion to determine their workers' employment status, regardless of how the work is performed in practice.

It is important to note, however, that in *Personnel Contracting*, a majority of the Court found that the employer's written contract misdescribed the worker as an 'independent contractor'.[17] The worker was found to be an employee in that specific case because the detailed rights and duties contained within the contract described him as such. Nevertheless, the new test of employment has since been applied to six other matters in the FWC and Federal Court, predictably favouring employers' descriptions of workers as 'independent contractors' in each case.[18] The case and its broader consequences, such as its impact upon labour-hire arrangements and the gig economy, have been discussed in more detail elsewhere, including in this journal.[19]

Relatedly, the definition of casual employment discussed by the High Court in *Rossato* and codified by the Morrison Government in 2021[20] was augmented in 2022 by a series of Full Federal Court and FWC decisions. Among these was an FWC decision that a casual who worked every week for 14 months was taken to have no reasonable expectation of continuing employment.[21] Neither was the worker entitled to statutory relief for unfair dismissal because her employment was not 'regular and systematic', as described by s 384(2)(a)(ii) of the FW Act.[22] In reaching this conclusion, the FWC followed the High Court's decision in *Rossato* and *Personnel Contracting,* applying a strict literalist interpretation of the employer's contract. Academic Anthony Forsyth criticised the decision on the basis that *Rossato* and *Personnel*

[13] *Personnel Contracting*, above n 1, at IR [44] (Kiefel CJ, Edelman and Keane JJ). Exceptions to this rule include where there is evidence of a partly written, partly oral contract, sham contracting, estoppel, variation and/or waiver: at [42] (Kiefel CJ, Edelman and Keane JJ).
[14] See, for instance, *Humberstone v Northern Timber Mills* (1949) 79 CLR 389; [1949] ALR 985; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; 63 ALR 513; [1986] HCA 1; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; 181 ALR 263; [2001] HCA 44.
[15] *Personnel Contracting*, above n 1, at IR [44] (Kiefel CJ, Edelman and Keane JJ).
[16] Ibid, at [63]–[67] (Kiefel CJ, Edelman and Keane JJ).
[17] Ibid (Steward J dissenting).
[18] *Gu v Geraldton Fishermen's Co-Operative Pty Ltd* (2022) 320 IR 109; [2022] FWC 1342 (*Gu*); *Alouani-Roby v National Rugby League Ltd* [2021] FWC 6282 (12 November 2021), affd (2022) 318 IR 389; [2022] FWCFB 171; *Pruessner v Caelli Constructions Pty Ltd* [2022] FedCFamC2G 206; *Deliveroo Australia Pty Ltd v Franco* (2022) 317 IR 253; [2022] FWCFB 156; *Murphy v Chapple* [2022] FCAFC 165; *Mandelson v Invidia Foods Pty Ltd* (2023) 321 IR 303; [2023] FWC 50 (16 January 2023).
[19] J R Munton 'Boundary Disputes: Employment v Independent Contracting in the High Court' (2022) 35 *AJLL* 79; E Schofield-Georgeson, 'Contract, Labour Law and Reality in the High Court of Australia' (2023) 48 *Mon ULR* 1 (forthcoming).
[20] Fair Work Act 2009 (Cth) (FW Act) s 15A.
[21] *Gu*, above n 18, at IR [27]–[29].
[22] Ibid, at [44].

Contracting concerned common law relationships and should not be used to interpret legislative definitions.[23]

Indeed, a Full Federal Court reached a similar conclusion, finding that casuals cannot simply be dismissed 'at will' due to the mere nature of casual employment.[24] Rather, as Justice McElwaine found, the word 'dismissed' has a specific statutory construction in which it is done 'on the employer's initiative', which in turn applies to all employees, including casuals.[25] The Court further admonished the trial judge for applying the *Rossato* decision to find that a worker was a casual employee when they were not paid casual loadings at the same time as being entitled to statutory notice, as well as annual and sick leave, hence demonstrating their status as ongoing employees.[26] The Full Court's finding of ongoing (rather than casual) employment appears to qualify the new statutory definition of a 'casual employee'[27] where the statute suggests that the employer's label or 'offer of (casual) employment' is definitive.[28]

Adverse Action

A key theme spanning most headline legal decisions throughout 2022 involved large employers invoking the pandemic to justify cuts to job security and real wages. But in 2022, the Transport Workers' Union of Australia (TWU) showed how such employer strategies might be resisted, using a range of innovative responses, including the law of adverse action, in a case concerning Qantas. Similar employer strategies to those at Qantas were observed across other areas of labour law, including industrial action, discussed below. Other significant adverse action cases are also discussed in this section of the article.

The facts and context in the Qantas dispute are complex. Between March 2020 and June 2022, Qantas received Australia's largest pandemic bailout — $2.35 billion — before laying off 8500 workers throughout the pandemic and returning to a positive operative cash flow of $2.67 billion in July 2022.[29] Early in the pandemic, Qantas announced that it would outsource 2,500 ground crew jobs to a contractor. The TWU formulated a novel response, organising Qantas ground crew workers to bid for the contract. The TWU's tender was described by finance consultancy firm Ernst & Young Australia as 'highly competitive', saving Qantas a total of $180 million over five years.[30] But the airline rejected the bid, instead awarding the tender to airport ground services contractor, Swissport.

[23] 'Rossato Loomed Too Large in FWC Ruling: Academic', *Workplace Express*, 10 June 2022.
[24] *Jess v Cooloola Milk Pty Ltd* (2022) 292 FCR 284, at [70]; [2022] FCAFC 75 (McElwaine J). [Q: Please provide the page number.] p301.
[25] Ibid, at FCR [70], p301. See FW Act ss 12, 386 for the meaning of 'dismissed'. [Q: Please provide the page number.] 301.
[26] Ibid, at FCR [140]. [Q: Please provide the page number.] p318.
[27] FW Act s 15A(1)(a).
[28] Ibid.
[29] M Elmas, 'QantasKeeper: Was Australia's Largest Pandemic Bailout a Ripoff?', *The New Daily*, 3 September 2022.
[30] *Transport Workers' Union of Australia v Qantas Airways Ltd* (2021) 308 IR 244; [2021] FCA 873, at [177] (*Qantas FCA*).

Crucially, Swissport's own enterprise agreements have failed the Better Off Overall Test on numerous occasions. The contractor has clashed with the TWU on multiple occasions over pay and conditions that the TWU has described as 'ripping off workers with appalling conditions and below award rates'[31]. An internal Qantas management report, on the other hand, described Swissport as being 'founded with the strategy of creating extraordinary value in ground handling … [w]ithout the burden of legacy work practices, labour agreements and demarcations'.[32] Accordingly, the union filed an adverse action claim in the federal court. It alleged that Qantas had rejected its bid for the ground crew contract specifically in order to avoid 'the influence of the Union and the exercise of workplace rights by its members'[33] to bargain, take industrial action and receive agreement conditions and rates of pay, contrary to ss 346(a) and 340 of the FW Act.

At first instance in 2021, Lee J found that Qantas had failed to disprove the allegation of adverse action, as required by adverse action reverse onus provisions under s 361 of the FW Act. Instead, Lee J found that Qantas viewed the pandemic as 'transformational', providing a 'vanishing window of opportunity' with which to rid the company of union influence.[34] Justice Lee, nevertheless, refused to order Qantas to reinstate the laid-off workers, instead imposing compensation. On appeal to a Full Bench of the federal court in 2022, Bromberg, Rangiah and Bromwich JJ refused to overturn the finding of adverse action, confirming the reasoning of the trial judge.[35] The Bench also refused to substitute reinstatement for compensation, as requested by the TWU.[36] In confirming the first instance decision, the Full Bench made two findings that have since proved controversial.

The first such finding was that s 340(1)(b) applies to prohibit employers from taking adverse action in respect to all future conduct, including industrial action. As Qantas argued, however, industrial action appears to be time-limited by the FW Act. That is, it can only occur in a specific timeframe *after* the expiry of an enterprise agreement.[37] The adverse action alleged by the TWU, on the other hand, was taken three months *before* the agreement expired. Therefore, Qantas' case was partly that s 340(1)(b) cannot apply to future adverse action such as industrial action or, indeed, unfair dismissal (which is also time-limited). Nevertheless, both the trial judge and the Full Federal Court dismissed this argument. As Justice Lee put it, 'there is no basis for adding a requirement' that the adverse action 'be sufficiently immediate …(or) direct' as submitted by Qantas.[38] Rather, as both the trial judge and Full Federal Court found, all that is required by s 340(1)(b) is that adverse action is taken 'to prevent' the exercise of a workplace

[31] 'Swissport Labels IR System a "Jobkiller" after Troubled Deal Quashed', *Workplace Express*, 12 August 2020; *Transport Workers' Union of Australia v Swissport Australia Pty Ltd* (2020) 298 IR 345; [2020] FWCFB 4232; 'Swissport to Press for Deal's Approval, after TWU Flags New Challenge', *Workplace Express*, 23 September 2020.
[32] *Qantas FCA*, above n 30, at [142].
[33] Ibid, at [3].
[34] Ibid, at [3], [110], [274].
[35] *Qantas Case*, above n 4.
[36] Ibid, at FCR , p142 [376]. [Q: Please confirm which report should be used. If FCR, please provide the page number before the paragraph pinpoint.]
[37] Ibid, at FCR, p99 [99]. [Q: Please confirm which report should be used. If FCR, please provide the page number before the paragraph pinpoint.]
[38] *Qantas FCA*, above n 30, at [278].

right, unconstrained by temporal requirements.[39] It is on this point that the High Court permitted *Qantas Airways Ltd v Transport Workers Union of Australia* to appeal.[40] The matter is currently awaiting judgement, having been heard in May 2023.

The second controversial aspect of the Full Bench decision was that the Court discussed the permissibility of an 'objective' or contextual approach when appraising the intentions of the employer in taking adverse action (as required by s 361(1)). The Full Bench suggested that when analysing an employer's intentions, the Court might look to 'identified unconscious contributing reason' or rather reasons not specifically claimed by the employer at the time of taking the alleged adverse action.[41] The comments were made in passing and were not part of the reasoning of the trial judge. Nevertheless, as Justice Snaden observed,[42] the comments reignite a long-running feud between the 'objective' approach deployed by the Full Federal Court in cases such as *Barclay v Board of Bendigo Regional Institute of Technical and Further Education (Barclay)*[43] and *BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* (*BHP Coal*),[44] and the 'subjective' approach preferred by the High Court, which overturned the Federal Court's decisions in both cases.[45] The reigning subjective approach looks exclusively to the subjective intentions of the decision-maker rather than considering 'unconscious' or other objective reasons. The subjective approach has been the subject of extensive academic critique, where it frequently favours convenient employer excuses for taking adverse action.[46] While a plurality in *Barclay* (French CJ and Crennan J) approved of the 'unconscious reasoning' approach, Snaden J pointed out that this approach had been extinguished by the plurality in *BHP Coal* (French CJ and Kiefel J), which adopted Heydon J's formalist approach from *Barclay.* As Snaden J put it, 'one of those propositions must be wrong'.[47] Perhaps a reconstituted and politically realigned High Court, composed of an array of new judicial appointees, may deliver some clarity on the issue in late 2023.

Another significant adverse action issue that before November 2022 might have been classified as either 'adverse action' or discrimination concerned the commencement of the new anti-sexual harassment jurisdiction of the FWC under s 789FC of the FW Act. The provision enables the FWC to issue 'stop bullying orders' in relation to sexual harassment. Two matters commenced in that jurisdiction failed. Failure in one matter was due to the perpetrators leaving the immediate workplace in the time since filing the application. In the other, a Commissioner

[39] Ibid; *Qantas Case*, above n 4, at FCRp73-5 [130]–[136]. [Q: Please confirm which report should be used. If FCR, please provide the page number before the paragraph pinpoint.]
[40] *Qantas Special Leave*, above n 5.
[41] *Qantas Case*, above n 4, at FCR p99-100p[224]–[227]. [Q: Please confirm which report should be used. If FCR, please provide the page number before the paragraph pinpoint.]
[42] *Serpanos v Commonwealth* [2022] FCA 1226, at [116]–[123] (*Serpanos*).
[43] (2011) 191 FCR 212; 274 ALR 570; [2011] FCAFC 14; see also the minority of the High Court (Higgins and Isaacs JJ) in *Pearce v WD Peacock & Co Ltd* (1917) 23 CLR 199; [1917] HCA 28.
[44] (2013) 219 FCR 245; [2013] FCAFC 132.
[45] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500; 290 ALR 647; [2012] HCA 32; *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243; 314 ALR 1; [2014] HCA 41.
[46] A Chapman, K Love and B Gaze, 'The Reverse Onus of Proof Then and Now: The *Barclay* Case and the History of the Fair Work Act's Union Victimisation and Freedom of Association Provisions' (2014) 37 *UNSWLJ* 471; J R Munton, *Labour Law: An Introduction to the Law of Work*, Oxford University Press, Docklands, 2021, pp 206–7.
[47] *Serpanos,* above n 42, at [120].

struggled to determine whether harassment had occurred 'at work' because it took place over the phone out of work hours.[48]

Industrial Action

Moves by governments and corporate Australia to capitalise on the pandemic by cutting wages were met by widespread employee industrial action, particularly in the NSW public sector. In some cases, however, corporate employers added aggression to their austerity by taking or threatening industrial action of their own. Meanwhile, two major industrial action matters resulted in the FWC being required to consider suspending protected industrial action on the basis of public welfare and significant damage to the economy under s 424 of the FW Act. The first concerned an NSW rail strike.

Indeed, 2022 witnessed a wave of rolling strikes by teachers, nurses, rail workers and bus drivers across NSW in response to the NSW Perrottet Liberal Government's 2.5% cap on public sector pay. The NSW Government pointed to pandemic expenditure and 'competing interests' to justify its decision before agreeing to marginally increase the pay cap to 3% in the 2022/23 financial year.[49] Nevertheless, as average national pay increases rose to around 5% towards the end of 2022,[50] the NSW Government's pay cap effectively stifled possibilities for meaningful bargaining.[51] Public sector unions were left with little choice but to respond by withdrawing their members' labour. The Perrottet Government counter-attacked, applying to the FWC to stop industrial action by rail workers under s 424 of the FW Act.[52] But the FWC declined to invoke s 424, where industrial action merely involved limitations on work rather than its complete cessation.[53] In this respect, Deputy President Cross distinguished industrial action in 2022 from that threatened in 2018, when the Commission halted rail strikes under s 424.[54] In 2022, the Commissioner supported the strikes, praising their organisation by the Rail Tram and Bus Union as 'agile', 'accurate' and designed to minimise inconvenience to the public while placing pressure on the employer to bargain.[55] A subsequent matter involving fines against rail workers who gave passengers free rides during protected industrial action was withdrawn from the federal court in early 2023.[56] Its withdrawal was part of an enterprise agreement deal in which the union settled for modest increases to the lowest-paid rail workers

[48] *Re THDL* [2021] FWC 6692 (24 December 2021); *Application by Ranmeet Kaur* [2022] FWC 487 (22 March 2022). [Q: Please confirm the case title.] This is the title.
[49] A Smith and L Cormack, 'NSW Lifts Public Sector Wage Cap to 3%, One-Off $3000 Payment to Health Staff', *The Sydney Morning Herald*, 6 June 2022.
[50] Fair Work Commission (FWC), *Statistical Report: Enterprise Agreements & Other Bargaining Data 8 October – 21 October 2022*, Report, FWC, 21 November 2022.
[51] L Wright, speech delivered at the *120th Anniversary of the New South Wales Industrial Relations Commission*, Sydney, 19 July 2022.
[52] FW Act s 424.
[53] *NSW v Australian Rail, Tram and Bus Industry Union and Communications* [2022] FWC 1746 (9 July 2022) (*NSW v RTBU*).
[54] *Sydney Trains v Perrottet* [2018] FWC 519 (25 January 2018).
[55] *NSW v RTBU*, above n 53, at [113].
[56] *Sydney Trains v Australian Rail, Tram and Bus Industry Union [No 2]* [2022] FCA 1264; Order of Raper J in *Sydney Trains v Australian Rail, Tram and Bus Industry Union* (Federal Court of Australia, NSD884/2022, 25 October 2022). [Q: We can't find the 15 February version. Please verify the full date.] Confirmed.

in return for the NSW Government agreeing to the union's safety demands to retrofit a new fleet of Korean-made intercity trains.[57]

The Perrottet Government's reluctance to bargain also saw the NSW Nurses and Midwives' Union defy orders of the NSW Industrial Relations Commission to refrain from industrial action.[58] Imposing penalties against the union, Justice Walton of the NSW Supreme Court nevertheless dismissed two other breaches of IRC 'no-strike' orders on the basis that they were incorrectly made.[59] The union was fined $25,000, from a maximum of $40,000.[60]

The second s 424 matter came at the urging of unions, together with the Minister, in response to a threat from tugboat operator, Svitzer, to lockout its workforce from 17 Australian ports for six months. The threat was made in the context of a bargaining deadlock with the Maritime Union of Australia, in which the company sought to reduce pay and casualise its workforce due to 'deteriorating commercial circumstances' related to the pandemic.[61] Federal Employment and Workplace Relations Minister, Tony Burke, described Svitzer's threat as 'economic vandalism'.[62] The FWC came to a similar conclusion under s 424 of the FW Act, issuing orders restraining the employer from industrial action on the basis that, much like the *Qantas Case*, the employer's action was 'opportunistic' and illegitimate.[63]

In Western Australia, employer lockouts proceeded on similar grounds to those at Svitzer Australia — for one month at the Shell Floating Liquefied Natural Gas Platform[64] as well as for six weeks at billionaire Kerry Stokes' *West Australian* newspaper.[65]

Trade Union Penalties and Rights of Entry

It was amidst this backdrop of belligerent employer strategy that 2022 proved a grim year for trade unions facing regulatory breaches. Prosecutions of trade unions mostly resulted in stiff penalties. Meanwhile, courts drew a concerningly restrictive view of trade union rights of entry.

In *Australian Building and Construction Commissioner v Pattinson*,[66] a 6:1 majority of the High Court discouraged the mitigation of civil penalties imposed against trade unions by forbidding the use of the 'proportionality principle' in such matters. The 'proportionality

[57] A Claassens, 'Members Win Sydney Trains/NSW Dispute', *Rail and Road*, March 2023, at 4.
[58] *Secretary of the Ministry of Health v New South Wales Nurses and Midwives' Association* (2022) 320 IR 249; [2022] NSWSC 1178.
[59] Ibid, at IR p440, [857]. [Q: Please confirm which report should be used.]
[60] Ibid, at IR p440, [860]. [Q: Please confirm which report should be used.]
[61] *Re Svitzer Australia Pty Ltd* (2022) 320 IR 91; [2022] FWCFB 213, at [40] (*Svitzer*).
[62] C McLeod, '"Economic Vandalism": Commonwealth Intervenes in Svitzer's Dispute with Port Workers', *The West Australian*, 16 November 2022.
[63] *Svitzer*, above n 61, at [43].
[64] *Shell Australia FLNG Pty Ltd v Australian Workers' Union* [2022] FWC 2077 (8 August 2022).
[65] 'Lockouts Continue in Wild West's "War of Attrition"', *Workplace Express*, 17 March 2022.
[66] (2022) 274 CLR 450; 314 IR 301; [2022] HCA 13 (*Pattinson*).

principle' is the enlightenment notion that 'the punishment should fit the crime'.[67] The majority distinguished the application of penalties for quasi-criminal offences under the FW Act from criminal offences, saying that the overriding objective of trade union regulatory offences should be 'deterrence', not proportionality.[68] According to the Court, proportionality has no place in civil penalty proceedings because it is associated with retribution in criminal sentencing.[69] Quoting Justice French, they said that '… retribution … within the sense of the Old and New Testament moralities that imbue much of our criminal law, [does not] have any part to play in economic regulation'.[70] In emphasising deterrence instead, a majority of the Court encouraged the application of maximum penalties in regulatory cases against the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) to deter future breaches.[71] While also encouraging large penalties against the CFMMEU, Justice Edelman suggested that retribution could not readily be distinguished from deterrence.[72] The majority's finding overruled the reasoning of a five-member Federal Court, which had relied on proportionality to reduce penalties against the union, as well as personal payment order against an elderly union official, Mr Pattinson. It restored the full penalties imposed in the first instance. Justice Edelman's approach, by contrast, would have reduced the amount of the personal payment order (but not fine against the union) in accordance with the Full Federal Court's decision. Emboldened by the majority's decision, the Australian Competition and Consumer Commission (ACCC) secured a maximum fine of $750,000 in respect to a CFMMEU secondary boycott later in the year.[73]

The Registered Organisations Commission, meanwhile, commenced civil penalty litigation in the Federal Court against the Australian Workers' Union for 27,000 membership breaches in which its inaccuracy led it to overstate actual membership numbers.[74] The matter will be heard in 2023.

But, the legal fortunes of trade unions in the face of regulatory breaches were not entirely bleak in 2022. The maximum penalty secured by the ACCC against the CFMMEU, for instance, was offset by the consumer watchdog abandoning a high-profile cartel conduct case against the union,[75] after which it was ordered to pay $2 million in legal costs to the union.[76] And in another case, a Full Federal Court halved the penalties imposed upon the CFMMEU at first instance.[77]

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[67] See, for instance, C Beccaria, *On Crimes and Punishments*, D Young (Tr), Hackett Publishing, Indianapolis, 1986, pp 14–16.
[68] *Pattinson*, above n 66, at IR [9]–[10] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).
[69] Ibid, at IR [15], [38]–[39].
[70] Ibid, at IR [15]; The comments of French J were made in *Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076, at 52,152; [1990] FCA 762, at 43–44.
[71] *Pattinson*, above n 66, at IR [9]–[10] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).
[72] Ibid, at IR [75]–[82] (Edelman J).
[73] *Australian Competition and Consumer Commission v J Hutchinson Pty Ltd [No 2]* [2022] FCA 1007.
[74] 'ROC to Seek Fines for 27,000 AWU Membership Breaches', *Workplace Express*, 13 October 2022.
[75] 'ACCC's Union Cartel Case Collapses', *Workplace Express*, 17 August 2021.
[76] 'Bill for Abandoned CFMMEU Cartel Case Tops $2M', *Workplace Express*, 10 August 2022.
[77] *Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) v Australian Building and Construction Commissioner* [2022] FCAFC 59.

More concerning, however, was a significant Federal Court decision restricting trade union rights of entry.[78] The dispute arose when the employer, a navy shipbuilding contractor, refused a trade union official entry to its yards for the purpose of obtaining members' signatures in support of a petition for a majority support determination. Justice Colvin reasoned that s 484 of the FW Act, authorising trade union rights of entry, exists for the sole purpose of 'holding discussions'.[79] In a narrow reading of the word 'discussion', his Honour found that discussions do not include 'commitment to a particular course of action in the future'.[80] Bizarrely, perhaps, 'discussions' were not held to include 'oral statements' committing one party to a course of action.[81] Neither did 'discussions' include formal signatures, contracts and other types of formal agreement.[82] The union has indicated its intention to appeal.[83]

The decision attracted criticism from academic Shae McCrystal, who has observed that it contradicts the statutory purpose of rights of entry 'to facilitate unions' capacity to organise on private property through the holding of discussions with their members'.[84] McCrystal suggests that the decision constructs an 'arbitrary' line, which is 'messy', 'legalistic' and 'difficult to police'.[85]

Statutory Entitlements, Awards and Agreements

The second half of 2022 saw the impact of the Russian invasion of Ukraine combined with the aftershocks of the pandemic and a string of climate-induced natural disasters to generate soaring energy costs and retail prices.[86] Inflation dovetailed with long-term wage stagnation, precipitating the election of a Labor Government that acted — through the FWC — to increase minimum wages. Wage increases followed two largescale wage reviews and occurred in the context of other new entitlements being delivered to employees — also discussed in this section.

The first wage review was the *Re Aged Care Award 2010*.[87] The case saw unions push for extensive 25% increases to pay, administration and support under the Aged Care Award, Nurses Award and Social, Community, Home Care and Disability Services Award.[88] Their claims were based on the significant undervaluing of aged care work, which directly contributed to crisis in the sector throughout the pandemic.[89] Claims for higher pay for the sector's 365,000 employees were supported by a Federal Labor Government Submission recognising that pay has not kept pace with increasing skill and qualification requirements

[78] *Communications Electrical Electronic Energy Information Postal Plumbing and Allied Services Union of Australia v Austal Ships Pty Ltd* [2022] FCA 1462 (6 December 2022).
[79] Ibid, at [30]–[45].
[80] Ibid, at [34], [39].
[81] Ibid, at [37].
[82] Ibid.
[83] 'Union Seeking to Reverse Crucial Entry Rights Ruling', *Workplace Express*, 8 December 2022.
[84] 'Entry Rights Ruling "Deeply Concerning", Says IR Academic', *Workplace Express*, 13 December 2022.
[85] Ibid.
[86] FWC, *Information Note: Industry Analysis*, Report, FWC, 26 May 2022.
[87] *Aged Care Work Value Case*, above n 8.
[88] Ibid, at FWCFB 332. Unions included the Health Services Union, Australian Nursing and Midwifery Federation and United Workers Union. [Q: Please confirm the full names.]CORRECT.
[89] Ibid, at 333. These claims appear to be supported by the Royal Commission into Aged Care Quality and Safety, *Aged Care and COVID-19: A Special Report*, Report, Royal Commission into Aged Care Quality and Safety, Canberra, 30 September 2020, at 3, 8, 10.

across the sector, attributable to 'gender-based assumptions' regarding the nature of care work.[90] The Commission awarded a 15% increase to minimum rates of pay across all three awards, observing that the increase was plainly 'justified by work value reasons'.[91] However, there was no increase to administrative and support staffing levels where 'the evidence was less clear and compelling and varies as between classifications'.[92]

Perhaps the most highly anticipated industrial decision in 2022 was the FWC's *Re Annual Wage Review 2021–22*.[93] The decision was delivered amid economic turmoil in which the Reserve Bank of Australia predicted inflation to surge to 7% by year's end. As inflation bit, the Australian Council of Trade Unions (ACTU) pitched for an increase to the national minimum wage (NMW) of 5.5%. The peak union body was joined by Prime Minister Anthony Albanese, who recommended a 5.1% increase '[to] ensure that the real wages of Australia's low-paid workers do not go backwards'.[94] The Australian Industry Group and Australian Chamber of Commerce and Industry, on the other hand, sought uniform annualised increases of 2.5% and 3%, respectively.[95] The FWC ordered a 5.2% increase to the NMW ($40) and a 4.6% increase to minimum award rates.[96] The NMW for 2021/22 stands at $812.60 per 38-hour week or $21.38 per hour.[97] In doing so, the FWC cited the concerns of the Prime Minister and the ACTU regarding the effects of inflation on low-paid workers.

Other significant award decisions enhancing statutory entitlements for employees included an FWC finding that time taken to perform a rapid antigen test 15 minutes before the commencement of a shift should properly be considered work time and that employees must be paid overtime rates in accordance with the relevant award or agreement.[98] Another such decision saw the FWC Full Bench recommend doubling the existing statutory amount of unpaid family and domestic violence (FDV) leave from five to 10 days.[99] Acting on this recommendation, the Labor Government went further, requiring FDV leave to be paid and extended to casual employees.[100] Yet another new employee entitlement appeared in a decision to approve an enterprise agreement containing the first paid cultural and First Nations leave (three days) while also allowing employees to take a public holiday on a date other than Australia Day.[101]

Other noteworthy award decisions included the exclusion of 'gig' operators or delivery platforms from coverage under the new definition of the 'fast food industry' in that industry's

[90] Commonwealth, *Submissions of the Commonwealth: Work Value Case: Aged Care Industry*, Melbourne, FWC, 2022, at 2.
[91] *Aged Care Work Value Case*, above n 8, at [293]. [Q: Kindly double-check the paragraph pinpoint.]
[92] Ibid, at [900].
[93] *Annual Wage Review 2021–22*, above n 8.
[94] New Australian Government, *Submission to the Fair Work Commission Annual Wage Review 2022*, Australian Government, Canberra, 3 June 2022, at [5].
[95] 'Unions, Employers Warn against Graduated or Flat Dollar Rises', *Workplace Express*, 9 June 2022.
[96] *Annual Wage Review 2021-22,* above n 8, at FWCFB [41]–[53], [178]–[179].
[97] Ibid, at [178].
[98] *Australian Nursing and Midwifery Federation* v *Jeta Gardens (QLD) Pty Ltd* [2022] FWC 3039 (16 November 2022).
[99] *Re Family and Domestic Violence Leave Review 2021* [2022] FWCFB 2001 (16 May 2021).
[100] See the Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (Cth).
[101] *Australian Council of Social Service Inc* [2022] FWCA 2232 (5 July 2s022).

award,[102] as well as the deletion of part-day public holiday and pandemic leave schedules from awards.[103]

A recurring theme in both the commission and courts, unrelated to the pandemic, was the validity of enterprise agreements when non-compliant with legislative pre-conditions under ss 180(4)–(5) and 186 of the FW Act, requiring employers to explain, circulate and permit employees to vote on a proposed agreement. The FWC took a somewhat hardline approach, refusing to approve such agreements on no less than five occasions in 2022.[104] A Full Court of the Federal Court, by contrast, took a more relaxed view of the agreement-making process, upholding the validity of an agreement in which 40% of employees had not been given the opportunity to vote.[105] 'The "validity" of an enterprise agreement', said the Full Bench, depends less upon strict compliance with legislative pre-conditions than 'upon the approval of the FWC which, in turn, depends upon whether it is satisfied as to the matters specified in s 186 including that the employees have genuinely agreed to its terms'.[106]

Significantly, the year 2022 gave the Federal Court an opportunity to expand the definition of 'reasonable working hours' under s 62 of the FW Act.[107] In a case predominantly concerning underpayment, Justice Katzman was required to consider whether 50 working hours per week were reasonable, accounting for statutory requirements such as health and safety, family responsibilities, needs of the workplace, overtime payments, notice given by both employer and employee, industry conventions, employee responsibilities and averaging terms.[108] The employee, in this case, was a vulnerable worker — an African refugee who did not negotiate additional working hours required by the employer for fear of losing his employment. He worked in an abattoir from 2 am until 11:30 am, six days per week, performing 12 hours of unpaid overtime per week, in contravention of the award and industry conventions.[109] Despite never having sought a reduction in working hours and entering freely into the contract, as argued by the employer,[110] Justice Katzman considered such hours in the employee's circumstances dangerous and unreasonable.[111] Among other breaches, the employer was fined $93,000.[112]

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[102] *Re 4 Yearly Review of Modern Awards: Plain Language Redrafting: Fast Food Industry Award 2010* [2022] FWCFB 123 (11 July 2022).
[103] *Re Part-Day Public Holidays* [2022] FWCFB 182 (30 September 2022); *COVID-19 Award Flexibility: Applications to Vary Schedule X* [2022] FWCFB 221 (1 December 2022).
[104] *Appeal by Ausdrill Pty Ltd* [2022] FWCFB 223 (7 December 2022) [Q: Please confirm the case title. We referred here: < https://jade.io/article/957072?at.hl=Ausdrill+Pty+Ltd+v+Construction%252C+Forestry%252C+Maritime%252C+Mining+and+Energy+Union+%255B2022%255D+FWCFB+223>.] CORRECT; *Re ACM Processing Pty Ltd* [2022] FWC 2609 (28 September 2022); *Re Viridian Glass Pty Ltd* [2022] FWC 2384 (8 September 2022); *Re Flick Hygiene Anticimex Pty Ltd* [2022] FWC 1705 (13 July 2022); *Re Better Read Pty Ltd* [2022] FWC 886 (14 April 2022). [Q: Please confirm the case titles.]Correct
[105] *Mid West Port Authority v CFMMEU* (2022) 289 FCR 88; (2022) 316 IR 95; [2022] FCAFC 53.
[106] Ibid, at FCR pp98-99, [45]. [Q: Please confirm which report should be used. If FCR, please provide the page number before the paragraph pinpoint.]
[107] *Australasian Meat Industry Employees Union v Dick Stone Pty Ltd* (2022) 314 IR 441; [2022] FCA 512 (*Dick Stone*).
[108] FW Act s 62(3).
[109] *Dick Stone*, above n 107, at [219]–[250].
[110] Ibid, at IR p482, [220]. [Q: Please confirm which report should be used.]
[111] Ibid, at IR p482, [219], p487,]–[250], p492, [285]. [Q: Please confirm which report should be used.]
[112] *Australasian Meat Industry Employees Union v Dick Stone Pty Ltd [No 2]* [2022] FCA 1263.

Underpayment

The volume of underpayment matters before the Courts and the quantum of money recovered throughout 2022 was a clear demonstration of a long-term shift in labour law policy. This shift has recently been described as a move towards the individualised enforcement of labour law, brought about through neoliberal labour policy and the decline of collective enforcement through trade unions over the past three decades.[113] Accordingly, in mid-2022, the Fair Work Ombudsman (FWO) announced that it had recovered $532 million in unpaid wages and entitlements over the last financial year — 2.5 times more than its previous record-breaking haul a year earlier.[114] The amount recovered is due in part to the size of the large employers targeted by recent FWO enforcement initiatives, which included a number of universities and major supermarket chains.[115] These large employers generated a significant number of cases associated with underpayment and class action claims led by unions and class action law firms.

Perhaps the most extraordinary underpayment decision involved Justice Snaden granting Monash University a stay against an $8.6 million wage claim by the National Tertiary Education Union (NTEU).[116] The stay was permitted to provide the University an opportunity to retrospectively vary the 2019 enterprise agreement, pursuant to which it had underpaid its casual staff, thereby extinguishing the underpayment claim. The variation matter under s 217 of the FW Act was heard in the first half of 2023. Despite describing Monash's application as a 'laudable' attempt to resolve 'uncertainty', Deputy President Bell, nevertheless, refused the application on similar grounds to that agitated by the NTEU.[117] According to the NTEU, if successful, the case would have had 'economy-wide implications'.[118] Indeed, the notion that employers can simply make underpayments disappear by retrospectively varying agreements stands to undermine the basic premise of an agreement. The matter will return to the Federal Court.

Meanwhile, the scope of underpayment orders in small claims matters broadened in 2022. In a matter brought by a community legal centre, the Federal Circuit Court made a compensation order against a director of a deregistered company.[119] The decision overrules a previous Federal Magistrates Court decision by Magistrate John O'Sullivan (a former advisor to Workplace Relations Minister, Kevin Andrews) that such orders were off limits in underpayment matters.[120] The decision is expected to stem the tide of similar 'phoenixing' matters frequently encountered by the Community Legal Centres employment lawyers when conducting underpayment claims.[121]

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[113] E Schofield-Georgeson, 'The Emergence of Coercive Federal Australian Labour Law: 1901–2020' (2021) 64 *JIR* 52.
[114] S Parker, *Annual Report 2021–22*, Report, Fair Work Ombudsman and Registered Organisation Commission Entity, Canberra, 21 September 2022, at 2.
[115] Ibid, at 3.
[116] *Monash University Case*, above n 6.
[117] Ibid, at [160] (Bell DP).
[118] 'Court Defers to "Specialist" FWC on Underpayments Claim', *Workplace Express*, 21 November 2022.
[119] *Nino v Kuksal* (2022) 316 IR 322; [2022] FedCFamC2G 401.
[120] *Beer v Lim* [2012] FMCA 494.
[121] E Schofield-Georgeson 'Organisational Co-Enforcement in Australia: Trade Unions, Community Legal Centres and the Fair Work Ombudsman' (2022) 35 *AJLL* 52 at 53, 75.

A host of underpayment class actions were commenced in 2022,[122] with one against McDonalds, claiming a record $250 million in unpaid entitlements on behalf of 250,000 workers.[123] In April, the Federal Court approved settlement of the long-running underpayment class action against 7/11 for the amount of $98 million.[124]

Meanwhile, Courts continued to regulate litigation lenders who fund class action law suits, as the High Court did in 2019.[125] In one sham contracting class action, a litigation lender had its share of a $20 million settlement reduced from $5.5 million to $3.7 million.[126] The reduction was warranted by the fact that class actions operate within a 'no costs' jurisdiction,[127] which, in turn, increased the workers' share of compensation from $10.7 to $12.8 million.[128] Similarly, class action firm Adero Law had its costs substantially reduced after Charlesworth J found that the firm had overcharged for work that was either not required or simply not performed across three separate matters.[129] In one such matter, the Court found that the firm was in breach of the Legal Profession Act 2006 (ACT) s 269(1)(d) and reduced costs by 25%.

As class actions boom in the wake of the shift towards individualised industrial relations, there is growing support to follow the Federal Court's lead in the abovementioned cases by capping costs in such matters. Currently, the median return to plaintiffs is 51% of the proceeds of litigation and 85% when lenders are not involved.[130] In 2020, the Victorian Government permitted firms to charge common interest contingency fees (a percentage) on the value of any payout rather than itemised costs, simplifying awards of costs in class actions.[131] Such fees are automatically capped at 25% of the value of the payout by the Legal Profession Uniform Law 2014 (NSW).[132]

Unfair Dismissal and Termination

In 2022, the commission continued to be deluged by a wave of 'Covid-dismissals' (unfair dismissal claims in which the applicant's employment was terminated upon their refusal to be vaccinated against the virus), discussed in the concluding remarks to this section. Amid the COVID-19 chaos, however, Courts and tribunals delivered a number of important and

[122] *Shop, Distributive and Allied Employees Association v McDonald's Australia Ltd* (Federal Court of Australia, SAD7/2022); *Retail and Fast Food Workers Union Incorporated v Tantex Holdings Pty Ltd* (2020) 299 IR 56; [2020] FCA 1258 (31 August 2020).[Q: Please provide the date of judgment.]
[123] *Shop, Distributive and Allied Employees Association v Bandec Pty Ltd* (Federal Court of Australia, SAD127/2022) (Filed 11 August 2022). [Q: Please provide the date of judgment.]
[124] *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd [No 11]* [2022] FCA 331.
[125] See, for instance, *BMW Australia Ltd v Brewster* (2019) 259 CLR 574; 374 ALR 627; [2019] HCA 45, in which the High Court quashed 'common fund orders', ensuring a return on investment for litigation lenders.
[126] *Bradshaw v BSA Ltd [No 2]* [2022] FCA 1440.
[127] Ibid; Justice Bromberg referred to the FW Act s 570.
[128] Ibid, at [118], [168].
[129] *Thomas v Romeo Lockleys Asset Partnership* [2022] FCA 1106; *Furnell v SEPL Pty Ltd* [2022] FCA 1603; *Schoneweiss v ssFourth Force Pty Ltd [No 2]* [2022] FCA 1489.
[130] M Pelly, 'Cap on Payouts for Class Action Funders and Lawyers', *The Australian Financial Review*, 30 September 2021.
[131] Supreme Court Act 1986 (Vic) s 33ZDA.
[132] Legal Profession Uniform Law 2014 (NSW) s 182(2)(b).

unrelated unfair dismissal and termination decisions. These concerned the breadth of intellectual freedom related to academic employment as well as the definition of 'dismissed' under s 389 of the FW Act.

After three years of litigation involving a first instance decision, Full Bench appeal and remittal proceedings in the Federal Court,[133] the enduring termination of employment saga involving academic Tim Anderson and the University of Sydney concluded this year with the Federal Court judgment of Justice Thawley.[134] The case revolved around the issue of academic freedom. Anderson's employment was terminated after five instances of offensive academic conduct. A number of these involved Anderson's repeated display of an image depicting a Jewish flag superimposed with a nazi swastika. Anderson displayed the image during lectures and on social media despite two warnings from university management not to do so. While the issue had been agitated on the basis of 'adverse action' in previous proceedings,[135] in 2022, the matter was remitted from the Full Court to a judge alone to determine the lawfulness of termination solely on the basis of a breach of the enterprise agreement under s 50 of the FW Act. Justice Thawley found that the warnings from management not to criticise Israeli treatment of Palestinians (in the manner selected by Anderson), as well as the University's characterisation of Anderson's behaviour as 'serious misconduct', breached the 'Intellectual Freedom' clauses of the relevant agreements.[136] Therefore, termination was unlawful. The judgment was delivered one year after the High Court's decision in *Ridd v James Cook University*,[137] in which the Court unanimously upheld the dismissal of an academic who breached a university code of conduct by denouncing the institution's climate change research in the name of academic freedom.

As significant was the decision of a Full Bench of the FWC in *NSW Trains v James*,[138] a case concerning the definition of 'dismissed' under s 386 of the FW Act in the context of an alleged dismissal by demotion. Section 386(1)(a) defines 'dismissed' to mean that 'employment has been terminated on the employer's initiative'. Section 386(2)(c) further provides that:

> a person has not been dismissed if … the person was demoted in employment but: (i) the demotion does not involve a significant reduction in his or her remuneration or duties; and (ii) he or she remains employed with the employer that effected the demotion.

The employee, Mr James, was demoted in rank, taking a 10% pay cut while performing the same duties required by his previous position. Demotion resulted from internal disciplinary proceedings stipulated by an enterprise agreement. In assessing whether he had been 'dismissed' within the meaning of s 386, the Full Bench clarified that demotion can indeed amount to a termination, except as otherwise provided by s 386(2)(c).

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[133] *National Tertiary Education Industry Union v University of Sydney* (2020) 302 IR 1709; [2020] FCA 1709 (*Anderson Primary Judgment*); *National Tertiary Education Industry Union v University of Sydney* (2021) 392 ALR 252; [2021] FCAFC 159 (*Anderson Appeal Judgment*); *National Tertiary Education Industry Union v University of Sydney [No 2]* [2021] FCAFC 184. [Q: Please note that we changed the originally unauthorised report into unauthorised LexisNexis report.] OK

[134] *Anderson Case*, above n 9.

[135] *Anderson Primary Judgment*, above n 133; *Anderson Appeal Judgment*, above n 133.

[136] *Anderson Case*, above n 9, at FCA [57], [62], [67]–[68]. [Q: Please confirm which report should be used.]

[137] (2021) 394 ALR 12; [2021] HCA 32. [Q: Please note that we changed the originally unauthorised report into unauthorised LexisNexis report.] OK.

[138] (2022) 316 IR 1; [2022] FWCFB 55 (*NSW Trains*).

Complicating the matter was that the facts partially resembled those in *Visscher v Honourable President Justice Giudice* (*Visscher*),[139] in which the High Court distinguished between the contract of employment and the employment relationship in order to explain that a demotion amounted to a repudiatory breach of contract that did not terminate the employment relationship until accepted by the employee. Mr James argued as much here. Unlike *Visscher,* however, in this case, an enterprise agreement specifically permitted demotion as a disciplinary procedure. Where the agreement was an 'industrial instrument' endowed with statutory authority by the FW Act, it was held to override any contractual authority to the contrary, including a repudiatory breach.[140] Therefore, demotion did not amount to a dismissal.[141]

This reasoning bears remarkable resemblance to the dissenting judgment of Gummow J in *Visscher*, which specifically elevated the statutory authority of an enterprise agreement over the common law of contract and the notion of a repudiatory breach.[142] Further distancing themselves from the High Court majority in *Visscher*, a majority of the FWC Bench (Deputy President Easton dissenting on this point) found that s 386(1)(a) 'exclusively defines the circumstances which give rise to a person being "dismissed" by an employer for the purposes of Part 3-2 of the Act'[143] and that it was unnecessary to determine a common law repudiatory breach of contract, along with the co-existence of an employment relationship, as per *Visscher.* The crucial distinguishing feature between the two cases appears to be that a demotion procedure was built into the agreement.

In 2022, the FWC's unfair dismissal jurisdiction was once again the 'coalface' of numerous 'anti-vax' or COVID-19 dismissal disputes. Among the most important was *Owens v I-Med Radiology Ltd*,[144] in which Deputy President Asbury outlined 10 points designed to assist unvaccinated dismissal claimants.[145] The guideline ruling largely reiterated existing NSW common law on the issue, upholding the validity of mandatory state government vaccination requirements contained within COVID-19 Public Health Orders.[146] The guidelines remind applicants that in requiring employees to be vaccinated, employers are merely complying with state government public health orders and that compliance with such a request is not 'coercive' but rather, a choice to be made by employees. Meanwhile, 100 Telstra employers commenced a class action against vaccine requirements imposed by the employer. It was filed in Queensland the day after a similar class action against Victorian vaccine mandates was abandoned in that state.[147]

Other significant dismissal matters saw a court and tribunal clarify the meaning of 'social origin' in relation to two cases arising from alleged 'social origin' discrimination under s

[139] (2009) 239 CLR 361; 258 ALR 651; [2009] HCA 34 (*Visscher*).
[140] *NSW Trains*, above n 138, at IR [137]–[138].
[141] Ibid, at [122].
[142] *Visscher,* above n 139, at CLR [13] (Gummow J).
[143] *NSW Trains*, above n 138, at IR [32].
[144] [2022] FWC 1823 (12 July 2022).
[145] Ibid, at [46].
[146] See, for instance, *Kassam v Hazzard* (2021) 106 NSWLR 520; 396 ALR 302; [2021] NSWCA 299; *Kikuyu v Hazzard [No 2]* (2022) 317 IR 356; [2022] FCA 812.
[147] *Wruck v Telstra Ltd* (Federal Court of Australia, QUD56/2022, 7 August 2023); *Harding v Sutton* [2021] VSC 741.

351(1) and s 772(1)(f). The first involved a COVID-19-related dismissal in which the applicant claimed that she had been dismissed as a result of her social origin as an 'anti-vaxxer'. The Commission accepted the applicant's social origin as an 'anti-vaxxer', which it found could be established through her 'disposition of the mind'; belonging to a social group that shared a specific form of 'cultural capital'; refusal to be vaccinated with an mRNA vaccine; and refusal to supply proof of vaccination status or an exemption.[148] The Commission nevertheless rejected her claim for discrimination, observing that such discrimination was 'indirect' or uniform, discriminating against all employees equally by requiring vaccination in accordance with public health orders.[149] The second 'social origin' dismissal involved a Bunnings store person whose employment was terminated after the employer discovered that the employee had been the perpetrator of serious sexual harassment, for which he had been dismissed by a previous employer 10 years earlier. The prior incident had been the subject of federal court proceedings. The applicant-employee claimed that the dismissal amounted to discrimination on the basis of social origin under s 351(1). In dismissing his application, a Deputy Chief Judge Mercuri found that the employer's 'conduct … is not unlawful' under any Victorian anti-discrimination nor equal opportunity legislation and must, therefore, fail on jurisdiction qualifications imposed under s 351(2)(a) of the FW Act.[150]

Constitutional Matters

Two minor constitutional labour law cases arose in 2022. Both concerned the implied freedom of political communication — a constitutional doctrine that has become a regular staging ground for labour disputes in recent years.[151]

The first case involved the banning of union logos and the Eureka flag in a workplace under the Code for the Tendering and Performance of Building Work 2016 (Cth) (Building Code) s 13(2)(j). The legislation was enforced by the Australian Building and Construction Commission, which issued a compliance notice against the employer, Lendlease, after its inspectors spotted various construction union logos and a Eureka flag displayed on a university construction project site. The ban was resisted by both the employer and the CFMMEU (as intervenor) alike on the grounds of the 'implied freedom'.[152] Justice Snaden nevertheless declared the legislation constitutionally valid on the basis that it is 'suitable', 'necessary' and 'appropriate and adapted' to its purpose of providing for 'freedom of association' (the right not to join a trade union), prescribed by the Building Code s 13.[153] The finding sits awkwardly among other constitutional jurisprudence involving the constitutional invalidity of legislation prohibiting the display of political words and symbols, including that which prohibits speech for a cogent political purpose.[154]

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[148] *Cook v St Vincent De Paul Society Victoria* (2022) 317 IR 402, at [16]; [2022] FWC 1440.
[149] Ibid, at IR [18].
[150] *Vergara v Bunnings Group Ltd* [2022] FedCFamC2G 818, at [32]–[34].
[151] See, for instance, *Comcare v Banerji* (2019) 267 CLR 373; 372 ALR 42; [2019] HCA 23; *Unions NSW v New South Wales* (2013) 252 CLR 530; 304 ALR 266; [2013] HCA 58 (*Unions NSW 2013*); *Unions NSW v New South Wales* (2019) 264 CLR 595; 363 ALR 1; [2019] HCA 1 (*Unions NSW 2019*).
[152] *Lendlease*, above n 10, at IR [81], [88].
[153] Ibid, at [202]–[231].
[154] See, for example *Davis v Commonwealth* (1988) 166 CLR 79; 82 ALR 633; [1988] HCA 63; *Coleman v Power* (2004) 220 CLR 1; 209 ALR 182; [2004] HCA 39: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

The second case involved yet another attempt by the NSW Liberal Party Government to hobble the political power of the NSW Labor Party Opposition by banning political donations from the Labor Party's traditional support base within the trade union movement as the state heads into an election.[155] The NSW Liberal Party Government used a similar tactic to stifle Labor Party political organising heading into two recent state elections, including the last election in 2019.[156] A High Court majority found as the Court did on both previous occasions, that the NSW legislation was constitutionally invalid on the basis of the implied freedom of political communication.

Psychological Injury

In *Kozarov v Victoria* (*Kozarov*),[157] the employer failed to take preventative measures to minimise foreseeable trauma suffered by the employee who was a solicitor within the sexual offences unit of the Office of Public Prosecutions. The High Court found that the employer had breached its duty of care by exposing a worker to psychiatric injury that was intrinsically dangerous to mental health. Later in the year, the Victorian Supreme Court distinguished the facts in *Kozarov* from similar facts in *Bersee v Victoria.*[158] It found that a teacher's psychiatric injury arising from increased class sizes was not foreseeable because teaching work is 'not inherently dangerous' and there were 'no evident signs' of psychological injury.[159] Psychiatric injury was further limited by a Queensland Court of Appeal finding that an employer's duty of care did not extend to protect employees from psychological harm arising from a disciplinary process.[160] Such a duty has been found to exist in the UK on the basis of an implied term of mutual trust and confidence owed largely by employers to employees. As the Queensland Court stated, however, mutual trust and confidence were irrefutably rejected by the Australian High Court in *Commonwealth Bank of Australia v Barker*.[161]

Conclusion

In 2022, we witnessed gains for employers in Courts and tribunals. These included the High Court's redefinition of employment, to its encouragement of maximum penalties for union governance offences, along with new right-of-entry restrictions. Piecemeal gains were made for Australia's lowest-paid workers who enjoyed what might be described as a 'subsistence' increase in wages. For the most part, the largest employment cases involved workers, unions and the FWO attempting to clawback unpaid wages or merely preserve existing entitlements and conditions, as seen across largescale underpayment matters as well as adverse action claims and industrial disputes involving *Qantas* and *Re Svitzer Australia Pty Ltd.* Indeed, these large employers were joined by the NSW State Government in citing 'the pandemic' as a means to reduce real wages and conditions.

[155] *Unions NSW 2023*, above n 10.
[156] *Unions NSW 2013*, above n 151; *Unions NSW 2019*, above n 151.
[157] (2022) 273 CLR 115; 399 ALR 573; [2022] HCA 12.
[158] [2022] VSCA 231.
[159] Ibid, at [122].
[160] *Potter v Gympie Regional Council* (2022) 313 IR 222; [2022] QSC 009 (*Potter*).
[161] (2014) 253 CLR 169; 312 ALR 356; [2014] HCA 32, affd *Potter*, above n 160, at IR [397].

At the time of writing in 2023, it will be important for labour lawyers to observe the outcome of Qantas' High Court appeal, along with the development of right of entry laws in *Communications Electrical Electronic Energy Information Postal Plumbing and Allied Services Union of Australia v Austal Ships Pty Ltd*. The treatment of Monash University by the Federal Court, following its failed attempt to retrospectively vary its enterprise agreement, will also be of interest. Other continuing developments include the legal treatment of NSW public sector workers following ongoing pay disputation with a new NSW Labor Government.