FEDERAL COURT OF AUSTRALIA

Grant v BHP Coal Pty Ltd (No 2) [2015] FCA 1374

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| Citation: | Grant v BHP Coal Pty Ltd (No 2) [2015] FCA 1374 |
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| Parties: | **DARRIN JAMES GRANT v BHP COAL PTY LTD and FAIR WORK COMMISSION** |
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| File number: | QUD 429 of 2014 |
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| Judge: | **COLLIER J** |
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| Date of judgment: | 4 December 2015 |
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| Catchwords: | **INDUSTRIAL LAW** – review of decision of Full Bench of Fair Work Commission – whether jurisdictional error in decision of Fair Work Commission – whether applicant unfairly dismissed within meaning of s 385 *Fair Work Act 2009* (Cth) – separate finding of fact – whether supervisor had role under s 26 *Coal Mining Safety and Health Act 1999* (Qld) – whether direction to attend medical assessment following return to work after lengthy sick leave was unlawful – whether supervisor had authority to give direction to applicant to attend medical examination pursuant to s 39 *Coal Mining Safety and Health Act 1999* (Qld) – whether applicant unreasonably failed to cooperate and participate in investigation – whether direction to attend medical assessment infringement of personal liberty – human rights concerning medical examinations – obligations of persons under s 39 *Coal Mining Safety and Health Act 1999* (Qld) – *Edwards v North Goonyella Coal Mines Pty Ltd* [2005] QSC 242 – whether applicant entitled to refuse to answer questions on basis of self-incrimination – whether any errors of Fair Work Commission within jurisdiction |
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| Legislation: | *Fair Work Act 2009* (Cth) ss 385, 387, 394, 394(1), 545, 546, 562, 563, 604(1), 607(3)*Federal Court of Australia Act 1976* (Cth) ss 23, 32*Judiciary Act 1903* (Cth) s 39B*Coal Mining Safety and Health Act 1999* (Qld) ss 7, 26, 29, 30, 30(1), 30(3), 39, 39(1), 39(1)(a), 39(1)(c), 39(2), 39(2)(d), 40(2)(a)(i), 40(2)(b)(i), 41, 41(1), 42, 42(c), 55, 62, 394*Legislative Standards Act 1992* (Qld) s 4*Motor Vehicle Insurance Act 1994* (Qld) s 46A*Personal Injuries Proceedings Act 2002* (Qld)*Crimes Act 1900* (NSW) ss 353A, 353A(2)*Coal Mining Safety and Health Regulation 2001* (Qld) Ch 2 Pt 6 Div 1 and Div 2, ss 10, 42, 42(c), 42(7), 44, 46*Coal Mining Safety and Health Bill 1999* (Qld) |
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| Cases cited: | *Blackadder v Ramsey Butchering Services Pty Ltd* (2002) 118 FCR 395*Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194*Coco v The Queen* (1994) 179 CLR 427*Collector of Customs v Pozzolanic* (1993) 43 FCR 280*Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union v Abigroup Contractors Pty Ltd* [2013] FCAFC 148*Dafallah v Fair Work Commission* (2014) 225 FCR 559*Edwards v North Goonyella Coal Mines Pty Ltd* [2005] QSC 242*Fernando v Commissioner of Police* (1995) 36 NSWLR 567*Fox v Australian Industrial Relations Commission* (2007) 161 FCR 263*Hunter Resources Ltd v Melville* (1988) 164 CLR 234*Jackson v State of Queensland* [2005] QSC 161*Kirk v Industrial Relations Commission* (2010) 262 ALR 569*Lee v New South Wales Crime Commission* (2013) 251 CLR 196*Linfox Australia Pty Ltd v Fair Work Commission* (2013) 240 IR 178*MBR v Parker* [2012] QCA 271*McNamara v Furini* [2008] QSC 24*Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259*Mr Darrin Grant v BHP Coal Pty Ltd* [2014] FWCFB 3027*Plaintiff M47-2012 v Director-General of Security* (2012) 251 CLR 1*Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319*Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82*Snedden v Minister for Justice for the Commonwealth of Australia* (2014) 315 ALR 352*Starr v National Coal Board* (1977) 1 All ER 243*Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union* [2015] FCAFC 105*Timmins v Yandilla Park Limited* [2000] QSC 281*Toms v Harbour City Ferries Pty Limited* (2015) 229 FCR 537 |
|  |  |
| Textbooks: | Pearce DC and Geddes RS, *Statutory Interpretation in Australia* (8th ed, LexisNexis Butterworths, 2014) |
|  |  |
| Date of hearing: | 26 March 2015 and 10 July 2015 |
|  |  |
| Place: | Brisbane |
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| Division: | FAIR WORK DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 147 |
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| Counsel for the Applicant: | Mr B Docking |
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| Solicitor for the Applicant: | Hall Payne Lawyers |
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| Counsel for the First Respondent: | Mr I Neil SC with Mr SR Meehan |
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| Solicitor for the First Respondent: | Ashurst Australia |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice, save as to costs. |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| FAIR WORK DIVISION | QUD 429 of 2014 |

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| BETWEEN: | DARRIN JAMES GRANTApplicant |
| AND: | BHP COAL PTY LTDFirst RespondentFAIR WORK COMMISSIONSecond Respondent |

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| JUDGE: | COLLIER J |
| DATE OF ORDER: | 4 DECEMBER 2015 |
| WHERE MADE: | BRISBANE |

THE COURT ORDERS THAT:

1. Leave be granted to further amend the amended originating application filed on 27 March 2015 by the insertion of sub-paragraph (aa) into paragraph 1.
2. The further amended originating application referred to in paragraph 1 of these Orders be dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| QUEENSLAND DISTRICT REGISTRY |  |
| FAIR WORK DIVISION | QUD 429 of 2014 |

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| BETWEEN: | DARRIN JAMES GRANTApplicant |
| AND: | BHP COAL PTY LTDFirst RespondentFAIR WORK COMMISSIONSecond Respondent |

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| --- | --- |
| JUDGE: | COLLIER J |
| DATE: | 4 DECEMBER 2015 |
| PLACE: | BRISBANE |

**REASONS FOR JUDGMENT**

1. Before the Court is an amended originating application in which the applicant, Mr Grant, seeks a number of remedies under s 39B of the *Judiciary Act 1903* (Cth), s 23 and s 32 of the *Federal Court of Australia Act 1976* (Cth) and s 562 and s 563 of the *Fair Work Act 2009* (Cth) (Fair Work Act). These remedies relate partly, but not exclusively, to a decision of the Full Bench of the Fair Work Commission of 18 June 2014 in *Mr Darrin Grant v BHP Coal Pty Ltd* [2014] FWCFB 3027, in which the Full Bench affirmed the earlier decision of the Fair Work Commission constituted by Commissioner Spencer. Mr Grant had claimed, unsuccessfully in the Fair Work Commission, that he had been unfairly dismissed by the first respondent. Materially, Mr Grant claimed that he had been dismissed in circumstances where the first respondent had (in his submission, wrongfully) directed him to attend a medical examination following his return to work after a lengthy period of sick leave for an injury, and he had refused to comply with that direction.
2. In the proceedings the parties provided the Court with a statement of agreed findings. However, and in addition to the judicial review of the decision of the Full Bench, the applicant seeks declarations which require a specific finding of fact by the Court in relation to the position of Mr William Gustafson. The parties have separately requested the Court to make such a factual finding.
3. Before turning to the application in this Court it is useful to examine the background facts, which are predominately undisputed.

# BACKGROUND

1. The applicant was employed by the first respondent as a boilermaker at its Peak Downs Mine (the mine) in central Queensland from 25 November 2003 until he was dismissed on 17 May 2013. At the time of his dismissal he was an area delegate for the Construction, Forestry, Mining and Energy Union (CFMEU).
2. On or about 21 October 2011 the applicant injured his shoulder while working at the mine. He subsequently sustained injuries to his shoulder a number of times between October 2011 and July 2012, both at work and outside working hours. On or about 23 July 2012 the applicant commenced sick leave in respect of injuries to his shoulder. He was absent from work for some nine months.
3. On 12 September 2012 he underwent shoulder stabilisation surgery, performed by orthopaedic surgeon Dr Cutbush. He subsequently commenced a period of “intensive rehabilitation”, arranged by Dr Peter Bastable at the Mater Hospital in Mackay.
4. In the Fair Work Commission the applicant gave evidence that the focus of his rehabilitation was to return him to his pre-injury capacity as a boilermaker.
5. The applicant returned to work on 2 April 2013. He produced a medical certificate in the following terms:

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| MATER IMMEDIATE MEDICAL SERVICETHE MATER MISERICORDIAE HOSPITAL MACKAYWILLETT’S ROAD, MACKAY…Dr Peter BastableMB BCHB AOF ACEM0202257T**Medical Certificate**This is to certify that **Mr Darrin Grant**is fit to return to his normal duties and from Monday April 1st 2013[signed]Dr Peter Bastable27 March 2013 |

1. The evidence before the Fair Work Commission was that on 2 April 2013 the applicant was told by Mr William Gustafson, a Field Maintenance Superintendent at the mine, to see occupational therapists employed by the first respondent prior to commencing work. The applicant was told that this was in order to ascertain whether there were any “restrictions” on the applicant’s work capacity, and that it was necessary for the purposes of the “PPI policy”. The applicant was then sent home.
2. The applicant claimed that on 10 April 2013 he received an email from Mr Gustafson, attaching a letter dated 9 April 2013, directing him to attend a medical appointment on 17 April 2013. The letter stated:

As discussed I require you to attend a medical examination so that I can understand any limitations with respect to your fitness for work, and how this impacts on your ability to perform your substantive position as Mine Employee - Boilermaker at Peak Downs Mine …

…

I would like to take this opportunity to reinforce that we remain committed and focussed on ensuring your safety at work. BMA has a duty of care to provide all employees with a safe working environment and given your injury, we need to be satisfied that you can safely perform the inherent requirements of your role.

1. Before the Fair Work Commission, Mr Grant said that following discussions with his representatives at the CFMEU, Mr Grant attended again at the mine on 16 April 2013 but was refused entry.
2. Pursuant to Mr Gustafson’s letter the first respondent made arrangements for Mr Grant to attend the office of Dr Robert McCartney on 17 April 2013 for a medical examination. For reasons including that Mr Grant did not have documentation including x-rays (although such documentation was not essential), Mr Grant did not attend. Although the first respondent arranged with Dr McCartney to reschedule the applicant’s appointment to see him later in the day on 17 April 2013, the applicant did not attend.
3. On 18 April 2013, Mr Gustafson telephoned Mr Grant and informed him that the first respondent was conducting an investigation into Mr Grant’s refusal to attend the appointment with Dr McCartney, and that he should attend a meeting the following week. On the same date the applicant was notified that he was suspended in accordance with clause 3.7 of the BMA Enterprise Agreement 2012.
4. At the meeting on 22 April 2013, the applicant, through his union representatives, requested that the first respondent put in writing any questions it required the applicant to answer.
5. At a further meeting on 30 April 2013, the first respondent served a “show cause” notice on the applicant, which relevantly stated:

I view your refusal to attend the appointment with Dr McCartney, and your refusal to participate in the interview with [Mr Gustafson] on 22 April 2013, to be refusals to follow lawful and reasonable directions contrary to your obligations as an employee of BMA.

I also find that your actions, taping conversations without the consent of other parties, undermine the trust and confidence relationship that needs to exist between you and BMA.

I have formed the preliminary view that your conduct is in breach of:

* Clause 4.5 of the BMA Enterprise Agreement 2012;
* BMA’s Charter Values of Respect and Integrity; and
* The relationship of trust and confidence that must exist between you and your supervisors and co-workers.
1. The applicant responded to this notice, maintaining that he understood the direction to attend upon Dr McCartney was unlawful and unreasonable.
2. The applicant attended a further meeting, following which his employment with the first respondent was terminated. The termination letter, dated 17 May 2013 and signed by Mr Andrew Townsend, Manager Maintenance at the mine, stated relevantly:

I have reviewed your responses to the findings of the Company’s investigation and do not consider that your explanations are satisfactory.

Specifically, I am of the opinion the findings of the Company’s investigation are substantiated and that you:

* Refused to attend your appointment with Dr McCartney at 11.00am on the 17th April 2013;
* Refused to attend your rescheduled appointment with Dr McCartney at 1.30pm on the 17th April 2013 after being directed to attend and warned that your failure to attend would result in disciplinary action;
* On numerous occasions since 2nd April 2013 you have sought to record conversations, without the consent of the individuals concerned;
* Refused to cooperate and participate during an investigation interview on the 22nd April 2013 into your refusal to attend the appointments with Dr McCartney, failed to treat Mr Gustafson with courtesy and respect during the interview and displayed an uncooperative attitude and demeanour during the interview.

# AT FIRST INSTANCE IN THE FAIR WORK COMMISSION

1. The applicant filed an application in the Fair Work Commission pursuant to s 394 of the Fair Work Act claiming unfair dismissal. He claimed that he had been unfairly dismissed within the meaning of s 385 of the Fair Work Act.
2. Before the Commission, the first respondent did not rely upon a contractual right to direct the applicant to attend a medical examination – rather the first respondent relied upon s 39 of the *Coal Mining Safety and Health Act 1999* (Qld) (Coal Act). Section 39 provides:

**Obligations of persons generally**

(1) A coal mine worker or other person at a coal mine or a person who may affect the safety and health of others at a coal mine or as a result of coal mining operations has the following obligations—

(a) to comply with this Act and procedures applying to the worker or person that are part of a safety and health management system for the mine;

(b) if the coal mine worker or other person has information that other persons need to know to fulfil their obligations or duties under this Act, or to protect themselves from the risk of injury or illness, to give the information to the other persons;

(c) to take any other reasonable and necessary course of action to ensure anyone is not exposed to an unacceptable level of risk.

(2) A coal mine worker or other person at a coal mine has the following additional obligations—

(a) to work or carry out the worker’s or person’s activities in a way that does not expose the worker or person or someone else to an unacceptable level of risk;

(b) to ensure, to the extent of the responsibilities and duties allocated to the worker or person, that the work and activities under the worker’s or person’s control, supervision, or leadership is conducted in a way that does not expose the worker or person or someone else to an unacceptable level of risk;

(c) to the extent of the worker’s or person’s involvement, to participate in and conform to the risk management practices of the mine;

(d) to comply with instructions given for safety and health of persons by the coal mine operator or site senior executive for the mine or a supervisor at the mine;

(e) to work at the coal mine only if the worker or person is in a fit condition to carry out the work without affecting the safety and health of others;

(f) not to do anything wilfully or recklessly that might adversely affect the safety and health of someone else at the mine.

1. In summary, the first respondent submitted that:
* Section 39(1)(c) of the Coal Act imposes a duty upon coal mine workers to ensure that no one is exposed to unacceptable levels of risk, and criminal offences are created for failure to discharge such duties.
* Because the duty had been imposed, powers had been created in favour of the first respondent, in particular the power to implement or give rise to the course of action so far as it is necessary to discharge the obligation. Specifically, the first respondent submitted it was able to take any reasonable and necessary course of action to ensure anyone is not exposed to an unacceptable level of risk.
* It followed that the first respondent was empowered to require the applicant to attend a medical assessment in the circumstances.
1. Commissioner Spencer said that a question for determination was whether the direction for the applicant to attend upon Dr McCartney was lawful and reasonable. The applicant submitted that it was not, and relied on the reasoning of the Supreme Court of Queensland in *Edwards v North Goonyella Coal Mines Pty Ltd* [2005] QSC 242.
2. The Commission found that the direction to the applicant was lawful under s 39(1)(c) of the Coal Act, that *Edwards* was distinguishable, and that a relevant authority was *Blackadder v Ramsey Butchering Services Pty Ltd* (2002) 118 FCR 395. Further, the Commission found that the direction to the applicant to attend the consultations with Dr McCartney was reasonable. This was because, in summary (110-118):
* The applicant had given advice or information as to the specific nature of the medical condition that existed, or any specific steps taken by him to prepare for his return to work other than appearing with a “medical clearance”.
* There was very limited contact between the applicant and the first respondent during the applicant’s approximately nine month absence from work, and no steps were taken by the first respondent to monitor the situation.
* The situation, involving the absence of communication, would reasonably have caused the first respondent to seek further information before allowing the applicant on to the mine site to perform potentially dangerous work, in an inherently dangerous workplace.
* An employer has an obligation to ensure a safe system of work, and a duty of care is owed to all those on their worksites, in particular employees. However, where an employee considers that he is medically fit, it is reasonable that the employer sets out the basis for requiring the employee to attend for further medical assessment.
* In the circumstances it is entirely reasonable that the first respondent would have at least sought further advice and information on the applicant’s fitness to ensure that it was not exposing the applicant, or others, to unacceptable risks from an limitation arising from the applicant’s injury or by virtue of his lengthy absence.
* The applicant was clearly suspicious, or uncertain, concerning the first respondent’s requests, considered that he held a full medical certificate, and further considered that he, and the CFMEU, were not given an explanation as to why further medical assessment was sought.
* On the facts, however, the medical evidence provided by the applicant was insufficient and did not particularly focus on an occupational assessment. This could have been explained to the applicant.
* In the circumstances, where the first respondent had a duty arising from their statutory obligations as coal mine operators to ensure the health and safety of the applicant, and anyone working with him, prior to the applicant returning to working at the mine, the first respondent was reasonable in requiring the applicant to attend upon Dr McCartney. Dr McCartney was specifically trained as an occupational physician and had knowledge of the operations of the first respondent. The applicant suggested that he visit his doctors, however they were not specialised in this regard, unlike Dr McCartney.
1. Commissioner Spencer was not satisfied that the reason for the applicant refusing to attend the appointment with Dr McCartney - that is, that the applicant did not have various medical reports and scans – was legitimate, because Dr McCartney had clearly indicated that having those documents would not constitute an impediment to the appointment meeting. It followed that the applicant failed to comply with the first respondent’s first direction to attend an appointment with Dr McCartney, and that this failure was unreasonable. The Commission was also satisfied that the applicant failed to attend Dr McCartney following the second direction.
2. It followed that the failure of the applicant to attend upon Dr McCartney, on both occasions, formed part of the valid reason for the dismissal.
3. The Commissioner was also satisfied that the applicant unreasonably failed to cooperate and participate in the investigation process, and that it was improper (given the relatively straightforward issues at hand) for the applicant to request that every question be put into writing.
4. Insofar as concerns other matters that the Commission considered relevant, Commissioner Spencer noted:
* It was concerning that Mr Grant attended at the mine after his absence despite the fact that he had not allowed for proper communication for his return with the first respondent.
* It was concerning that the applicant felt it necessary to record various conversations and message in circumstances where there was no evidence of any previous dubious or deceptive actions towards the applicant on the part of any person representing the first respondent. Such conduct undermines the employment relationship and the obligation of mutual trust and confidence.
* There was no reason for the first respondent not to have clearly explained to the applicant and his representatives the basis of their responsibilities and associated concerns regarding the nature of the medical information (or lack of ) which they had available to them regarding the applicant’s fitness for work.
* Coalmine workers have obligations under s 39 of the Coal Act to give information to other persons which those other persons need to fulfil their own obligations or duties under the Coal Act.
1. It followed that the instruction to provide further medical information was warranted in the circumstances (at [141]).
2. The Commission concluded that the termination of Mr Grant’s employment was not harsh, unjust or unreasonable, and accordingly the application under s 394 of the Coal Act was dismissed.

# APPEAL TO THE FULL BENCH OF THE FAIR WORK COMMISSION

1. In considering whether the Commission erred in finding that the direction of the first respondent to the applicant was lawful, the Full Bench noted that the first respondent relied on s 39 of the Coal Act as imposing a general obligation to do what it must to achieve the safety objective.
2. The Full Bench examined the decision in *Edwards*, but noted that that case did not involve detailed consideration of s 39 of the Coal Act – rather Atkinson J in *Edwards* examined the power to direct an employee to undergo a medical assessment in the context of the *Coal Mining Safety and Health Regulation 2001* (Qld) (Coal Regulation) (in particular Div 2 of Pt 6 of the Coal Regulation) and the common law. Accordingly, the Full Bench did not consider the judgment in *Edwards* to be applicable to consideration whether s 39 of the Coal Act empowered an employer to require an employee to undertake a medical assessment. further, the Full Bench considered that *Edwards* did not stand for any proposition that denied the first respondent the power to direct an employee to do such things that were not unlawful and which fell within the scope of the employment contract, all other things being reasonable. They observed:

[94] We think, further, that s.39 of the CMSH Act, in requiring coal mine workers and other persons at a coal mine “to take any other reasonable and necessary course of action to ensure anyone is not exposed to an unacceptable level of risk”, imposes an obligation in wide terms on the relevant persons (conditioned by reasonableness and necessity) to do all things necessary to ensure that no one at a coal mine is exposed to an unacceptable risk. The CMSH Act at s.39 is couched in broad terms and applies to a broad cohort.

1. After considering s 42 of the Coal Act the Full Bench continued:

[97] We think s.39 of the CMSH Act imposes a broad obligation and we do not consider that obligation in its breadth is overridden by or otherwise confined in the manner contended by the Appellant: it remains a source of a statutory obligation that falls upon a wide cohort of workers and other persons, being a:

coal mine worker or other person at a coal mine or a person who may affect the safety and health of others at a coal mine or as a result of coal mining operations.

[98] By contrast, s.42 of the CMSH Act imposes a particularised obligation upon the SSE, which in large measure (but not comprehensively) is given effect through s.42 of the CMSH Regulation.

[99] And similarly, s.46 of the CMSH Regulation (as set out above) imposes an obligation upon the “employer” (but only in relation to health checks for particularised purposes).

1. Section 42 of the Coal Act provides:

**Obligations of site senior executive for coal mine**

A site senior executive for a coal mine has the following obligations in relation to the safety and health of persons who may be affected by coal mining operations—

(a) to ensure the risk to persons from coal mining operations is at an acceptable level;

(b) to ensure the risk to persons from any plant or substance provided by the site senior executive for the performance of work by someone other than the site senior executive’s coal mine workers is at an acceptable level;

(c) to develop and implement a single safety and health management system for all persons at the mine;

(d) to develop, implement and maintain a management structure for the mine that helps ensure the safety and health of persons at the mine;

(e) to train coal mine workers so that they are competent to perform their duties;

(f) to provide for—

(i) adequate planning, organisation, leadership and control of coal mining operations; and

(ii) the carrying out of critical work at the mine that requires particular technical competencies; and

(iii) adequate supervision and control of coal mining operations on each shift at the mine; and

(iv) regular monitoring and assessment of the working environment, work procedures, equipment, and installations at the mine; and

(v) appropriate inspection of each workplace at the mine including, where necessary, pre-shift inspections.

1. Further, s 42 and s 46 of the Coal Regulation provide:

**42 Safety and health management system for personal fatigue and other physical and psychological impairment, and drugs**

(1) A coal mine’s safety and health management system must provide for controlling risks at the mine associated with the following—

(a) personal fatigue;

(b) other physical or psychological impairment;

*Example of other physical or psychological impairment—an impairment caused by stress or illness*

(c) the improper use of drugs.

(2) The system must provide for the following about personal fatigue for persons at the mine—

(a) an education program;

(b) an employee assistance program;

(c) the maximum number of hours for a working shift;

(d) the number and length of rest breaks in a shift;

(e) the maximum number of hours to be worked in a week or roster cycle.

(3) The system must provide for protocols for other physical and psychological impairment for persons at the mine.

(4) The system must provide for the following about drug consumption or ingestion for persons at the mine—

(a) an education program;

(b) an employee assistance program;

(c) an obligation of a person to notify the site senior executive for the mine of the person’s current use of medication that could impair the person’s ability to carry out the person’s duties at the mine;

(d) an obligation of the site senior executive to keep a record of a notification given to the site senior executive under paragraph (c);

(e) the following assessments to decide a person’s fitness for work—

voluntary self-testing;

random testing before starting, or during, work;

testing the person if someone else reasonably suspects the person’s ability to carry out the person’s duties at the mine is impaired because the person is under the influence of drugs.

(5) The site senior executive must consult with a cross-section of workers at the mine in developing the fitness provisions.

(6) In developing the fitness provisions, the site senior executive must comply with section 10, other than section 10(1)(a) and (d)(ii)(C), as if a reference in the section to a standard operating procedure were a reference to the fitness provisions.

(6A) If the fitness provisions provide for the assessment of workers for a matter mentioned in subsection (1)(a) or (b), the site senior executive must establish the criteria for the assessment in agreement with a majority of workers at the mine.

(7) If the fitness provisions provide for the assessment of workers for a matter mentioned in subsection (1)(c), the site senior executive must make a reasonable attempt to establish the criteria for the assessment in agreement with a majority of workers at the mine.

(7A) If the majority of workers at the mine disagree with the criteria for the assessment under subsection (7), the criteria for assessment stated in a recognised standard apply until an agreement is reached.

(8) In this section—

***fitness provisions*** means the part of the safety and health management system that provides for the things mentioned in subsections (2) to (4).

…

**46 Health assessment**

(1) The employer must ensure a health assessment is carried out for each person who is to be employed, or is employed, by the employer as a coal mine worker for a task other than a low risk task.

(2) An assessment must be carried out—

(a) before the person is employed as a coal mine worker; and

(b) if the nominated medical adviser considers the assessment is necessary after being given notice under section 49(3)—periodically, as decided by the adviser; and

(c) otherwise, periodically, as decided by the nominated medical adviser, but at least once every 5 years.

(3) An assessment must be carried out—

(a) in accordance with the instructions, and covering the matters, in the approved form; and

(b) by, or under the supervision of, the nominated medical adviser.

(4) An assessment may include matters not covered in the approved form if, having regard to a risk assessment carried out for a task for which the person is to be employed, or is employed, the nominated medical adviser considers the person needs to be assessed in relation to the additional matters to achieve an acceptable level of risk.

(5) Despite subsection (3)(a), a person may undergo an assessment (a subsequent assessment) in accordance with some of the instructions only, and covering some of the matters only, in the approved form if—

(a) the person has previously undergone a health assessment (a previous assessment); and

(b) the subsequent assessment relates to a matter identified at a previous assessment; and

(c) the assessment is carried out to ensure the person is able to carry out the person’s tasks at the mine without creating an unacceptable level of risk having regard to the matter mentioned in paragraph (b).

(6) A medical examination of the person carried out by a doctor other than the nominated medical adviser is taken to be a health assessment carried out by the nominated medical adviser under subsection (3) if—

(a) the medical examination is carried out under the instructions in the approved form and the nominated medical adviser gives the employer a health assessment report about the examination; or

(b) the medical examination is for other purposes and the nominated medical adviser—

(i) is satisfied the examination is equivalent to a health assessment; and

(ii) gives the employer a health assessment report in the approved form about the examination.

1. The Full Bench observed:

[100] The regime for medical assessments as provided for in s.46(2) can only be carried out at prescribed times and in the prescribed manner. In our view, to restrict the manner of responding to a concern about the fitness for work of a coal mine worker to the confined procedures and circumstances set out in s.46 of the CMSH Regulation, would be counter to the objectives of the CMSH Act. It would also be inconsistent with the obligations placed on the employer by s.39 of the CMSH Act.

[101] Generally, we do not view s.39 and s.42 of CMSH Act and s.42 and s.46 of CMSH Regulation to be conflicting, or that one should override the other. Rather, they appear readily able to work conformably with one another to achieve the objects of the Act – which seek to ensure those who work in coal mines are not exposed to an unacceptable level of risk.

[102] It follows from the above discussion, therefore, that we do not think that the proposition (pressed upon us by the Appellant) that s.39 of the CMSH Act, and s.39(1)(c) in particular, must give way to s.42 and s.46 of the CMSH Regulation for reason of the rule or principle *generalia specialibus non derogant*, has application in the circumstances before us. The various provisions discussed above are not in conflict or otherwise irreconcilable (see *Purcell v Electricity Commission of NSW*).

(footnotes omitted.)

1. Critically for present purposes they continued:

[103] Further, s.39(1) of the CMSH Act, subject to the conditions of reasonableness and necessity, obligates a coal mine worker or other person (as described) to take “any [...] other course of action” to achieve the objective cited above beyond those actions stipulated in s.39(1)(a) and s.39(1)(b) of the CMSH Act. We do not consider that an obligation of such broad remit should be read down against the terms of the CMSH Regulation in the manner contended by the Appellant.

[104] It also appears to us that s.39(2)(d) of the CMSH Act also imposes on a coal mine worker and other persons at a coal mine an additional and complementary obligation to that imposed by s.39(1)(c) of the CMSH Act:

*(2) A coal mine worker or other person at a coal mine has the following additional obligations:*

*(d) to comply with instructions given for safety and health of persons by the coal mine operator or site senior executive for the mine or a supervisor at the mine;*

[105] Mr Gustafson, we point out, was at all times the Appellant’s supervisor, and the instructions he gave the Appellant, who was a coal mine worker, concerned the Appellant’s safety and health.

[106] We add finally that the Respondent had not at any time promulgated under the terms of s.42 of the CMSH Regulation a safety and health management system that had achieved the support of at least a majority of employees at the mine.

[107] In our view, absent such an approved system, the Respondent would remain obligated under the CMSH Act, and otherwise, to take what reasonable steps are necessary to minimise risk to coal mine workers.

[108] It was also pressed on the Full Bench by Counsel for the Appellant that there was no lawful basis on which to direct the Appellant to attend the medical practitioner for a functional assessment. We have referred to this above in passing. Essentially, the Appellant contends that there must be a discernible, positive rule of law supporting Mr Gustafson’s direction and in the absence thereof his direction was unlawful.

[109] As we have said above, we are of the view that Mr Gustafson’s direction was supported by a positive rule of law. But regardless of that, we do not conclude that Mr Gustafson’s direction was illegal (or unreasonable) as a consequence or that the Appellant should not have followed that direction or had a right to refuse to do so.

[110] This is because a direction given to an employee is lawful to the extent that it falls reasonably within the scope of service of the employee.

1. The Full Bench rejected an argument that s 39(1) of the Coal Act only applies in circumstances where the conduct in question arises in the physical confines of the coal mine and not otherwise (at [116]-[121]).
2. The Full Bench considered it open to the Commissioner to find that the lawful direction by the first respondent to the applicant that he attend the medical examination with Dr McCartney was reasonable (at [129]-[130]).
3. In relation to whether the Commissioner erred in finding that the first respondent had a valid reason for dismissing the applicant, the Full Bench considered that there was no error on the part of the Commissioner in concluding there was a valid reason. In particular:
* as there was a lawful statutory basis for the direction to attend a medical practitioner, it was open to the Commissioner to conclude that the applicant wilfully refused to attend medical appointments organised by the first respondent; and
* it was open to the Commissioner to conclude that the applicant refused to participate in the investigation process.
1. Further, the Full Bench dismissed contentions of the applicant that the Commissioner failed to take into account relevant considerations ([156]-[160]) or took into account irrelevant considerations ([161]-[164], [169]-[176]) in reaching her decision.

# PROCEEDINGS IN THE FEDERAL COURT

1. In his amended originating application filed 27 March 2015 the applicant claims as follows:

On the grounds stated in the statement of claim, accompanying affidavit or other document prescribed by the Rules, the Applicant claims:

1. Pursuant to section 39B of the *Judiciary Act 1903* (Cth), sections 21, 22, 23 and 32 of the *Federal Court of Australia Act 1976* (Cth) and sections 562 and 563 of the *Fair Work Act 2009* (Cth):

a. An order declaring that the First Respondent’s directions or orders that Darrin James Grant attend on 17 April 2013 any medical examination at Mackay in the State of Queensland was not a lawful requirement, direction or order because of the fundamental common law right, freedom or immunity that no person may be required to submit to a medical examination without that person’s consent.

b. An order declaring that, on the proper construction of clauses 3.7(d) and 4.5 of the *BMA Enterprise Agreement 2012* (**the Agreement**), the First Respondent on 22 April 2013 was entitled to direct Darrin James Grant to attend a disciplinary interview and was entitled to ask him questions but Mr Grant was entitled to refuse to answer any question asked of him by the First Respondent.

c. An order declaring that, on the proper interpretation of clause 4.5 of the Agreement, Darrin James Grant on 22 April 2013 was not in breach of clause 4.5 by refusing to answer any of the First Respondent’s questions and requesting all questions be put in writing by the First Respondent so Mr Grant could give a formal response.

2. Pursuant to section 39B of the *Judiciary Act*, section 23 of the *Federal Court of Australia Act* and section 563 of the *Fair Work Act*, an order that a writ of certiorari be issued directing the Second Respondent to remove the decision made on 18 June 2014 in matter C2014/3771 and as recorded in decision [2014] FWCFB 3027 for the purpose of being quashed.

3. Pursuant to section 39B of the *Judiciary Act*, section 23 of the *Federal Court of Australia Act* and section 563 of the *Fair Work Act*, an order that a writ of mandamus be issued to the Second Respondent to hear and determine matter C2014/3771 according to law.

4. Further and alternatively, pursuant to section 39B of the *Judiciary Act*, section 23 of the *Federal Court of Australia Act* and section 563 of the *Fair Work Act*, an order that a writ of certiorari be issued directing the Second Respondent to remove the decision and order made on 14 March 2014 in matter U2013/10299 and as recorded in decision [2014] FWC 1712 for the purpose of being quashed.

5. Further and alternatively, pursuant to section 39B of the *Judiciary Act*, section 23 of the *Federal Court of Australia Act* and section 563 of the *Fair Work Act*, an order that a writ of mandamus be issued to the Second Respondent to hear and determine matter U2013/10299 according to law.

6. Such further or other declarations and orders as may seem appropriate.

1. In paragraph 1 of the application the applicant seeks declarations from this Court in its original jurisdiction. In paragraphs 2, 3, 4 and 5 the applicant seeks judicial review of the decision of the Full Bench.
2. At the hearing the applicant sought leave to further amend the amended originating application by the insertion of a new sub-paragraph (aa) into paragraph 1, to read as follows:

aa. An order declaring that the First Respondent’s directions or orders that Darrin James Grant attend on 17 April 2013 any medical examination at Mackay in the State of Queensland was not a lawful requirement, direction or order because s39(1)(c) and (2) of the Coal Mining Safety and Health Act 1999 (Qld) was not and could not be relied on by the First Respondent.

1. As a general proposition, there is authority that an application in which is sought this combination of declaratory relief in the originating jurisdiction of the Court, and judicial review, is competent. In *Dafallah v Fair Work Commission* (2014) 225 FCR 559 the applicant sought judicial review of the decision of the Fair Work Commission in relation to her unfair dismissal proceedings in the Commission, but also brought a variety of claims said to be in the original jurisdiction of the Federal Court (namely, an application for penalties under s 546 of the Coal Act for breach of the applicable certified agreement, an application for reinstatement and compensation under s 545 of the Fair Work Act, and damages for breach of contract and negligence in relation to the termination of her employment). The respondent submitted that the Court should dismiss all of applicant’s non-judicial review claims on the grounds they constituted an abuse of the processes of the Court. In finding that it was open to the Court to consider the non-judicial application, at [58] Mortimer J observed:

The different jurisdictions and jurisdictional bases of the Commission and this Court mean, as the Full Court said in *Miller v University of New South Wales* (2003) 132 FCR 147; [2003] FCAFC 180, that claims of *res judicata* and issue estoppel as between claims in the Commission and proceedings in this Court are misconceived:

The primary judge held that the decision of the AIRC conclusively determined that the direction given to the appellant to assume the disputed duties was both reasonable and lawful, that there was conduct on the part of the appellant amounting to serious misconduct, namely, conduct constituting a serious breach of contract in evincing an intention no longer to be bound by the contract, and that there existed a valid reason under the certified agreement for the termination of the appellant’s employment by the respondent. In our opinion, these were merely steps along the way to the value judgment which had to be made in exercise of the only jurisdiction given to the AIRC, and could give rise to no estoppel. None of them was the necessary foundation of the ultimate decision. There was no jurisdiction to make such findings conclusively. Put another way, the question as to whether the termination was harsh, unjust or unreasonable will not be litigated in this proceeding in determining any of the pleaded remedies. We do not agree that this analysis is contrary to what was decided by *Edwards v Giudice* [1999] FCA 1836; (1999) 94 FCR 561. It may be that the different legislation considered in *Green v Hampshire County Council* enables that decision to be distinguished. If not, we respectfully disagree with it.

In our opinion, the present proceeding is not an attempt to litigate again matters which have been decided against the appellant in the relevant sense. As we have endeavoured to explain, a proceeding in the AIRC for relief on the ground that termination of employment was harsh, unjust or unreasonable is quite different in kind from the jurisdiction which the court is being asked to exercise in this proceeding. The criterion for relief is different. The remedies available pursuant to s 170CH, including reinstatement and continuity of employment, are not available to the court. Correspondingly, the relief sought in this proceeding was not available to the AIRC, although there could be the potential for overlap in relation to monetary compensation. The substance of the present proceeding could not have been combined with the proceeding in the AIRC. The separate statutory claims pursuant to ss 413 and 413A and the common law claim are not within the jurisdiction of the AIRC. We thus conclude that the ground upon which the proceeding was stayed was not available. No alternative basis for a finding of abuse of process is suggested.

1. In the case before me, while I understand that the applicant seeks declaratory relief I am somewhat uneasy at the prospect of making factual findings in respect of matters which appear to have been already decided by the Fair Work Commission, namely the authority of Mr Gustafson. Further, I am more uneasy at the prospect of this Court granting declarations where the same substratum of facts underpins both that prayer for relief and the application for judicial review of the Fair Work Commission proceedings which have been determined. Indeed, I consider that the claim for declarations veers perilously close to an attempt by the applicant to relitigate matters already determined by the Full Bench of the Fair Work Commission.
2. While the first respondent neither demurs from its request (jointly with the applicant) that the Court make findings of fact in respect of the role and authority of Mr Gustafson, nor claims that the application for declaratory is an abuse of process to the extent that the Court is asked by the applicant to make declarations in addition to judicial review of the decision of the Full Bench, the first respondent submits that paragraphs 2, 3 and 4 constitute the primary relief available to the applicant and should be determined before the Court turns to the declarations sought. In my view this is an accurate summation of the applicant’s position. This is because:
* A major issue before the Fair Work Commission concerns the lawfulness and reasonableness of the first respondent’s direction to the applicant to attend a medical examination with Dr McCartney. This issue is also relevant to the applicant’s application for both declaratory and prerogative writ relief in this Court.
* The Fair Work Commission, both at first instance and in Full Bench, has already made determinations concerning the lawfulness and reasonableness of the first respondent’s direction to the applicant to attend a medical examination. For the applicant to be otherwise than bound by the decision of the Full Bench, that decision must be set aside: *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union v Abigroup Contractors Pty Ltd* [2013] FCAFC 148 at [176]. As Mortimer J explained in *Dafallah* at [54]:

it is not in the interests of the administration of justice for this court on judicial review to reach conclusions effectively contrary to the decision-making of the Full Bench in its appellate jurisdiction under the FW Act, by calling up and quashing the decision of a Commissioner, unless it has also formed the view that the decision of the Full Bench is itself affected by jurisdictional error.

As the Full Court of this Court also observed in *Linfox Australia Pty Ltd v Fair Work Commission* (2013) 240 IR 178 at [45] involving similarly pleaded legislation:

The confined task of this court was correctly accepted by Senior Counsel on behalf of Linfox. Notwithstanding the fact that Linfox invoked the jurisdiction of this court pursuant to s 562 of the Fair Work Act and s 39B of the Judiciary Act, no submission was advanced that the jurisdiction conferred by s 562 was free of such limitations which it was accepted were inherent in the jurisdiction conferred by s 39B. Nor was it suggested that the position was affected by the fact that Linfox also relied on ss 21, 22 and 23 of the Federal Court of Australia Act. The need to identify “jurisdictional error” in the decision of the Full Bench, it was common ground, had to be made out.

* In isolation, the declarations sought by the applicant in paragraph 1 would produce no foreseeable consequences for the parties, and would be directed to nothing more than answering an abstract or hypothetical question. That the Court does not give advisory opinions, including making declarations, at large, was recently reiterated by the Full Court in *Snedden v Minister for Justice for the Commonwealth of Australia* (2014) 315 ALR 352 at [168], applying the reasoning of the High Court in *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319 at 359 [103]. The force of the declarations would be in subsequent orders by the Court to set aside the decision of the Fair Work Commission.
1. It follows that the proper course for the Court in examining the application before it is to consider whether the writs of mandamus and certiorari against the decision of the Full Bench ought be issued, and then turn to the prayer for relief in paragraph 1 of the application.
2. Before doing so, however, it is convenient to first decide the outstanding factual issue concerning Mr Gustafson, which at the hearing was addressed in the nature of a threshold issue.

## Authority of Mr Gustafson

1. The “live” factual issue for determination is whether Mr William Gustafson was authorised by the site executive of the mine to give directions to other coal mine workers in accordance with the safety and health management system at the mine, for the purposes of s 26 and s 39(2)(d) of the Coal Act. I note that this is notwithstanding that the decision of both Commissioner Spencer and the Full Bench appeared predicated on factual findings that Mr Gustafson was the field maintenance superintendent at the mine, that Mr Gustafson had authority to direct the applicant to attend a medical examination with Dr McCartney, and that the first respondent acted through Mr Gustafson under the Coal Act (for example, at [8] and [10] of the Full Bench decision).
2. Section 26 of the Coal Act provides:

**Meaning of supervisor**

A supervisor at a coal mine is a coal mine worker who is authorised by the site senior executive to give directions to other coal mine workers in accordance with the safety and health management system.

1. Section 39(2)(d) provides:

**39 Obligations of persons generally**

(1) …

(2) A coal mine worker or other person at a coal mine has the following additional obligations—

(a) …

(b) …

(c) …

(d) to comply with instructions given for safety and health of persons by the coal mine operator or site senior executive for the mine or a supervisor at the mine.

1. Clearly the fact that Mr Gustafson may have been Mr Grant’s “supervisor” does not mean that he was a “supervisor” within the meaning of s 26 and s 39(2)(d) of the Coal Act. The first respondent claims however that Mr Gustafson did hold such a position within the meaning of the Coal Act. In particular, the first respondent relies on the affidavit of Mr Sean Milfull affirmed 24 October 2014 in which Mr Milfull deposes as follows:

1. I am employed by BHP Coal Pty Ltd as the General Manager at the Peak Downs Mine (**Mine**).

2. I am duly authorised to make this affidavit on behalf of the First Respondent.

3. I commenced my employment as the General Manager at the Mine on or about 14 October 2012.

4. I am the Site Senior Executive (**SSE**) at the Mine, which is the statutory position under the *Coal Mining Safety and Health Act 1999* (Qld). I was appointed to the position of SSE at the Mine on approximately 10 October 2012. I have held the position of SSE since that time, except for periods in December 2012 and September/October 2014, when another person was appointed SSE in an acting capacity while I was on leave.

5. Throughout 2013 Mr Bill Gustafson was the Field Maintenance Superintendent at the Mine. Throughout April and May 2013, Mr Gustafson had my authorisation as the Field Maintenance Superintendent at the Mine to give directions to other coal mine workers in accordance with the Mine’s safety and health management system.

1. The first respondent also relies on a document headed “Appointment as a Supervisor – S66, Coal Mining Safety and Health Act 1999”, being a letter dated 11 December 2009 addressed to Mr Gustafson (to which is attached a document headed “SUPERVISORS SAFETY RESPONSIBILITIES”), and which relevantly provides:

You are hereby appointed in accordance with Section 66 of the *Coal Mining Safety and Health Act 1999*, as a *Supervisor* of Peak Downs Mine. The extent of the mine and facilities for which you are responsible as a result of this appointment are as those shown for your Department in the Mine Responsibility Plan.

Your general responsibilities and competencies are outlined in the Peak Downs Health and Safety Management System (relevant section attached) and the Coal Mining Safety and Health Act and Regulation.

In this position you have the day to day Health, Safety and Environmental responsibilities of:

* Supervision of people and their activities
* Carrying out safety inspections in your area of responsibility in accordance with the standard operating procedure for Work Area Inspections and Hazardous Area Access Control.
* Complying with and ensuring those you supervise comply with the Site Health and Safety and Environmental Management Systems.

Acceptance of this appointment confirms acceptance of the obligations, duties and requirements imposed by the *Coal Mining Safety and Health Act 1999* and the Site Health and Safety and Environmental Management Systems.

1. The letter was apparently signed by Mr Tim Day, Site Senior Executive, on 14 December 2009.
2. At the base of the first page is the following statement:

I, Bill Gustafson, accept this appointment as *Supervisor* for Peak Downs Mine.

1. The letter appears to have been signed by Mr Gustafson on 15 December 2009.
2. The letter together with its attachment are marked exhibit 2(R) in these proceedings.
3. At the hearing on 26 March 2015 under cross-examination by Mr Docking for the applicant, Mr Milfull gave evidence to the effect that:
* Although in his affidavit Mr Milfull deposed that Mr Gustafson had “my authorisation” to be supervisor, Mr Milfull had never personally signed an authorisation appointing Mr Gustafson a supervisor under the Coal Act.
* Nonetheless, the appointment of Mr Gustafson from December 2009 by an earlier Site Senior Executive continued to be effective. To that extent, Mr Gustafson had Mr Milfull’s authorisation to be Supervisor.
* The December 2009 appointment of Mr Gustafson had not been revoked or suspended by Mr Milfull.
1. The applicant submitted that no documentary evidence was provided that Mr Gustafson was “authorised” on 17 April 2013 for the purposes of s 26 of the Coal Act, notwithstanding the provisions of ss 40(2)(a)(i), (b)(i), 42(c), 55 and 62 of the Coal Act. These sections impose requirements on the mine that there must be a document stating the responsibilities for each supervisory position at the mine and the system must be an auditable documented system.
2. That Mr Gustafson was properly appointed to as a supervisor for the purposes of s 26 and s 39(2)(d) of the Coal Act is evidenced by the affidavit of Mr Milfull and further supported by the letter of 11 December 2009 appointing Mr Gustafson. No evidence to the contrary was adduced by the applicant. No real challenge to the evidence of Mr Milfull was mounted by the applicant.
3. I am not persuaded on the material before me that either:
* the validity of the appointment of Mr Gustafson was dependent upon ss 40(2)(a)(i), (b)(i), 42(c), 55 and 62 of the Coal Act, which provide that a management system be established; or
* that, in any event, those provisions were breached on the facts of this case.
1. In my view it is clear that, at material times, Mr Gustafson was a “supervisor” within the meaning of s 26 and s 39(2)(d) of the Coal Act, and accordingly had authority to give directions to other coal mine workers in accordance with the safety and health management system at the mine. I accept that Mr Gustafson was appointed as a supervisor on or about 15 December 2009 by the then Site Senior Executive at the mine, and that this appointment has not been revoked.
2. In those circumstances it is now appropriate to turn to the claims before this Court.

## Question of jurisdictional defect

1. The applicant applied to the Fair Work Commission under s 394(1) of the Fair Work Act, which is headed “Application for unfair dismissal remedy”. Section 394(1) provides that a person who has been dismissed may apply to the Fair Work Commission for an order under Div 4 granting a remedy. Section 385 provides that a person has been unfairly dismissed if the Fair Work Commission is satisfied that:

(a) the person has been dismissed; and

(b) the dismissal was harsh, unjust or unreasonable; and

(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

(d) the dismissal was not a case of genuine redundancy.

1. Section 387 of the Fair Work Act sets out “Criteria for considering harshness etc.” in the following terms:

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

(a) whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees); and

(b) whether the person was notified of that reason; and

(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and

(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

(e) if the dismissal related to unsatisfactory performance by the person--whether the person had been warned about that unsatisfactory performance before the dismissal; and

(f) the degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(h) any other matters that the FWC considers relevant.

1. A person who is aggrieved by a decision of the Fair Work Commission may, with the permission of the Fair Work Commission, appeal the decision (s 604(1)). Section 607(3) provides that the Fair Work Commission may do any of the following in relation to the appeal:

(a) confirm, quash or vary the decision;

(b) make a further decision in relation to the matter that is the subject of the appeal or review;

(c) refer the matter that is the subject of the appeal or review to member of the Fair Work Commission (other than an Expert Panel Member) and:

(i) require the member to deal with the subject matter of the decision; or

(ii) require the member to act in accordance with the directions of the Fair Work Commission.

1. As a general proposition the Court will not grant constitutional writs unless it is established that the tribunal against which relief is sought has made a jurisdictional error: *Fox v Australian Industrial Relations Commission* (2007) 161 FCR 263 at [36]. As was observed in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [163]:

The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error. There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly.) The former kind of error concerns departures from limits upon the exercise of power. The latter does not.

(cf *Kirk v Industrial Relations Commission* (2010) 262 ALR 569 at [66]; *Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union* [2015] FCAFC 105 at [60].)

1. Whether a decision of the Full Bench of the Fair Work Commission is infected by jurisdictional error in circumstances involving an allegation of unfair dismissal has been the subject of consideration in a number of cases.
2. In *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 Gleeson CJ and Gaudron and Hayne JJ said at 203 [14]:

Ordinarily, if there has been no further evidence admitted and if there has been no relevant change in the law, a court or tribunal entertaining an appeal by way of rehearing can exercise its appellate powers only if satisfied that there was error on the part of the primary decision-maker.

(footnotes omitted.)

1. Later in the judgment their Honours explained a discretionary decision in the following terms (at 204-205 [19]):

“Discretion” is a notion that “signifies a number of different legal concepts”. In general terms, it refers to a decision-making process in which “no one [consideration] and no combination of [considerations] is necessarily determinative of the result”. Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made. The latitude may be considerable as, for example, where the relevant considerations are confined only by the subject-matter and object of the legislation which confers the discretion. On the other hand, it may be quite narrow where, for example, the decision-maker is required to make a particular decision if he or she forms a particular opinion or value judgment.

(footnotes omitted.)

1. Their Honours continued:

[21] Because a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be challenged by showing error in the decision-making process. And unless the relevant statute directs otherwise, it is only if there is error in that process that a discretionary decision can be set aside by an appellate tribunal. The errors that might be made in the decision-making process, were identified, in relation to judicial discretions, in *House v the King* …

(footnotes omitted.)

1. Their Honours later said (at 208-209 [31]):

There would only have been jurisdictional error on the part of the Full Bench if it had misconceived its role or if, in terms used by Jordan CJ in *Ex parte Hebburn Ltd; Re Kearsley Shire Council*, it “misunder[stood] the nature of [its] jurisdiction… or ‘misconceive[d] its duty’ or ‘[failed] to apply itself to the question which [s45 of the Act] prescribes’… or [misunderstood] the nature of the opinion which it [was] to form”. The Full Bench did none of those things.

1. In *Toms v Harbour City Ferries Pty Limited* (2015) 229 FCR 537 Buchanan J with whom Allsop CJ and Siopis J agreed, observed:

[47] Although administrative tribunals must act within any jurisdictional limits which apply to them, that requirement generally requires a correct appreciation of the task at hand and diligent application to it rather than purity of result, or one where the merits of the result are free from contention or legitimate dispute.

[48] The basic test is stated by *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163 where the High Court said, when contrasting the work of administrative tribunals with that of inferior courts (at 179):

If ... an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal’s exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

[49] Earlier, in *Public Service Association of South Australia v Federated Clerks’ Union of Australia, South Australian Branch* [1991] HCA 33; (1991) 173 CLR 132 (“PSA”) a majority of the High Court (Brennan, Dawson and Gaudron JJ, Deane and McHugh JJ dissenting) held that the Industrial Commission of South Australia acted in excess of its jurisdiction. Brennan J distilled the test for relief as follows (at 142):

Judicial review on the ground of excess or want of jurisdiction is available when a body purportedly acting in exercise of jurisdiction has no jurisdiction to act in the particular way. Judicial review on that ground stands in contrast with judicial review on the ground of a wrongful failure or refusal to exercise jurisdiction. In the former case, there is no jurisdiction to exercise; in the latter, there is jurisdiction but no exercise of it.

and (at 144):

The Full Commission misconceived its jurisdiction and failed to consider the true question which they had to·decide, ... This was a jurisdictional error.

(Footnote omitted.)

[50] Dawson and Gaudron JJ said (at 160):

The issues raised when it is complained that necessary issues have not been decided, and when it is asserted that, had they been decided, the result might have been different, are different from the issue that arises when it is contended that a discretionary decision is wrong. ...

A failure to exercise jurisdiction is a jurisdictional error, although, prima facie, it is not an error involving an excess of or want of jurisdiction ...

and (at 161):

Thus, where a court or tribunal determines some matter or issue which it was not called upon to determine, the determination is one which is beyond its jurisdiction.

1. Later his Honour said:

[58] The High Court observed in *Coal and Allied* (at [32]):

32 In his reasons for decision, Giudice J proceeded on the basis that the Full Bench could intervene only if there was error on the part of Boulton J. In this his Honour was correct. Giudice J held that there was error on the part of Boulton J. If he was wrong in that view (a matter upon which it is unnecessary to express an opinion), that was an error *within* jurisdiction not an error as to the nature of the jurisdiction which the Full Bench was required to exercise under s 45 of the Act. Accordingly, it was not an error in respect of which relief could be granted by way of prohibition or mandamus under s 75(v) of the Constitution.

[59] With respect, that is an important statement and it brings together a number of matters where the High Court was critical of the analysis of the Full Court. The task on judicial review is not simply to assess whether an administrative tribunal was right or wrong in its conclusions, or whether it made errors in its analysis. The task is not to correct perceived errors made within jurisdiction. The task is to examine whether the tribunal misconceived its role or otherwise failed to exercise its jurisdiction so that its decision should not be seen as a true exercise of the power committed to it at all.

1. His Honour subsequently observed:

[86] The present case first required a broad evaluation about whether the termination of the applicant’s employment was “harsh, unjust or unreasonable”. In *Coal and Allied* an evaluation of a similar broad kind was referred to at [20] as a discretionary judgment “in a broad sense”. The decision about a remedy was more classically discretionary, but that point was only reached after a conclusion of unfair dismissal.

1. In considering the matter before it, it is clear that that the Full Bench appreciated the following issues:
* The proceeding was an appeal by way of rehearing, with the powers of the Full Bench being exercisable only if there is error on the part of the primary decision-maker (at [54]-[55]).
* The decision the subject of appeal from the Commissioner concerned alleged unfair dismissal of the applicant by the first respondent.
* A key question for determination was whether the first respondent’s direction to the applicant to undertake a medical examination was lawful. The Full Bench examined the facts, the decision of the Commissioner, the relevant legislation, and relevant case law. The Full Bench concluded that, on proper interpretation of s 39 of the Coal Act, the direction was lawful.
* A key question for determination was whether the first respondent’s direction to the applicant to undertake a medical examination was reasonable. On the facts, the Full Bench concluded that it was reasonable.
* The primary question before the Commissioner, and the Full Bench, was whether there was a valid reason for the dismissal of the applicant. The Full Bench noted the decision of the Commissioner, and findings of the Commissioner, including:
	+ the inference drawn by the Commissioner from the evidence that the applicant had wilfully decided not to attend the medical appointments, and did so in circumstances in which he had been warned of the prospect of disciplinary action should he fail to do so (at [137]);
	+ the finding of the Commissioner that the applicant’s conduct in requiring written questions rather than participating in an interview was a measure designed to disrupt or otherwise delay the first respondent’s processes or otherwise was an unconstructive contribution to an ordinary workplace process (at [143]).
* A key question for determination was whether a workplace investigation interview intended to inquire into an employee’s conduct attracted the application of principles relevant to self-incrimination. The Full Bench concluded that it did not (at [152]).
1. The process adopted by the Full Bench, in this respect, was appropriate. The manner in which the applicant claims that decision of the Full Bench was attended by jurisdictional errors can be summarised as follows:
* There was a defect in the inquiry process on behalf of the Full Bench in this case, namely a failure to accord natural justice or procedural fairness, or failure to take into account a relevant matter. In particular, the Full Bench failed to deal with an argument that it was an infringement of one’s personal liberty to insist any person go to a medical examination, and in failing to do so the Full Bench breached the limits of its appeal power both under the statute and at common law.
* The first respondent never relied upon s 39 of the Coal Act before the termination of Mr Grant, and never relied upon it to assert it gave a lawful or reasonable direction. Before the Full Bench the applicant submitted that an employer cannot retrospectively realise that it relied upon a policy and then, post termination, claim that it really relied on s 39 of the Coal Act. The applicant made this submission to the Full Bench however the Full Bench failed to engage with it.
1. In respect of paragraphs 4 and 5 of his application, the applicant also submits that the decision of Commissioner Spencer was attended by jurisdictional error because:
* The Commissioner found that there was a valid reason for the termination of the applicant (namely, *inter alia*, the lawful and reasonable direction of the first respondent to the applicant), and therefore acted on a wrong principle or asked a wrong question in finding that Mr Gustafson could give a lawful direction to the applicant.
* The first respondent had no right to require or obligate the applicant to participate in the interview process by answering questions given the fundamental common law right, freedom or immunity of privilege against self-incrimination or penalty privilege or both.
1. In my view, neither the decision of the Full Bench nor the decision of the Commissioner were attended by jurisdictional error. I have formed this view for the following reasons.

## Alleged failure of the Full Bench to address applicant’s argument concerning infringement of personal liberty

1. The first respondent concedes that the applicant made a submission to the Full Bench to the effect that s 39(1)(c) of the Coal Act should be read down so as not to interfere with his asserted right not to undergo a medical examination, and concedes further that the Full Bench did not explicitly mention that submission in its decision.
2. In my view, however, this ground of judicial review propounded by the applicant is unmeritorious, as inviting the Court to examine the decision of the Full Bench “minutely and finely with an eye keenly attuned to the perception of error”, contrary to principles explained in *Collector of Customs v Pozzolanic* (1993) 43 FCR 280 at 287 and *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at [30]. It is abundantly clear that, before the Full Bench of the Commission, the key propositions advanced by the applicant were that the applicant had a common law right not to be forced to undertake a medical examination, that this right would only be abrogated by clear Parliamentary intention or other lawful authority, that the applicant’s right had not been abrogated, and that accordingly the first respondent’s direction to the applicant in respect of a medical examination was not lawful. It is equally, and again abundantly, clear that the Full Bench considered, in detail, all of these issues, and formed the view that s 39 authorised the direction by the first respondent to the applicant in this case.
3. While the Full Bench may not have *specifically* addressed in its decision the specific question whether s 39(1)(c) should be read down so as not to interfere with the applicant’s asserted common law right not to undergo a medical examination, the overarching question as to whether the first respondent was entitled to direct the applicant to undergo a medical examination (notwithstanding any general rights of the applicant and the provisions of the Coal Regulation) was addressed, and decided by the Full Bench in its decision. Examples of this analysis can be seen in the decision at [61]-[69], [70]-[72], [74]-[76], [83], [96]-[103]. I note the consideration by the Full Bench (for example at [83]-[88]) of the decision of the Supreme Court of Queensland in *Edwards* where common law rights to refuse a medical examination were examined in detail. I further note the detailed consideration given by the Full Bench to the question of proper statutory interpretation of s 39 and the authority it conferred on the first respondent (for example at [75], [92], [97]-[103]).
4. While the applicant complains that the Full Bench found that s 39 was “couched in broad terms”, “imposes a broad obligation” and creates “an obligation of such broad remit” at [82], [94], [97], and [103], in my view such findings were not only open to the Full Bench, but they answer the applicant’s submission that the Full Bench did not address the applicant’s case that s 39(1)(c) of the Coal Act should be read down. Indeed, in these paragraphs it is clear that the Full Bench rejected the case of the applicant that s 39(1)(c) should be read down.
5. Finally, the applicant refers to [108] of the Full Bench decision, where they say:

It was also pressed on the Full Bench by Counsel for the Appellant that there was no lawful basis on which to direct the Appellant to attend the medical practitioner for a functional assessment. We have referred to this above in passing. Essentially, the Appellant contends that there must be a discernible, positive rule of law supporting Mr Gustafson’s direction and in the absence thereof his direction was unlawful.

1. The applicant submits, in summary, that this paragraph represents an error in the reasoning of the Full Bench, because the applicant made no such submission as to the requirement for a positive rule of law supporting the relevant direction. In my view, however, any error in the language used by the Full Bench in [108] was immaterial. This is because:
* The first sentence of the paragraph was, clearly correct.
* The third sentence, with which the applicant cavils, is expressed in general and summary terms. The Full Bench prefaces the sentence with the qualification “Essentially”, and then sets out in general terms its understanding of the applicant’s case, namely that in the applicant’s submission had a common law right to refuse to attend a medical examination which could only be overcome by specific legislative provision or other lawful (including contractual) authority. This understanding was clearly correct.
1. I consider that the applicant’s criticism of [108] of the Full Bench decision is without merit.

## Alleged subsequent reliance on section 39(1)(c) of the Coal Act

1. The applicant contends that, before the Full Bench, he submitted that the first time Mr Gustafson referred to s 39 of the Coal Act was in the first respondent’s affidavit material filed over five months after the applicant’s termination. In written submissions the applicant also contends:

… the Full Bench referred to but did not engage and address this submission or relevant evidence that s 39 was only raised post-termination. It ignored this relevant material to make an erroneous finding or to reach a mistaken conclusion about s 39 being relief on by the first respondent …

1. The first respondent submits, in summary, that the premise of the applicant’s submission was factually incorrect, because the Commission heard evidence on this issue and found, as a fact, that at the time the applicant was first directed to attend the medical examination, Mr Gustafson identified his obligation under the Coal Act as the justification for that direction.
2. The submission of the first respondent is supported by reference to the decision of Commissioner Spencer. I note in particular the following:

[42] The Applicant advised that he again telephoned Mr Gustafson and asked Mr Gustafson for a written reason as to why he was “stood down” and sent home. This is the first time in the Applicant’s evidence that the phrase “stood down” is utilised. The Applicant recalled that Mr Gustafson referred to his, being Mr Gustafson’s, obligation in ensuring workplace health and safety under the *Coal Mining Safety and Health Act 1999* (Qld) (the Coal Act).

[43] The Applicant’s evidence is that he recited to Mr Gustafson “clause 18 of Schedule B of the Agreement” which only required, for a non-work related injury, a medical clearance from the particular employee’s doctor, prior to returning to work. Mr Gustafson responded by again referring the Applicant to the obligations under the Coal Act. The Applicant pressed his request for “it” in writing. The Applicant’s evidence is that Mr Gustafson did not agree to put it in writing the matters to which he referred. The evidence of the Applicant included a file note of this conversation.

1. Commissioner Spencer subsequently found:

[109] Mr Gustafson was uniquely placed to discharge this obligation. In his position, as the Applicant’s manager, he was obligated to take action to ensure the health and safety of the workers with which the Applicant would work, and the Applicant himself. I find that the direction upon the Applicant was lawful under the Coal Act; specifically s.39(1)(c).

1. Before the Full Bench, the applicant submitted that:

14. The respondent did not mention s 39 of the *CMSH Act* until after the dismissal and no weight in the decision should have been attached to that belatedly and improperly advanced submission …

1. However it appears that the findings of Commissioner Spencer concerning, *inter alia*, the recollection of the applicant that Mr Gustafson had relied on the Coal Act were not challenged at the Full Bench hearing. Further, the Full Bench observed:

[8] The Appellant and the Respondent then entered into communications in which there was a contest as to the authority upon which the Respondent was acting. The Respondent – through Mr Gustafson, the field maintenance superintendent at the mine – said that it was acting under the *Coal Mining Safety and Health Act 1999* (Qld) (“**the CMSH Act**”). The Appellant gave evidence that Mr Gustafson explained to him on 3 April 2013 that the reason for his (Mr Gustafson’s actions) was that:

*I’ve got an obligation under the Coal Mining & Health Act to ensure the safety of our people on the mine. We just have to make sure that we don’t send you out on the mine, particularly after you’ve had such an extensive time off. You may re-injure yourself at work.*

[9] The Appellant sought particularisation of the section under the CMSH Act that Mr Gustafson was acting, and Mr Gustafson replied that it concerned the “obligations of a coal mine operator”. No further particularisation was provided.

[10] The Appellant contended in reply that clause 18 of schedule BMA Enterprise Agreement 2012 (“the agreement”), which relates to a return from work from a non-work related injury, only required the presentation of a medical certificate from an employee’s medical practitioner prior to returning to work in relation to a non-work-related injury. Mr Gustafson was of the view (in response) that his obligations under CMSH Act overrode any term of an enterprise agreement.

1. While the Full Bench did not specifically mention s 39(1)(c) in these passages just quoted, I consider it reasonable, particularly in light of their decision that that section authorised the direction by the first respondent, that Mr Gustafson’s “obligation under the Coal Mining Safety and Health Act 1999 (Qld)” to which Mr Gustafson referred in his communications with the applicant on 3 April 2013 was referable to s 39(1)(c) of the Coal Act.
2. It follows that I do not accept the applicant’s submissions in respect of this issue, and find no jurisdictional error.

## “Wrong question” - fundamental human right

1. Even had Commissioner Spencer (or the Full Bench) erred in forming the view that s 39 of the Coal Act entitled the first respondent to direct the applicant to attend a medical examination, I am not satisfied that such an error would have been a jurisdictional error. I have formed this view in light of the principles explained in *Coal and Allied* and *Toms*. In summary:
* The decision of Commissioner Spencer to refuse relief for alleged unfair dismissal was a discretionary remedy. As I have already noted, it would have been proper for the Full Bench to overturn that decision had it been satisfied of error.
* In relation to the question whether a fundamental human right of the applicant had been abrogated, resolution of that question by Commissioner Spencer at first instance, and subsequently the Full Bench, involved identification of that right, statutory interpretation of the Coal Act and the Coal Regulation, and determination of the legal question whether the first respondent had authority to so direct the applicant. However this was, in my view, an issue within the jurisdiction of the Fair Work Commission. There was no error in the manner in which the Fair Work Commission, either Commissioner Spencer or the Full Bench, approached their respective tasks. Any error in determining whether the direction of the first respondent to the applicant was lawful, as well as reasonable, would have been an error ***within*** jurisdiction.
1. However, even if I am wrong in finding that any such error would have been an error within jurisdiction, I am satisfied that no error was made by either the Commissioner or the Full Bench in finding that the first respondent lawfully directed the applicant to attend the medical assessment with Dr McCartney.
2. The submissions of the applicant in this respect may be summarised as follows:
* It is a fundamental principle of the common law that in the absence of clear statutory, or other lawful, authority or excuse, no person may be requested to submit to a medical examination without his or her consent.
* Parliament is presumed not to enact legislation which interferes with the liberty of the subject without making it clear that this was its intention.
* The existence of the common law or human right in respect of the first respondent’s medical examination directions attracts application of the principle of legality, considered in *Lee v New South Wales Crime Commission* (2013) 251 CLR 196.
* The Coal Act and the Coal Regulation constitute an overall scheme, and were considered in such cases as *Edwards* and *MBR v Parker* [2012] QCA 271.
* The Explanatory Memorandum in relation to s 39(1) of the Coal Act refers to the obligations of on-site persons and off-site persons, and only to on-site for s 39(2).
* Section 39(1)(c) and s 39(2)(d) of the Coal Act do not contain unambiguous words abrogating the common law or human right regarding medical examination directions or orders. In contrast, there are clear words to that effect, directing attention to the abrogation of that right, in the two specific coal mine worker health assessment systems prescribed by the Coal Regulation (in Ch 2 Pt 6 Div 1 (in particular s 42) and Div 2).
* No dispute exists that the first respondent could not lawfully make any medical examination direction or order under either a PPI Policy developed under s 42 of the Coal Regulation or a “Section 4 Health Assessment Report” under s 46 of the Coal Regulation. The first respondent accepts that it could not rely on the mine’s PPI Policy to give the relevant directions to the applicant.

### “Fundamental human right”

1. In support of this contention, the applicant relies on a number of cases including *Fernando v Commissioner of Police* (1995) 36 NSWLR 567; *Starr v National Coal Board* (1977) 1 All ER 243; *Timmins v Yandilla Park Limited* [2000] QSC 281 and *McNamara v Furini* [2008] QSC 24, as well as *Edwards*. It is useful to examine principles emerging from these cases.

### Fernando

1. In *Fernando* the plaintiffs were charged with murder. The police indicated that they wished to take blood samples from them, and they refused to consent to the samples being taken. The plaintiffs sought orders that no police officer should take from either of them without his consent any sample of blood or any other bodily fluid, on the basis that it would be an assault against which they should be protected. The Crown claimed that the taking blood from the plaintiffs would not be unlawful because s 353A of the *Crimes Act 1900* (NSW) applied to the circumstances of the case and gave statutory authority for the taking of blood from the plaintiffs.
2. At 572 Priestly JA noted that, although s 353A had been amended since first enacted, none of the subsequent amendments to the section, enlarged the authorisation made by s 353A(2), which provided:

(2) When a person is in lawful custody upon a charge of committing any crime or offence which is of such a nature and is alleged to have been committed under such circumstances that there are reasonable grounds for believing that an ***examination*** of his person will afford evidence as to the commission of the crime or offence, any legally qualified medical practitioner acting at the request of any officer of police of or above the rank of sergeant, and any person acting in good faith in his aid and under his direction, may make such an examination of the person so in custody as is reasonable in order to ascertain the facts which may afford such evidence

(emphasis added.)

1. His Honour considered that this provision authorised:

… an external examination involving an examination by eye and by touch. The words of subs (2) do not suggest to me an intention to make lawful the taking of some part of the body itself from within the body of the person in lawful custody. None of the subsequent amendments to the section, in my opinion, enlarges the authorisation made by subs (2) when enacted in 1924.

1. His Honour continued:

None of these conditions suggests to me that the statutory authority to commit what in technical terms would be, but for the statutory authority, an assault upon the person in custody, went to the extent of authorising the taking from within the body of the person in custody part of the body, namely blood.

1. Priestly JA referred to comments of the High Court in *Coco v The Queen* (1994) 179 CLR 427 at 438-439, where the majority said:

The insistence of express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights: see *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 12 per Mason CJ.

1. His Honour considered that while there could be no doubt that s 353A made lawful some technically unlawful assaults, it did not express an unmistakable and unambiguous intention to authorise the drawing of blood from the body of a person in custody (at 574). His Honour examined in detail the legislative history of the provision, and concluded that there was nothing to indicate that the “examination” referred to in the provision could extend to anything beyond examination by sight and touch.
2. His Honour later observed at 583:

A further matter is the strong way in which the High Court in *Coco v The Queen* stated the approach that courts should take to the construction of legislation which arguably abrogates or curtails “a fundamental right, freedom or immunity”. Although there is much room for argument about the precise content of such terms as fundamental rights and freedoms in the versions of common law presently on foot in the various jurisdictions in Australia, it was not contended in this case that the unlawfulness of an unauthorised assault upon a person in custody should not be regarded as meaning that the person in custody had a right not to be assaulted and a freedom from assault falling within the concepts of fundamental rights and freedoms as those terms were used by the High Court in *Coco v The Queen*.

1. Powell JA expressed the position strongly, observing at 591:

… in the absence of clear statutory, or other lawful, authority, or excuse, no person – whether a prisoner or other detainee, or not – may be required to submit to a medical examination, and still less to undergo any form of medical treatment or to be detained in a hospital for the purposes of any form of medical treatment, without his consent (see, eg, *R v Hallstrom: Ex parte W* [1986] 1 QB 1090 at 1104), the corollary of which is, of course, that, in the absence of such authority, or of some excuse recognised by the law, any attempt to carry out such a medical examination, or medical treatment, without the consent of the subject person, constitutes a trespass to the person …

1. Accordingly, in finding that legislation did not authorise the drawing of blood from within the body of a person in lawful custody without that person’s consent, but rather merely permitted an external examination involving an examination by eye and by touch, the Court of Appeal of New South Wales by majority allowed the appeal.

### Starr

1. In *Starr v National Coal Board* the plaintiff brought an action against his employers for damages for personal injuries, including ulnar nerve compression, which he claimed to suffer as a result of his employment. A specialist doctor examined the plaintiff on behalf of the defendants but found it impossible to make an exact judgment concerning whether the plaintiff had suffered nerve damage, and, if he had, the cause of damage. As a result of this conclusion of the specialist, the defendants wanted to obtain the opinion of a neurologist, and nominated a particular neurologist to examine the plaintiff. The plaintiff was unwilling to be examined by the particular neurologist because he alleged that the neurologist was a hostile examiner of plaintiffs. The defendants applied for an order staying all proceedings in the action until the plaintiff was examined by the nominated neurologist.
2. The English Court of Appeal affirmed the decision at first instance staying the proceedings. After examining relevant case law Scarman LJ said at 249:

So what is the principle of the matter to be gleaned from those cases? In my judgment the court can order a stay if, in the words of Lord Denning MR in *Edmeade’s* case, the conduct of the plaintiff in refusing a reasonable request for medical examination is such as to prevent the just determination of the cause. I think that those words contain the principle of the matter …

In the exercise of the discretion in this class of case, where a plaintiff has refused a medical examination, I think the court has to recognise … that in the balance there are, amongst many other factors, two fundamental rights which are cherished by the common law and to which attention has to be directed by the court. First … there is the plaintiff’s right to personal liberty. But on the other side there is an equally fundamental right - the defendant’s right to defend himself in the litigation as he and his advisers think fit; and this is a right which includes the freedom to choose the witnesses that he will call. It is particularly important that a defendant should be able to choose his own expert witnesses, if the case be one in which expert testimony is significant.

1. The judge considered principles relevant to stay and continued at 250:

First, one has to look to the defendant’s request and ask oneself the question: is it a reasonable request? The defendant is not to be regarded as making an unreasonable request merely because he wishes to have the plaintiff examined by a doctor unacceptable to the plaintiff. The decisive factor, therefore, becomes … That of the interests of justice; of the just determination of the particular case.

1. His Lordship concluded that:
* The defendant’s request for the examination of the plaintiff by its nominated doctor was a reasonable request, in light of the facts that the doctor was a distinguished consultant neurologist, and the opinion of a consultant neurologist was needed in order that the defendants might properly prepare their case; and
* In determining whether the plaintiff’s refusal to be examined by the nominated doctor was reasonable, the test must be related to the necessity of ensuring a just determination of the cause. In this case, there was nothing before the Court to undermine the confidence in the impartiality of the neurologist nominated by the defendants.
1. Geoffrey Lane and Cairns LJJ agreed.

### Timmins

1. In *Timmins* the plaintiff had applied for workers compensation in respect of a condition he allegedly developed while working for the defendant. The plaintiff obtained a medical report from an orthopaedic surgeon, Dr Khursandi. The defendant sought an order that he be required to attend on another orthopaedic surgeon, Dr Morgan, for examination, on the basis that previous examinations by other doctors were some time ago, and no examination had been conducted for the purpose of common law proceedings subsequently instituted by the plaintiff.
2. Mackenzie J examined *Starr* in detail, and concluded that it was not unreasonable or unnecessarily repetitious for an orthopaedic examination of the plaintiff to be made by a medical practitioner nominated by the defendant (at [30]).

### McNamara

1. In *McNamara* the plaintiff sought damages for personal injuries said to have been sustained by her as a result of the negligent driving of the first respondent. The second respondent, the insurer of the first respondent, sought an order that the plaintiff be examined on their behalf by a psychiatrist and occupational therapist. The insurer relied on s 46A of the *Motor Vehicle Insurance Act 1994* (Qld) which provides that a claimant must comply with a request by the insurer to undergo relevant medical examinations unless the examination is unreasonable or unnecessarily repetitious. McMeekin J referred to comments of Cullinane J in *Jackson v State of Queensland* [2005] QSC 161 in respect of proceedings under the *Personal Injuries Proceedings Act 2002* (Qld), namely:

[28] As was pointed out by Lord Scarman in Starr v National Coal [1977] 1 All ER 243 at page 249, two important rights come into conflict in a case of this kind and have to be adjusted. For the purposes of the *Personal Injuries Proceedings Act 2002* (Qld), s 25 (2) and (3) … provide the principles upon which that adjustment is made.

[29] The defendant has the statutory right to obtain the necessary and relevant information to defend claims made against it and to enable it to enter into negotiations for the purposes of compromising such claims. An important public interest is served by the obtaining of such medical reports, namely the resolution of claims or the defence upon a fully informed basis.

[30] On the other hand the right of the plaintiff not to be required to submit to a medical or similar examination against her must weigh significantly.

1. In the circumstances of the case, his Honour concluded that the examinations sought would be repetitive and unnecessary, and dismissed the insurer’s application.
2. In challenging the decision of the Full Bench the applicant relies heavily on the decision of the Supreme Court of Queensland in *Edwards*.

### Edwards

1. In *Edwards* the application before the Supreme Court of Queensland concerned the question whether the respondent employer could compel its employee Mr Edwards to undergo a particular medical examination under the Coal Regulation or the common law. In summary, Mr Edwards was employed as a coal mine worker, but not employed to carry out a low risk task as defined by s 44 of the Coal Regulation. Mr Edwards attended health assessments under the Regulation every five years. The results of the last assessment included a comment in the report of the examining medical officer to the effect that Mr Edwards had a particular medical condition which required exercise stress test and blood tests to determine the control and stability of his medical condition prior to a determination of his fitness for his position. The mine manager was provided with a copy of the report, and instructed Mr Edwards not to commence work, but rather to make arrangements to undertake the tests listed on the report. Mr Edwards refused to undertake the further tests. Both parties sought relief in the proceedings. Mr Edwards sought the following declarations:

1. A declaration that on the proper construction of Part 6 of the Regulation, an NMA ***[nominated medical adviser]*** appointed to s45 of the Regulation, can only carry out or supervise a medical examination to ascertain the applicant’s fitness for work, where such medical examination is conducted as a health assessment for the purposes of Subdivision 3 of that Part.

2. A declaration that the respondent can only direct the applicant, at any time, to attend an examination by a medical practitioner for the purpose of ascertaining the applicant’s fitness for duty, in accordance with Part 6, Division 2 of the Regulation.

3. A declaration that on the proper construction of s 46 of the Regulation, a health assessment carried out by or under the supervision of an NMA can only be lawfully carried out:

a) on the terms specified in s 46 (2) of the Regulation; and

b) without consideration to any other medical or other reports.

4. A declaration that on the proper construction of Part 6 of the Regulation, a doctor other than an NMA, can only carry out the medical examinations of coal mine workers, where such medical examinations are conducted as a health assessment in accordance with Sub-division 3 of that Part

1. In turn, the respondent employer sought the following declarations:

1. A declaration that the requirement for the tests referred to in the section 4 report was a requirement which could be made by an NMA under the Regulation.

2. A declaration that North Goonyella could direct Mr Edwards to attend an examination for the purpose of undertaking the tests referred to in the health assessment report.

1. Atkinson J examined the legislative scheme created by the Coal Act and the Coal Regulation. Her Honour observed:

[11] The *Coal Mining Safety and Health Act 1999* (the “Act”) was passed by the Queensland parliament in 1999. The relevant provisions commenced operation on 16 March 2001. It applies, as its name suggests, to all coal mines and coal mining operations in Queensland (s 4). The objects of the Act are to protect the safety and health of persons at coal mines and persons who may be affected by coal mining operations and to require that the risk of injury or illness to any person resulting from coal mining operations be at an unacceptable level.

1. Her Honour observed at [12] that the Coal Act focused on the standards of safety and health which must be met, allowed the mine operator to use the most appropriate methods and technology to achieve those standards, and was intended to provide a modern legislative framework for the safety and health of those involved in the coal industry. Her Honour noted s 7 of the Coal Act which set out the manner in which these objects was to be achieved in the following terms:

The objects of this Act are to be achieved by—

(a) imposing safety and health obligations on persons who operate coal mines or who may affect the safety or health of others at coal mines; and

(b) providing for safety and health management systems at coal mines to manage risk effectively; and

(c) making regulations and recognised standards for the coal mining industry to require and promote risk management and control; and

(d) establishing a safety and health advisory council to allow the coal mining industry to participate in developing strategies for improving safety and health; and

(e) providing for health and safety representatives to represent the safety and health interests of coal mine workers; and

(f) providing for inspectors and other officers to monitor the effectiveness of risk management and control at coal mines, and to take appropriate action to ensure adequate risk management; and

(g) providing a way for the competencies of persons at coal mines to be assessed and recognised; and

(h) requiring management structures so that persons may competently supervise the safe operation of coal mines; and

(i) providing for an appropriate coal mines rescue capability; and

(j) providing for a satisfactory level of preparedness for emergencies at coal mines; and

(k) providing for the health assessment of coal mine workers.

1. Her Honour examined s 29 of the Coal Act, which provided that for risk from coal mining operations to be at an acceptable level the operations must be carried out so that the level of risk was within acceptable limits and as low as reasonably achievable, and s 30 which set out how the objective of an acceptable level of risk was achieved. In particular, s 30 provided that to achieve an acceptable level of risk, the Coal Act required that management and operating systems be put in place for each coal mine (s 30(1)). In particular, s 30(3) provided:

Also, the way an acceptable level of risk of injury or illness may be achieved may be prescribed under a regulation.

1. Her Honour then examined the Coal Regulation, in particular s 10 and s 42. Her Honour noted that s 42(c) of the Coal Regulation required the senior site executive at a coal mine to develop and implement a safety and health management system for the relevant mine, and imposed corresponding obligations on the coal mine operator pursuant to s 41(1) of the Coal Act. In particular, s 41 of the Coal Act provided:

**41 Obligations of coal mine operators**

(1) A coal mine operator for a coal mine has the following obligations—

(a) to ensure the risk to coal mine workers while at the operator’s mine is at an acceptable level, including, for example, by providing and maintaining a place of work and plant in a safe state;

(b) to ensure the operator’s own safety and health and the safety and health of others is not affected by the way the operator conducts coal mining operations;

(c) not to carry out an activity at the coal mine that creates a risk to a person on an adjacent or overlapping petroleum authority if the risk is higher than an acceptable level of risk under the *Petroleum and Gas (Production and Safety) Act 2004*;

(d) to appoint a site senior executive for the mine;

(e) to ensure the site senior executive for the mine—

(i) develops and implements a safety and health management system for the mine; and

(ii) develops, implements and maintains a management structure for the mine that helps ensure the safety and health of persons at the mine;

(f) to audit and review the effectiveness and implementation of the safety and health management system to ensure the risk to persons from coal mining operations is at an acceptable level;

(g) to provide adequate resources to ensure the effectiveness and implementation of the safety and health management system.

(2) Without limiting subsection (1), the coal mine operator has an obligation not to operate the coal mine without a safety and health management system for the mine.

(3) In this section—

adjacent or overlapping petroleum authority means any of the following under an Act as follows if, under that Act, its area is adjacent to, or overlaps with, the land the subject of the mining tenure under which the coal mine is operated—

(a) a 1923 Act petroleum tenure under the Petroleum Act 1923;

(b) a petroleum tenure under the *Petroleum and Gas (Production and Safety) Act 2004*.

1. Her Honour observed at [20] that if fitness provisions developed by the senior site executive in consultation with the mine workers provided for the assessment of workers with physical or psychological impairment, s 42(7) of the Coal Regulation provided that the senior site executive must establish the criteria for the assessment in agreement with a majority of workers at the mine. In the case before her Honour, such agreement had not been reached. Section 46 of the Coal Regulation provided for health assessments to be carried out for employees of coal mines by nominated medical advisers.
2. At [33] her Honour said:

The employer does have the power to provide for assessments for physical or psychological impairment in fitness provisions developed under s 42(6). However North Goonyella has not developed any relevant fitness provisions. If it had, there may have been the power to make the direction it did. Absent that, there is no power found in the Regulation for the employer to require a coal mine worker to undergo further medical tests.

1. Her Honour then turned to the question whether the respondent employer retained a power which survived the detailed provisions of the Coal Act and the Coal Regulation to require its employee to attend a medical examination. Her Honour said:

[36] … The duty to take reasonable precautions for the worker’s safety will not necessarily be accompanied by a power to require an employee to attend a medical examination. Such a power must, if it exists, be a term of the contract. There is no such express term in the contract of employment.

1. Her Honour considered that no such implied term existed, and observed:

[37] … The employer has the statutory rights set out in detail in Division 2 of Part 6 of the Regulation. In addition it has the right to develop protocols for the assessment of workers for physical or psychological impairment under s 42 in Division 1 of Part 6 of the Regulation. It is unnecessary in those circumstances to imply any further terms into the contract giving a general right to the employer to require the employee to undertake further medical tests. The Act and Regulation set out a comprehensive regime for those matters.

### Direction to the applicant to be examined by Dr McCartney

1. Examining these authorities, the following is clear:
* As a general proposition a person is not obliged to submit to a medical examination without his or her consent (*Fernando*, *Hallstrom*, *Furesh*). A forced examination of a person without the consent of the person is assault.
* Legislation can require a person to submit to a medical examination without his or her consent, however such legislation must be clear and unambiguous (*Fernando*, *McNamara*).
* A contractual right can be given to an employer to direct or order an employee to attend a medical examination (*Fernando*).
* Courts have power to protect the integrity of their own processes, and safeguard the administration of justice. In this respect, the Courts can make orders such as staying proceedings if a plaintiff refuses to undergo a medical examination (*Starr*). However this does not equate to a positive power in the Court to order a person to undergo a medical examination against their will.
1. It is common ground that the first respondent could not lawfully make any medical examination direction or order under either a physical or psychological impairment (PPI) protocol established under the mine’s safety and health management system and authorised under s 42 of the Coal Regulation. Further, unlike a number of authorities to which my attention was directed, this is not a case where one party is seeking an order for the medical examination of another party in the course of instituted legal proceedings, where a question for the Court is whether such an order is necessary to advance the administration of justice by the Court. Clearly, this is a case where the actual question for determination is the legitimacy of a direction by the employer to an employee that the employee submit to such a medical examination.
2. The applicant claims to be seized of a fundamental right to refuse to undergo a medical examination against his will. As a general proposition, I accept that he is so seized. Further, there is no express or implied contractual right in the first respondent to direct him to attend a medical examination by Dr McCartney.
3. The first respondent strongly argues that the statutory regime – specifically, the provisions of s 39(1)(c) and s 39(2)(d) of the Coal Act – permits the first respondent to insist on the applicant being examined by a medical practitioner nominated by it, such that if the applicant refused the first respondent was entitled to dismiss him. The first respondent’s rationale for this contention was that s 39(1)(c) established a duty or an implied grant of power in the first respondent to ensure that workers were not exposed to unacceptable levels of risk, and effect a course of action in order to discharge the relevant statutory duty. In this case, this led the first respondent to require the applicant to undergo a functional assessment before recommencing duties within the coal mine.
4. As the authorities demonstrate, such a right could only be conferred on the first respondent by clear and unambiguous legislative enactment. As is clear from *Edwards*, the Supreme Court of Queensland found that a statutory regime referable to coal miners in Queensland existed whereby protocols could be put in place to allow an employer to require an employee to undergo a medical examination. Her Honour in *Edwards* clearly considered however that the statutory regime giving rise to such authority in the employer was constituted by the Coal Act and the Coal Regulation read together, and that primary reference should be had to the provisions of the Coal Regulation and in particular to s 42 and s 46 of the Coal Regulation which empowers employers to provide for assessments for physical or psychological impairment in fitness provisions developed under that section.
5. The language of s 39(1)(c) of the Coal Act does not unambiguously entitle an employer to force an employee to undergo a medical examination against his or her will. Equally, however, in my view s 39(1)(c) entitles an employer to direct an employee to undergo a medical examination before allowing him to work, in circumstances where there are health or other concerns in respect of the employee which could result in that employee – or anyone else – being exposed to an unacceptable level of risk.
6. The Explanatory Notes accompanying the *Coal Mining Safety and Health Bill 1999* (Qld) make reference to s 4 of the *Legislative Standards Act 1992* (Qld). Section 4 provides:

**Meaning of fundamental legislative principles**

1. For the purposes of this Act, fundamental legislative principles are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.

*Note*—

*Under section 7, a function of the Office of the Queensland Parliamentary Counsel is to advise on the application of fundamental legislative principles to proposed legislation.*

(2) The principles include requiring that legislation has sufficient regard to—

(a) **rights and liberties of individuals**; and

(b) the institution of Parliament.

(3) …

1. Materially, the Explanatory Notes provide:

The Bill has been drafted with due regard to the fundamental legislative principles as outlined in section 4 of the *Legislative Standards Act 1992*. However, in the hazardous industries that the legislation is intended to control, persons may endanger the safety and health of large groups of other people by failing to meet safety obligations.

It is necessary to strike a balance between the rights of persons not to be endangered by the actions of others and the rights of the individual. In this case there has to be some compromise on FLPs to ensure safety of others.

1. The Explanatory Notes emphasise the powers of Inspectors under the legislation, the duty of care obligations of employers and employees, and penalties imposed for legislative breaches.
2. The extensive provisions of the Coal Regulation, in particular s 42 and s 46 requiring the development of protocols by the employer concerning assessments of employees for physical or psychological impairment, indicate that the statutory regime contemplates that such protocols be developed by the employer to deal with, *inter alia*, medical examination of employees to ascertain their fitness for work. However, I am not persuaded, in the context of an employer satisfying its obligations to ensure the safety and health of persons at the coal mine under the Coal Act, that Parliament intended that conduct of the employer by way of a direction to an employee who has been on sick leave for several months to undertake a medical examination as a prerequisite to returning to work could only be pursuant to Pt 6 of the Coal Regulation. This is because:
* Such a proposition is inconsistent with general principles of statutory interpretation. Section 39 of the Coal Act is expressed in wide-ranging terms, referable to ensuring persons are not exposed to an unacceptable level of risk. As a general proposition a statutory provision is not to be construed by reference to regulations made pursuant to the primary statute: *Plaintiff M47-2012 v Director-General of Security* (2012) 251 CLR 1 at [56]; *Hunter Resources Ltd v Melville* (1988) 164 CLR 234 at 244; Pearce DC and Geddes RS, *Statutory Interpretation in Australia* (8th ed, LexisNexis Butterworths, 2014) at [3.41].
* Part 6 of the Coal Regulation appears to make provision for a general safety and health management system to control and address risks associated with persons at the mine being affected by alcohol, fatigue, “other physical or psychological impairment” (including from stress or illness), or drugs. Section 39(1)(c) of the Coal Act is expressed in broad terms – as the Full Bench observed at [94], it is applicable to a “broad cohort”. It would be an inflexible approach, and indeed contrary to common sense, to find that the statutory regime permits no steps to be taken to ensure health and safety of persons in a potentially dangerous mining environment otherwise than in accordance with any system developed pursuant to the Coal Regulation.
* A restrictive approach to s 39 of the Coal Act is inconsistent with the Explanatory Notes, which emphasise the importance of general health and safety of persons at mines, potentially at the expense of some reduction of personal liberty.
* Section 39(1)(c) contemplates a general authority to undertake reasonable and necessary action in addition to any powers under a safety and health management system for the mine recognised by s 39(1)(a) and developed under the Regulation.
1. In conclusion, I am satisfied that no error was made by either Commissioner Spencer or the Full Bench in finding that the first respondent’s direction to the applicant was lawful.

## Self-incrimination

1. I noted earlier the claim of the applicant that the decision of the Fair Work Commission was affected by jurisdictional error, in failing to accept that the first respondent had no right to require or obligate the applicant to participate in the interview process by answering questions, given the fundamental common law right, freedom or immunity of privilege against self-incrimination or penalty privilege or both.
2. The applicant submitted, in summary, that:
* The applicant’s privilege against self-incrimination was enlivened as the first respondent relies on the safety and health obligations for a coal mine worker at coal mines and if those obligations are not discharged the applicant was exposed to maximum penalties including fines or imprisonment.
* That privilege could not be abrogated or curtailed by clauses 3.7(d) and 4.5 of the Enterprise Agreement.
* Dismissal from his position was a penalty of the most serious kind.
1. Commissioner Spencer considered the refusal of the applicant to answer questions otherwise than in writing, as follows:

*Refusal to cooperate and participate in investigation process*

[126] Further, on the evidence, the Applicant unreasonably refused to cooperate and participate in the investigation process, whereby he refused to respond to questions from the Respondent, unless the questions were first committed to writing by the Respondent.

[127] The very nature of these meetings is to ascertain the matters between the parties and to explore the facts or issues in contention. Given that the issues at hand were relatively straightforward, the Applicant’s request for every question to be put in writing and for him to respond to that was improper, in terms of the employment relationship.

[128] The practice sought by the Applicant, in having all questions in writing, was inconsistent with an investigation interview. As an interview of this type proceeds, it is regular that issues arise, from both sides, that require further or different questions. The Responses given by a person may give rise to additional questions or considerations than was otherwise anticipated. To require all questions to be put in writing would unreasonably restrict the purpose of the process. The Applicant was to be supported by the Union at the interview. This stance by the Applicant, gave further insight into the Applicant’s approach to the employment relationship. This has been considered together with the Applicant’s refusal to attend the medical assessment, and his endeavours to tape the conversations.

[129] The Commission is satisfied that this refusal to participate in the investigation process formed part of the valid reason for the dismissal.

1. The Full Bench dealt with this issue as follows:

**Conduct in interview etc**

[143] Similarly, the Appellant’s conduct in requiring written questions rather than participating in an interview was a measure viewed by the Commissioner (as we imply from her decision) to disrupt or otherwise delay the Respondent’s processes or otherwise was an unconstructive contribution to an ordinary workplace process. The Commissioner found that this “formed part of the valid reason for the dismissal”.

[144] It was argued on appeal that the Appellant was not obliged to obey an order which required him to incriminate himself, and otherwise that the Appellant had a penalty privilege.

[145] We were taken in this regard to the case of *Hartmann v Commissioner of Police* (“*Re Hartmann*”) where it was said:

*The protection against self-incrimination is intended to protect against any type of punishment or penalty [...] It follows that the privilege against self incrimination exists to protect against the penalty of dismissal from employment, and its financial consequences.*

[146] We note firstly that no issue of the Appellant exercising a penalty privilege was before the Commissioner and the issue was not raised in the proceedings before her, which we note were fully argued by competent counsel. No reason was put to us as to why we should consider new arguments of this kind on appeal.

[147] Notwithstanding this, we think that the case in *Re Hartmann* is distinguishable from the circumstances before us. The central issue in *Re Hartmann* arose in circumstances in which a person gave evidence that the Royal Commission into the New South Wales Police Service, and his evidence incriminated him and was given unwillingly and under objection. A question arose subsequently whether by s.17(2) of the *Royal Commissions Act 1923* (NSW) witnesses are protected from the evidence being used against them in circumstances in which the evidence in the Commission proceedings was admitted into evidence in proceedings before the Government and Related Employees Appeal Tribunal (for the purposes of a police disciplinary hearing).

[148] Furthermore, the case in Re Hartmann dealt with a penalty of dismissal arising from statutory police disciplinary regime; T*he Police Services Act 1990* (NSW) (“the PS Act”). The PS Act included s.179 which states as follows:

*179. (1) if a departmental charge or criminal charge against a police officer is duly proved, the Commissioner may take such action against the police officer as the Commissioner considers appropriate.*

[149] Section 179(2) of the PS Act goes onto specify the types of actions the Commissioner may take against a police officer, and these include, at s.179(2)(c) of the PS Act, the imposition of “a fine”. Section 179(3) of the PS Act sets out that “any fine imposed by the Commissioner under this Section may be recovered in a court of competent jurisdiction of the deck to the Crown or deducted from the pay of the police officer in accordance with the regulations.”

[150] On both counts as set out above, the decision in *Re Hartmann* concerns significantly dissimilar provisions to those which are before us, and on which this matter turns.

[151] We do not think the case in *Re Hartmann* assists in the circumstances before us in which an employee is required to assist in a workplace investigation.

[152] We do not construe a workplace investigation interview intended to inquire into an employee’s conduct as attracting the application of such principles as asserted. This is particularly so when the single query put to the employee (which in effect was to explain his reason for not attending the medical appointments as directed) was material to the employment relationship.

[153] The Commissioner also considered that the Appellant’s conduct in seeking to gain entry to the mine, when he had been directed to obtain a medical clearance before resuming his duties, also reflected adversely on the Appellant’s approach to his relationship with his employer.

[154] In all, the Commissioner considered a range of evidentiary issues, weighed those matters as a whole in so far as they reflected on and informed the Appellant’s conduct, and concluded that there was a valid reason for the dismissal. The matters may have had variable weight in her judgment, and we take the Commissioner’s conclusion at paragraph 129 to reflect that:

*The Commission is satisfied that this refusal to participate in the investigation process formed part of the valid reason for the dismissal.*

[155] We do not seek to displace the Commissioner’s reasoning as based on the evidence that was before her. The findings were open to her, and she apportioned relative weight to the matters under consideration. We detect no error in the Commissioner’s approach in this regard.

(footnotes omitted.)

1. As I have already noted, the decisions of the Commissioner, affirmed by the Full Bench, to find that the termination of the applicant was not harsh, unjust or unreasonable, and to dismiss the applicant’s application made pursuant to s 394 of the Fair Work Act, were discretionary in nature. The conclusion of the Commissioner that the refusal of the applicant to answer questions was a valid reason for dismissal was within the jurisdiction of the Commissioner. I take the same view in respect of the decision of the Full Bench to affirm the Commissioner’s decision.
2. In any event, I consider that the Full Bench accurately set out legal principles including in respect of such cases as *Hartmann*. I do not accept that the privilege against self-incrimination was capable of being enlivened in the workplace investigation the subject of these proceedings. As the first respondent has correctly submitted, the requirement that the applicant cooperate in the investigation, including answering questions, was not unlawful. There was no exposure to a civil penalty in the circumstances of the investigation.
3. I consider that this aspect of the claim has no merit.

## Conclusion

1. For the reasons I have given I am satisfied that the relief sought by the applicant in paragraphs 2, 3, 4 and 5 of his amended originating application should be refused.

# DECLARATORY RELIEF

1. I am prepared to grant the applicant leave to amend his amended originating application by the addition of paragraph 1(aa) as set out earlier in this judgment, and as sought at the hearing. Reasons for this are that I am satisfied that:
* ground 1(aa) raises nothing which has not been raised in respect of the decision of the Fair Work Commission; and
* I am satisfied that the first respondent was in a position to deal with this aspect of the claim.
1. However as I have made clear, I consider that the decisions of the Fair Work Commission (both at first instance and in the Full Bench) were not only within jurisdiction, but in accordance with legal principle. In these circumstances, I am not prepared to make the declarations sought by the applicant in paragraph 1(a), (aa), (b) and (c) of his amended originating application.

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| I certify that the preceding one hundred and forty-seven (147) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Collier. |

Associate:

Dated: 3 December 2015