FEDERAL COURT OF AUSTRALIA

 Construction Forestry, Maritime, Mining and Energy Union v BM Alliance Coal Operations Pty Ltd [2023] FCA 30

|  |  |
| --- | --- |
| File number(s): | QUD 155 of 2020 |
|  |  |
| Judgment of: | **COLLIER J** |
|  |  |
| Date of judgment: | 30 January 2023 |
|  |  |
| Catchwords: |  **INDUSTRIAL LAW** – s 340 *Fair Work Act 2009* (Cth) – whether adverse action taken against employee of independent contractor for exercising a workplace right – whether employee exercised workplace right – ‘workplace law’ – ‘workplace right’ – s 12 Fair Work Act- whether Standard Operating Procedure a ‘workplace instrument’ - *Coal Mining Safety and Health Act 1999* (Qld) - *Coal Mining Safety and Health Regulations 2017* (Qld) – whether adverse action taken for a prohibited reason – application granted  |
|  |  |
| Legislation: | *Coal Mining Safety and Health Act 1999* (Qld)*Fair Work Act 2009* (Cth)*Coal Mining Safety and Health Regulations 2017* (Qld) |
|  |  |
| Cases cited: | *ALAEA v Sunstate Airlines (Qld) Pty Ltd* (2012) FCR 306*Barnett v Territory Insurance Office* (2011) 196 FCR 166 at [31]-[32]*Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 |
|  |  |
| Division: | Fair Work Division |
|  |  |
| Registry: | Queensland |
|  |  |
| National Practice Area: | Employment and Industrial Relations |
|  |  |
| Number of paragraphs: | 197 |
|  |  |
| Date of hearing: | 17 – 19 March 2021 and 24 August 2021  |
|  |  |
| Counsel for the Applicant: | Mr C Massy  |
|  |  |
| Solicitor for the Applicant: | Hall Payne Lawyers  |
|  |  |
| Counsel for the Respondent: | Mr D Mahendra  |
|  |  |
| Solicitor for the Respondent: | Herbert Smith Freehills  |

ORDERS

|  |  |
| --- | --- |
|  | QUD 155 of 2020 |
|   |
| BETWEEN: | CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNIONApplicant |
| AND: | BM ALLIANCE COAL OPERATIONS PTY LTDRespondent |

|  |  |
| --- | --- |
| order made by: | COLLIER J |
| DATE OF ORDER: |  30 January 2023 |

THE COURT DECLARES THAT:

1. BM Alliance Coal Operations Pty Ltd (**respondent**) contravened s. 340 of the *Fair Work Act 2009* (Cth) (**FW Act**) by taking adverse action within the meaning of Item 3(d) in the table in s. 342 of the FW Act against Mr Daryl Meikle, an employee of WorkPac Pty Ltd (**WorkPac**), by refusing to make use of services offered by WorkPac as an independent contractor to the respondent, in that the respondent excluded Mr Meikle from the Daunia Mine on or about 16 January 2020 because he had exercised workplace rights on 7, 8 and 9 December 2019.

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

REASONS FOR JUDGMENT

COLLIER J:

# INTRODUCTION

1 By originating application filed 26 May 2020 the applicant (**CFMMEU**) claimed that the first respondent, WorkPac Pty Ltd (**WorkPac**), and second respondent, BM Alliance Coal Operators Pty Ltd (**BMA**) contravened s 340 of the *Fair Work Act 2009* (Cth) (**FW Act**).

2 On 11 March 2021 the applicant filed a notice of discontinuance against WorkPac, by consent. What remains of the relief sought in the originating application is as follows:

4. A declaration that the Second Respondent contravened s. 340 of the FW Act by taking adverse action within the meaning in Item 3(d) in the table in s. 342 of the Act against Mr Meikle, an employee of the First Respondent, by refusing to make use of services offered by the First Respondent as an independent contractor to the Second Respondent, in that the Second Respondent excluded Mr Meikle from the Mine on or about 16 January 2020 because he had exercised workplace rights on 7, 8 and 9 December 2019.

5. Further or in the alternative, a declaration that by reason of s. 362 of the Act the Second Respondent contravened s. 340 of the Act on 16 January 2020 in that, because Mr Meikle had exercised workplace rights on 7, 8 and 9 December 2019, the Second Respondent advised, encouraged or incited the First Respondent to dismiss and/or exclude its employee, Mr Meikle, from the Mine thereby injuring him in his employment, altering his position to his prejudice and/or discriminating between him and other employees of the First Respondent at the Mine.

…

7. An order pursuant to s. 545 of the Act that the Second Respondent pay Mr Meikle compensation for loss and damage he suffered as result of the Second Respondent’s unlawful conduct.

…

9. An order pursuant to s. 546 of the Act that the Second Respondent pay pecuniary penalties in respect of its contraventions of the Act.

10. An order pursuant to s. 546(3) of the Act that any such penalties be paid to the Applicant.

11. Such further or other orders as the Court considers appropriate.

# BACKGROUND

3 In the circumstances, given that the proceedings against WorkPac have been discontinued by the applicant, it is convenient to simply refer to BMA as “the respondent”.

4 The relevant background facts are set out below:

 At all material times the respondent operated the Daunia Coal Mine (the **Mine**) located near Moranbah in Queensland;

 WorkPac operated a labour hire business which supplied suitably qualified personnel to BMA for work at the Mine;

 From about 23 October 2017, Mr Daryl Meikle was employed by WorkPac as a Mobile Plant Operator on a casual basis. From 5 June 2019 until 16 January 2020, WorkPac deployed Mr Meikle to work exclusively at the Mine;

 Mr Meikle’s duties at the Mine were regulated by, inter alia:

(1) Daunia Traffic Management Plan (**Traffic Management Plan**);

(2) Daunia Specification Traffic Rules (**Traffic Rules**);

(3) Standard Operating Procedure Isolation and Tagging (**Isolation and Tagging SOP**); and

(4) Standard Operating Procedure Workplace Inspections (**Workplace Inspections SOP**).

 On 27 November 2018 the Chief Inspector of Coal Mines issued a recommendation concerning the management of risks arising out of lightning events;

 The DNM Severe Weather Procedure governed the response of workers and management to severe weather events including lightning at the Mine;

 On 6 December 2019 there was severe adverse weather at the Mine including a close lightning strike **lightning event** or **adverse weather event**). Mine operations did not cease throughout the lightning event;

 On 7 December 2019 Mr Meikle was rostered to work a night shift which commenced at 6.00pm and concluded on the morning of 8 December 2019;

 During this shift Mr Meikle and other workers attended a pre-start meeting as was the Mine’s practice (**7 December pre-start meeting**);

 At the 7 December pre-start meeting:

* + the lightning event was discussed;
	+ Mr Meikle complained, amongst other related issues, about the failure to cease work during the lightning event, stating that it endangered workers’ health and safety;

 On the morning of 8 December 2019 at approximately 3.15am Mr Meikle was directed to speak with his supervisor, Mr James Cameron;

 Shortly thereafter at around 3.25am Mr Meikle spoke with Mr Cameron who directed him to meet with Ms Angela Dow, Open Cut Examiner;

 Later that morning Mr Meikle attended Ms Dow’s office. The details of that meeting are in dispute, however it is common ground that the 7 December pre-start meeting was discussed (**8 December Dow meeting**);

 On the evening of 8 December 2019 Mr Meikle was again rostered on to work a night shift, which commenced at 6.00pm and concluded on the morning of 9 December 2019;

 Shortly after the shift had commenced, at approximately 6.15pm, Mr Meikle placed an “information” tag on a truck he was allocated to drive during his shift, as he had noticed an oil leak coming from the truck;

 Mr Meikle alerted Mr Cameron, who then advised Mr Meikle to place an “out of service” tag on the truck, as the “information tag” was the incorrect tag. Mr Meikle placed the out of service tag on the stairs of the truck. It is common ground that the out of service tag was not placed in accordance with the Isolation and Tagging SOP;

 Given that Mr Meikle could not drive the truck, Mr Lance Newman, another supervisor at the Mine, drove Mr Meikle to another location to find another truck which Mr Meikle could operate during his shift;

 Whilst driving on the Mine site with Mr Newman:

* + Mr Meikle saw a water cart pass by a stationary truck on the right hand side of a keep left sign;
	+ Mr Newman, after radioing the stationary truck driver, passed by the stationary truck on the right hand side of a keep left sign; and
	+ A conversation between Mr Meikle and Mr Newman ensued in respect of that manoeuvre by Mr Newman, however the details of that discussion are in dispute.

(**overtaking manoeuvre**)

 Mr Newman and Mr Meikle then returned to the original truck at the pre-start area as there were no other trucks available on the Mine;

 After returning to the original truck, Mr Meikle was advised that the truck had been fixed. At around 7.10pm Mr Newman instructed Mr Meikle to remove the out of service tag. Mr Meikle refused to remove the tag from the truck as he stated that he was not authorised under the Isolation and Tagging SOP to do so, and that only a “fitter” was able to remove the tag. A discussion ensued between Mr Meikle and Mr Newman. The details of that discussion are in dispute (**tagging incident** or **Isolation and Tagging Breach**);

 At around 8.00pm Mr Meikle met with Mr Cameron. The details of that meeting and the discussion that occurred are in dispute between the parties, however it is common ground that the overtaking manoeuvre and tagging incident were discussed (**8 December Cameron meeting**);

 On 9 December 2019 Mr Meikle was rostered on to work a night shift which commenced at 6.00pm and concluded on the morning of 10 December 2019;

 At the commencement of that shift, Mr Meikle was not allocated a vehicle to operate, and was instead directed to meet with Mr Cameron;

 At around 6.15pm Mr Meikle met with Mr Cameron. The details of that discussion are in dispute, however it is common ground that the overtaking manoeuvre was discussed (**9 December Cameron meeting**);

 Followingthe 9 December Cameron meeting, Mr Meikle left the worksite and returned to the campsite. The circumstances leading to Mr Meikle’s departure are in dispute;;

 On 10 December 2019 Mr Meikle was advised by WorkPac that he was being stood down with pay, pending the outcome of an investigation into allegations of misconduct;

 On 17 December 2019 WorkPac wrote to Mr Meikle advising that WorkPac had been made aware of allegations that Mr Meikle had breached the Isolation and Tagging SOP and had been using a SOP from a different mine site in breach of his employment obligations. Accordingly, WorkPac advised Mr Meikle that it was commencing an investigation into those allegations and requested Mr Meikle show cause as to why his assignment at the Mine should not be terminated;

 On 23 December 2019 WorkPac wrote to Mr Meikle advising that the allegation regarding Mr Meikle’s reliance on an allegedly wrong SOP was no longer pressed;

 On 8 January 2020 Mr Meikle made representations to WorkPac responding to the allegations;

 On 16 January 2020 Mr Meikle received two letters from WorkPac:

* + The first letter advised that BMA had revoked Mr Meikle’s access to the Mine and as a consequence his casual assignment at the Mine had come to an end;
	+ The second letter advised that the investigation was complete and the allegation of misconduct (concerning Mr Meikle’s placement of a tag in the wrong place on a truck) was substantiated. Accordingly, Mr Meikle was being issued with a written warning.

# OBJECTIONS TO EVIDENCE

5 Prior to the trial the parties prepared a document entitled Proposed Resolution of Unresolved Objections, listing objections by each party to the evidence of the other. This document was filed on 16 March 2021 and I understand that those objections remain outstanding. In summary, the objections related to relevance, hearsay and opinion.

6 A significant number of the objections pressed were the subject of a suggested resolution, being that, if the specific evidence was relevant, an Order should be made under s 136 of the *Evidence Act 1995* (Cth) that the evidence be admitted but that its use be limited to prove the state of mind of that witness. I note that agreement to this effect was reached in respect of a number of objections, and to that extent where the parties agreed on admission of evidence as being so limited, I rule that this evidence be admitted on that limited basis pursuant to s 136 of the Evidence Act.

7 I now turn to remaining objections to evidence.

### Affidavit of James Cameron dated 12 January 2021

8 The applicant objects to the entirety of paragraphs 26 and 27 of this affidavit pursuant to ss 77 and 78 of the Evidence Act.

9 In summary, in paragraph 26 Mr Cameron gave detailed evidence concerning s 65 of the Isolation and Tagging SOP, and when out of service tags and information tags are required. Mr Cameron also gave evidence concerning the correct place for tags to be placed on trucks, and his view that Mr Meikle acted contrary to the Isolation and Tagging SOP by placing an incorrect tag on an incorrect place on a truck.

10 In paragraph 27, Mr Cameron disagreed with para 41 of Mr Meikle’s first affidavit, and did not agree that Mr Meikle’s placement of the tag on the stairs could be deemed an isolationist control within the terms of the Isolation and Tagging SOP.

11 In my view his evidence is relevant to the proceedings. While Mr Cameron gives opinions as to proper requirements and consequences of failure to comply with those requirements, these opinions are relevant to Mr Cameron’s perception of Mr Meikle’s conduct, and potentially inform Mr Cameron’s subsequent acts and state of mind.

12 This evidence is admissible, limited to prove Mr Cameron’s state of mind pursuant to s 136 of the Evidence Act.

### Affidavit of Lance Newman dated 25 January 2021

13 The applicant objects to the entirety of paragraphs 13 and 31, and the second, third and fourth sentences of par 28 of Mr Newman’s affidavit, pursuant to ss 77 and 78 of the Evidence Act.

14 In para 13 Mr Newman gave evidence regarding specific guidelines in the Isolation and Tagging SOP for the placement of different categories of tags on equipment. Mr Newman also gave evidence of his view of s 67 of the Isolation and Tagging SOP.

15 In para 28 Mr Newman again gave evidence of his understanding of s 67 of the Isolation and Tagging SOP (second and third sentences) and an opinion about the fitter failing to remove the Out of Service tag after attending the truck (fourth sentence).

16 In para 31 Mr Newman gave evidence regarding the contents of s 69 of the Isolation and Tagging SOP, reiterated his interpretation of s 67, and commented on Mr Meikle’s conduct concerning placement of the relevant tag.

17 In my view this evidence is relevant to the proceedings. Given the evidence before the Court of the interactions of Mr Cameron and Mr Newman, Mr Newman’s views of Mr Meikle’s conduct were relevant.

18 This evidence is admissible, limited to prove Mr Newman’s state of mind pursuant to
s 136 of the Evidence Act.

### Affidavits of Mr Meikle dated 25 September 2020 and 13 November 2020

19 The respondent objects to evidence of Mr Meikle in his affidavit dated 25 September 2020 as follows:

(a) paras 9-11 on the grounds of relevance;

(b) the words “this happened inadvertently due to poor lighting and dust” in para 12, as an unsupported conclusion or submission;

(c) the second sentence of para 13 as an unsupported conclusion;

(d) para 17 on the ground of hearsay;

(e) the second sentence of para 18 on the ground of hearsay;

(f) the second sentence of para 19 on the ground of hearsay;

(g) the second and third sentences of para 20 on the ground of hearsay;

(h) para 38 on the ground of relevance and unsupported assertion;

(i) para 41 on the ground of opinion;

(j) the words “the vehicles were being operated in a manner that was unsafe and did not comply with traffic rules” in para 51 on the ground of opinion;

(k) the words “I knew that it was against the SOPs for me to do so” in para 53 on the ground of opinion;

(l) para 56 on the ground of opinion;

(m) paras 69-71 on the ground of opinion.

20 Further, the respondent objects to evidence of Mr Meikle in paras 33 and 35 of his affidavit dated 13 November 2020 on the basis of inadmissible opinion.

21 At the hearing the objections to the evidence of Mr Meikle were resolved to the extent that the parties were content for me to admit the evidence on the basis that the relevant objection would form a submission as to the weight of the evidence.

### Affidavit of Ms Rakitovszky dated 23 October 2020

22 The respondent objects to evidence of Ms Rakitovszky in paras 39-44, and para 46. This evidence was provisionally admitted at the hearing.

23 The applicant relied on paras 39-44 only to explain why Ms Rakitovszky decided to give Mr Meikle a written warning. The evidence is not tendered for the truth of those conclusions. I am content to admit this evidence on that basis.

24 In relation to para 46 I consider this evidence relevant, and accordingly admissible, but in light of uncertainties regarding this evidence (as exemplified by the witness’ inability to recall the surname of “Blair” until the hearing) I will accord it limited weight.

# ISSUES IN DISPUTE

25 By statement of agreed facts and issues filed 8 April 2021, the parties agree that the following issues remain in dispute:

1. What transpired:

(a) At the 8 December Dow Meeting;

(b) Between Mr Meikle and Mr Newman during:

(i) The passing manoeuvre;

(ii) The discussion about the removal of the out of service tag;

(c) At the 8 December Cameron Meeting;

(d) At the 9 December Cameron Meeting;

2. Did the second respondent take adverse action within the meaning of s.342 Item 3 of the FW Act:

(a) By excluding Mr Meikle from the Mine; and

(b) If the answer to (a) is “yes” was the adverse action taken against Mr Meikle?

3. Were the SOPs workplace instruments?

4. Did Mr Meikle exercise a workplace right when he refused to move the ‘out of service tag’ on 8 December 2019 as pleaded at 67A of the Amended Statement of Claim?

5. Was Mr Meikle’s conduct as pleaded at [34], [43], [47] and [54] of the Amended Statement of Claim a workplace right within the meaning of s. 341 of the FW Act in that it was the performance of, or discharge of a role or responsibility conferred or imposed by s. 39(1)(b), or s. 39(1)(c) and/or s. 39(2)(c) of the CMSH Act and/or the Workplace Inspections SOP.

6. Did Workpac dismiss Mr Meikle within the meaning of s. 342 Item 1(a);

7. By making a decision to exclude Mr Meikle from the Mine, did the second respondent advise, encourage or incite Workpac, within the meaning of s. 362 to take adverse action against Mr Meikle either in the form of dismissing him or giving him a written warning?

8. In the event that the applicant can establish the objective elements of ss. 340 and 362, has the second respondent discharged the legal onus imposed upon in?

26 I note that, if the applicant is successful in respect of its claim against BMA under s 342 of the FW Act, it would not press its claims in respect of s 362 of the FW Act.

27 For convenience, particularly given the related nature of the issues, some issues will be considered together, as follows:

(1) Facts in dispute (issue 1)

(2) Workplace Instrument (issue 3)

(3) Adverse Action (issues 2, 6 and 7)

(4) Workplace Right (issues 4 and 5)

(5) Prohibited Reason (issue 8)

# FACTS IN DISPUTE

28 The parties have been unable to agree as to what transpired on 8 and 9 December 2019. Specifically, they cannot agree regarding the details of the following events:

(1) What occurred at the 8 December Dow meeting;

(2) What occurred between Mr Meikle and Mr Newman during:

(a) The overtaking manoeuvre; and

(b) The discussion about the removal of the out of service tag;

(3) What occurred at the 8 December Cameron meeting;

(4) What occurred at the 9 December Cameron meeting;

29 Before turning to the precise factual disputes it is convenient to summarise the evidence on which the parties rely.

## Evidence of the Applicant

30 In relation to the factual disputes between the parties, the applicant relied on evidence given by Mr Meikle, who gave affidavits dated 25 September 2020 and 13 November 2020. Although the applicant relied on evidence given by Ms Rakitovszky, this was more pertinent to the adverse action claimed by the applicant.

31 In his 25 September 2020 affidavit Mr Meikle gave evidence concerning events of 6-10 December 2019. In relation to the events of the 7 December pre-start meeting, Mr Meikle deposed at [14] to [18]:

14. On 7 December 2019 I attended a pre-start meeting at the Mine's Main Go-Line at approximately 6.00pm. The meeting was led by supervisor, Mr Chris Hull. Mr Laurie Gibson, Open Cut Examiner (OCE), was also present at the meeting.

15. Before we went into the pre-start meeting, there was a Mine Record Entry, a document issued in accordance with section 68 of the CMSH Act, on the tables in my crib-hut. The Mine Record Entry related to an adverse weather event from the previous evening (the **Weather Event**), that being the night of 6 December 2019. There was a significant amount of lightning at the Mine during the Weather Event. The Mine Record Entry advised that during adverse weather events vehicles should be parked up. Annexed hereto and marked "**DM-2**' is a copy of the Mine Record Entry dated 7 December 2019.

16. Mr Hull told us that the Weather Event was to be discussed at the pre-start meeting. At that meeting a number of workers raised safety issues regarding the Weather Event.

17. The concerns and questions raised by the workers at that meeting included:

(a) why we were left running trucks, including water trucks, during a weather event that triggered a red Trigger Action Response Plan (**TARP**);

(b) why the Mine had not been shut down;

(c) why workers had not been warned and removed to a place of safety; and

(d) how the red TARP was supposed to operate.

18. Mr Hull told us that it was safe to continue working, that nobody was at risk of being hurt, and that we were safe in our truck cabs. Several workers said that they felt threatened and unsafe being told to continue operating in that weather.

32 Mr Meikle deposes that, during the 7 December pre-start meeting, the following conversation occurred:

21. I raised my hand and asked Mr Gibson a question in words to the effect of:

*"Was it wise for the mine management to not be taking notice or the information brief from the Chief Mines Inspector of Queensland and for management to be doing their own thing outside of the Mine Inspector's recommendations?"*

22. When I said "the Mine Inspector's recommendations” I was referring to the 'Lightning strikes on rubber-tyred vehicles' mine safety bulletin, which is contained in DM-2.

23. Mr Gibson's response was that, if a storm front was traveling towards the Mine and he had stopped operations but the storm did not hit the Mine, he would have to answer to BMA management as to why he had shut down operations and stopped production.

24. Mr Gibson then explained that it was safe according to the orange and red TARP slides, which we had been shown on a power point presentation during the meeting. He also said it was safe to carry on running the trucks because they had nitrogen in their tyres.

25. I raised my hand again and said words to the effect of:

*'Why were we left running in a red TARP when there was a safely advisory alert posted on the mines record noticeboard from the Queensland Mines Inspectorate and /he chief mines Inspector slating that a heavy tyred vehicle Is not a place of safety during an electrical storm.*

*No truck that I have driven on site had any information tag advising that nitrogen was in all or any tyres, It is therefore not an effective control for all workers driving the trucks, For it to be an effective control, the nitrogen lyres would need to be easily identifiable for all workers driving heavy tyred trucks.*

26. After I finished speaking, Mr Gibson did not respond to me. Instead, Mr Hull shut down the meeting.

33 Mr Meikle then deposed that at approximately 3.15am on the morning of 8 December 2019 he returned from his second crib break and received a call from “Mine Control”. During that call Mr Meikle was advised to cease work as his supervisor, Mr Cameron, wanted to speak with him. He was not provided with any further information and waited for Mr Cameron.

34 Upon speaking with Mr Cameron, Mr Meikle was directed to speak with Ms Angela Dow. He waited outside Ms Dow’s office until around 5.00am when she commenced her shift.

35 Mr Meikle recalled Ms Dow asking him about the questions he asked at the 7 December 2019 pre-start meeting. He stated that Ms Dow told him that her door was always open to him.

36 Mr Meikle deposed that the following conversation took place at the Dow meeting:

31. Ms Dow proceeded to tell me that no workers had been put at risk and that the TARP system had been followed and that the TARP was under review. Ms Dow proceeded to tell me that it was safe to drive the trucks on site during a lightning TARP as a number of trucks had nitrogen in their tyres and that made them safe to drive.

32. I said words to the effect of:

*“I believe from my own experience that it was not an effective control as no truck that I have driven had any information in or on the trucks stating that it had nitrogen in the tyres, or if all of the tyres where filled with nitrogen. If a truck went to the tyre workshop then was put back into production then any tyre may have been changed out and repaired or replaced and filled with normal air.”*

33. Ms Dow then said that any worker that had felt at risk could have called their supervisor and parked up their truck. I then replied in words to the effect of:

*'Some coal mine workers had requested to get off their trucks when the adverse weather event happened. They were instructed to stay in their trucks. Then when lightning was hitting the ground near to them, they again called up to be removed from their trucks. They were told by their supervisor that they could not come and get them in a light vehicle because it was unsafe to do so because of the adverse weather and lightning strikes and for them to remain in their trucks and heavy machinery.*

*That may be all right in your view but workers either do not know what part of the coal mining act they could use to park up if they felt they were at immediate risk or felt exposed and vulnerable as most of the workers were labour hire and If they parked up they would be possibly questioned why they parked up or would receive a phone call saying they no longer had a job.”*

34. Ms Dow said she had never seen this happen and if a worker either felt like that or was put in that position she would not let it happen and would speak to management about it. I replied words to the effect of:

*"The worker would get the phone call when they were away from work or on days off that they were no longer required without any reasons when they had lost their jobs, and that you would not be able to help them as they would be away from work and unable to come back on site.”*

37 Mr Meikle recalled Ms Dow asking him if he had any further concerns or recommendations for the Mine. Mr Meikle explained some further concerns regarding “hotseat changeovers”, and recommended that sections of the *Coal Mining Safety and Health Act 1999* (Qld) (**CMSH Act**) be printed and provided to workers to better understand their obligations.

38 On 8 December 2019 Mr Meikle was rostered on for a night shift, and attended a pre-start meeting at 6.00pm. After the pre-start meeting he attended his assigned truck and commenced pre-start checks. As part of the pre-start check Mr Meikle noticed a significant oil leak at the rear of the truck. Mr Meikle deposed that he considered it appropriate and in accordance with the Isolation and Tagging SOP to place an “information tag” on the stairs of the truck to ensure anyone attempting to use the truck would be aware of the tag and not use the truck.

39 Mr Meikle then sought Mr Cameron and advised him that he had placed an information tag on the truck, and queried whether an “out of service” tag should be placed on the truck instead. Mr Meikle deposed that Mr Cameron told him this was appropriate, and that he consequently swapped the tags. Upon doing so he returned to the pre-start area as there were no other trucks for him to drive, and again sought Mr Cameron for direction.

40 Mr Newman, who was with Mr Cameron, offered to drive Mr Meikle to another truck he believed Mr Meikle could use. During the drive, Mr Newman and Mr Meikle came across a water truck stopped behind another truck at an intersection. Mr Meikle deposed at [46] – [51] in relation to that incident:

45. At approximately 7.00pm Mr Newman drove me to where he believed another truck was available for me to operate. It was during the drive out to find another truck for me to operate that I observed what I considered to be a safety contravention caused by a water cart performing an unsafe overtaking manoeuvre and Mr Newman subsequently repeating that unsafe overtaking manoeuvre (together the Unsafe Overtaking Manoeuvre).

46. The water truck was stopped behind another truck at an intersection. I was in the passenger seat of a light vehicle being driven by Mr Newman. We were stopped behind the water truck for about approximately 3-4 minutes before the driver of the water truck asked over the radio for permission to overtake the haul truck in front of it by driving to the right of the centre divider in front of it. The centre divider had a "KEEP LEFT" sign on it.

47. When I heard the request over the radio, I had a verbal exchange with Mr Newman in words to the effect of:

Meikle: *“She can't do that.”*

Newman: *"Yes you can do it, if you have a spotter.”*

Meikle*: “No you can't, the SOP clearly states that you must follow all traffic rules on the mine site at all times."*

48. Neither Mr Newman nor I responded to the water truck driver. The driver of the haul truck, Mr Sam Moody, gave the water truck driver permission to overtake over the radio and she then overtook the stationary haul truck in front of her by driving to the right of it and the centre divider with the KEEP LEFT sign on it As a result of our disagreement, I said words to Mr Newman to the effect of:

*“I want it followed up on."*

49. Shortly after, Mr Newman decided to do the same thing, which caused me to say to Mr Newman words to the effect of:

*“You can’t do that, we can’t pull out and go around the centre divider either. You must follow all traffic rules on site at all times."*

50. Mr Newman ignored me and proceeded to overtake to the right of the KEEP LEFT sign. We did not have a spotter, but he did make positive radio communications indicating that he was going to overtake before doing so.

51. I raised these concerns with Mr Newman because I was concerned that the vehicles were being operated in a manner that was unsafe and did not comply with the traffic rules.

41 After this incident, Mr Newman returned Mr Meikle to the pre-start area, as there were no trucks available for Mr Meikle to use. Upon returning, Mr Meikle was informed that a fitter had fixed the original truck. However, the fitter had not removed the out of service tag. Mr Meikle deposed that Mr Newman told him to remove the tag which he refused as he believe the Isolation and Tagging SOP required only the fitter to remove it. After some discussions between Mr Meikle, Mr Newman and the fitter as to who was authorised to remove the out of service tag, the fitter returned and removed the tag.

42 At around 8.00pm Mr Meikle sought out Mr Cameron and reported the tagging incident as well as the overtaking manoeuvre, as he believed it was his obligation to do so. At that time, Mr Meikle deposes that Mr Cameron agreed with Mr Newman’s approach to the overtaking manoeuvre. Mr Meikle, who keeps various standard operating procedures in his ‘crib bag’, which he carried with him, showed Mr Cameron the Vehicles SOP and the Traffic Rules, and insisted that Mr Newman’s approach was in breach of the SOP and those rules.

43 Mr Meikle then requested copies of isolation and tagging SOP, Traffic Management Plan and Traffic Rules from Mr Cameron. At this time, they were not provided. Mr Meikle subsequently filled out an incident report about the tagging incident.

44 On 9 December 2019 Mr Meikle was again rostered on night shift and attended the pre-start meeting. At the pre-start, Mr Meikle was not assigned a truck and was requested to attend Mr Cameron’s office. At this time, Mr Meikle was informed that he was being investigated for the tagging incident.

45 After arriving at Mr Cameron’s office at around 6.15pm, Mr Meikle deposed that he was informed that he was also being investigated for not knowing the Mine’s traffic rules and for following the rules from another mine, namely Goonyella Riverside Mine. At this time Mr Cameron provided a copy of the relevant rules, and Mr Meikle was informed that he would receive training that night on the Traffic Rules. Mr Meikle deposed that the following events and conversation took place:

68. Mr Cameron then produced, for the first time, the Traffic Rules and a copy of the Traffic Management Plan that I has asked for the night before. He then told me that you can overtake a centre divider on the wrong side of the road if you used positive communications (i.e. using the radio to notify other vehicles of what your intentions are). Mr Cameron then showed me a section in the Traffic Rules titled “Overtaking” that he had highlighted. I then asked if I could read a copy of it. He agreed and gave a copy to me.

69. I took about a half dozen steps outside his office and sat down at a desk in the hallway for about 5-7 minutes whilst I read the copy of the Traffic Rules. On the opposite page to the page that he had cited there was a heading called ‘Vehicle Movement’ under which clause 25 stated “*Traffic control and road signs must be followed at all times”*.

70. I read the Traffic Rules in full and could not find anything to support Mr Cameron and Mr Newman’s interpretation that it was okay to drive to the right of a KEEP LEFT sign on the wrong side of the road if you had a spotter and/or used positive communications.

71. I went back to Mr Cameron's office and asked if I could speak with him again. He said yes, so I showed him what I had round in the document and asked him to read it back to me, which he did. I then said to him that I believed that I was correct and that it was not permissible to pass to the right of a KEEP LEFT sign on the wrong side of the road, and further, that I could find nothing in the document to support his interpretation.

72. Mr Cameron's voice and body language changed immediately, and he became more direct and blunt in telling me that he was right. He said he would call Ms Dow, Mr Gibson and Mr Hennessey about the matter and told me to leave his office.

73. A short time later he called me back into his office and told me that he had spoken with the three others and that his interpretation of the Traffic Rules was unchanged.

74. He then told me that he had information from the Maintenance Department that I had a tray up alarm warning come up in my truck and a possible over speed warning. A tray up alarm warns a truck operator if they accelerate over 9-13km/h whilst the tray is still up (or not fully down). The sensors in the trucks often cause false alarms. I believe that any tray up or other abusive alarms, including overspeed alarms, were false alarms. However, this is the first time these issues had been raised with me.

75. I said to Mr Cameron words to the effect of:

*“A lot of trucks have alarms going off often for no reason like hard cornering alarms going off when the truck was standing being loaded by a digger, so I very much doubt what is being reported by you is accurate."*

76. Mr Cameron also raised an allegation that I had put in the wrong delays in the MineStar computer system. I said to Mr Cameron words to the effect of:

*"I struggle to believe that if I put the wrong MineStar delays that it would have been left until now to tell me as the mine is very production focused and I would have been told about it straight away.”*

77. Among other things, I proceeded to say to Mr Cameron words to the effect of:

*“I believe that all of this is more than a coincidence that you are bringing these things up now. I am being bullied, threatened and intimidated.”*

46 Mr Meikle then stated he made further complaints regarding the lightning event and that he was directed to speak to Ms Dow as a result of those complaints.

47 Relevantly, Mr Meikle deposed that the conversation ended in the following terms:

79. Among other things, I said words to the effect of:

*“I find it intimidating and threatening that I was the only coal mine worker that was asked to meet with Angela. I only asked two questions and was the last worker to ask questions. I feel as if I am being singled out and am being bullied, threatened and intimidated and am now in no frame of mind to take any further comment both spoken and written. I am not in a fit frame of mind to operate any trucks on this site and am enacting 275AA of the mining act.”*

80. Mr Cameron asked me what I wanted to do and I said words to the effect of:

*“No, what are you going to do about it?”*

81. Mr Cameron offered to have me taken back to the camp and I accepted.

## Evidence of the Respondent

48 The respondent relied on evidence given by the following witnesses:

 Mr Lance David Newman;

 Ms Angela Dow;

 Mr James Cameron;

 Mr Todd Hennessy;

 and

 Mr Laurie William Gibson.

#### Mr Lance Newman

49 Mr Newman gave evidence on behalf of the second respondent by way of affidavit dated 23 October 2020 and sworn 23 January 2021.

50 Mr Newman had worked at the Mine since 2014 as an Operator (and occasionally as a Step-up Supervisor since 2018), and was employed by Central Queensland Service Pty Ltd. Mr Newman’s ordinary duties included the operation of heavy vehicles such as bulldozers, excavators and electronic shovels. When Mr Newman acted as a supervisor, his ordinary duties included such tasks as supervising the production execution team, and monitoring and reporting on safety and compliance at the Mine.

51 Annexed to Mr Newman’s affidavit was the Isolation and Tagging SOP and Traffic Rules.

52 Mr Newman gave evidence that around 7.00pm on 8 December 2019 Mr Meikle approached himself and Mr Cameron, as there were no trucks for Mr Meikle to drive. Mr Newman recalled offering to drive Mr Meikle to another truck on the Mine site.

53 Mr Newman’s evidence aligned for the most part with that given by Mr Meikle, however, variations include:

 In relation to the overtaking manoeuvre:

* + Mr Newman disagreed that Mr Meikle observed a safety contravention in relation to the passing incident and that the overtaking manoeuvre was not safe;
	+ After Mr Meikle requested that the overtaking manoeuvre be followed up, Mr Newman said words to the effect “*yes, I will follow up on this and go and see the Open Cut Examiner”* and did not ignore Mr Meikle;
	+ In Mr Newman’s experience, drivers often performed overtaking manoeuvres on the Mine, such as the subject overtaking manoeuvre, provided there was positive communication, as this is necessary for the effective and efficient operations of the Mine;

 In relation to the tagging incident:

* + Mr Newman was not surprised that the fitter had not removed the out of service tag because it was in the wrong location;
	+ The fitter gave permission for Mr Meikle to remove the out of service tag;
	+ It was Mr Newman’s understanding that Mr Meikle could remove the out of service tag because it was originally incorrectly placed, and was therefore not operational; and
	+ Mr Newman disagreed that he told Mr Meikle to remove the tag before speaking to the fitter who subsequently gave Mr Meikle permission, and disagreed he gave Mr Meikle any directions contrary to the Isolation and Tagging SOP.

54 Further, Mr Newman deposed:

38. On 8 December 2019, I entered Mr Cameron's office to try and locate my work phone so I could call the rostered OCE and discuss Mr Meikle's interpretation of the Traffic Rules. When I entered the office, I found that Mr Gibson (who was the rostered OCE) was in Mr Cameron's office. To the best of my knowledge, I recall the words to the following effect were spoken at the meeting:

Mr Newman: *"I was just driving with Daryl and he had a different interpretation of the traffic rules to me which I wanted to check with an OCE. He is of the view that we are unable to overtake, even when we have pos comms. He is saying that the rule that says you have to follow road signs means you can't overtake, but I thought you could if you had pos comms. What do you guys think?"*

Mr Cameron: *"I agree, I think it's fine with pos comms."*

Mr Gibson: *"Me too, as long as you have pos comms, it's fine."*

39. I was motivated to discuss the overtaking manoeuvre with Mr Cameron and Mr Gibson as I genuinely wanted to confirm the Mine's position in relation to overtaking on the Mine. It is important as a mine we adhere to a uniform interpretation of our procedures to make sure all CMWs are following the procedure in the same way and if I am doing something incorrectly in that respect, I need to know about this so I and other CMWs are operating at an acceptable level of risk. I also raised it with Mr Cameron and Mr Gibson because I had told Mr Meikle I would escalate his question about the Traffic Rules to make sure we were all on the same page. I categorically deny that I was motivated to discuss the overtaking manoeuvre with Mr Cameron and Mr Gibson for any other reason apart from this, including any unlawful reason (including trying to get Mr Meikle in some sort of trouble). Similarly, I was required to report the isolation and tagging incident to Mr Cameron as I had witnessed Mr Meikle breach the Isolation and Tagging SOP and accordingly I am obligated under the Act to raise the safety breach with Mr Meikle himself and his supervisor (Mr Cameron). Again, there was no other reason for me deciding to do this.

#### Ms Angela Dow

55 Ms Angela Dow was a Site Systems Specialist and an Open Cut Examiner (**OCE**) employed by BHP Coal Pty Ltd (**BHP**). At all material times Ms Dow was a Shift Compliance Coordinator and an appointed OCE at the Mine. Her duties as a Shift Compliance Coordinator included:

 Assisting with the review of the safety and health management system of the Mine;

 Understanding and assisting with compliance with relevant coal mining health and safety legislation;

 Contributing to driving a strong safety culture within the Mine;

 Measuring, monitoring and reporting on safety and compliance at the Mine; and

 Assisting with the provision of coaching and development in order for workers at the Mine to understand and adhere to the policies and procedures at the Mine.

56 Ms Dow ordinarily worked a day shift at the Mine, between the hours of 5.00am and 5.30pm. Prior to the commencement of each shift, and prior to the pre-start meetings, the night shift and day shift OCEs held a handover meeting covering, *inter alia*, significant safety events or hazards that took place over the previous shift. Generally, OCEs would prepare an electronic bundle of relevant documents, known as a “pack”, for the supervisors to relay to the workers at the pre-start meeting.

57 Relevantly, Ms Dow gave evidence concerning the Severe Weather Procedure, a document promulgated by BMA regarding the process the Mine was to follow during severe weather events. Relevantly, the Severe Weather Procedure included a section concerning a “Lightning and Severe Weather Trigger Action Response Plan”, commonly referred to as the “Severe Weather TARP”. At [15] Ms Dow explained:

15. The Severe Weather TARP outlines a set of conditions (or triggers) along with a set of actions which named personnel must following when these trigger events occur. The Severe Weather TARP includes the following levels:

(a) Blue: Level 1 Response;

(b) Yellow: Level 2 Response;

(c) Orange: Level 3 Response; and

(d) Red: Level 4 Response.

16. At each of the abovementioned levels, the TARP outlines what operations must take place at each of the levels.

58 Ms Dow deposed:

20. On the morning of 7 December 2019, Laurie Gibson, the outgoing OCE at the Mine (Mr Gibson) and the incoming OCE, Michael North held a handover meeting, at which I was present.

21. During the handover meeting, to the best of my recollection, Mr Gibson said words to the effect of:

“There was a storm at the mine last night. At one point, there was cloud-to-ground lightning strikes at the mine. In response to this, a Red or Level Four Response was triggered in accordance with the severe weather procedure and TARP. Some CMWs were confused about the severe weather procedure and TARP and raised concerns on the two-way radio. Given the concerns and confusion I think we should do a refresher of the severe weather TARP at tonight’s pre-start meeting.”

22. As a result of my conversation with Mr Gibson, I prepared for a copy of the Severe Weather TARP to be inserted at 7 December nightshift pre-start meeting pack. The purpose of this was to ensure the Severe Weather TARP was discussed at the pre-start meeting for the incoming shift and any confusion CMWs may have had in relation to the Severe Weather TARP could be clarified.

23. This type of task is common for me. As the Shift Compliance Coordinator, part of my role is to promote an understanding of our safety procedures and policies and to support the on-shift OCEs on site.

59 As Ms Dow’s shift concluded at 5.30pm, she was not present at the 7 December pre-start, however at around 6.45pm that night she spoke to Mr Gibson on the phone. During that phone call, she recalled Mr Gibson saying words to the following effect:

“The meeting went okay. Some CMWs did voice some concerns and questions in the pre-start meeting but we were able to talk through them. One of the CMWs, Daryl Meikle, was vocal about risk of rubber tyred equipment being struck by lightning. He was referencing various documents from the mining inspectorate. I feel like he was confusing others on the crew further.”

60 Ms Dow deposed that she did not find this unusual and sought to set up an informal meeting with Mr Meikle to discuss his concerns.

61 Key aspects of Ms Dow’s evidence in relation to the 8 December Dow meeting that followed included:

 Informal meetings between supervisors, including OCEs, and workers were commonplace and necessary in order to gain an understating of their concerns and to provide workers with clarification on the Mine’s safety and health management system;

 The door was open during the 8 December Dow meeting;

 Ms Dow wanted to understand Mr Meikle’s concerns. She did not want to meet with him simply because he had asked questions at the 7 December pre-start meeting;

 Although Mr Meikle mentioned that he felt like he was being singled out, there was no discussion about Mr Meikle feeling threatened, bullied or intimidated. The purpose of the meeting was not intended to be a disciplinary or adverse meeting;

 Ms Dow would not have said words as definitive as “no workers had been put at risk and that the TARP system had been followed” as she was not at the Mine at the time. However she agreed that she said words to the effect that the “TARP was under review”;

 Nitrogen in tyres was not currently an effective control at the Mine against cloud-to-ground lightning;

 Ms Dow did not recall asking Mr Meikle for recommendations about the Mine, however she recalled that Mr Meikle brought up the topic of the hotseat changeovers and suggested that relevant legislation be provided to workers. Ms Dow recalled responding to the effect that she did not think printing the legislation was necessary as the Mine was proactive in respect of safety; and

 Ms Dow did not recall that Mr Meikle appeared distressed or upset during the meeting.

62 Ms Dow spoke to Mr Todd Hennessy later in her shift on 8 December 2019 regarding the concerns Mr Meikle voiced at the 8 December Dow meeting. Ms Dow recalled that Mr Hennessy said he would follow up those concerns.

63 Ms Dow annexed to her affidavit an undated “file note” of her conversation with Mr Gibson and meeting with Mr Meikle. I will return to this file note later in the judgment.

#### Mr James Cameron

64 Mr Cameron was employed by BHP as an Overburden Supervisor at the Mine. Mr Cameron commenced working at the Mine in 2013 as an Operator and occasional step-up supervisor until January 2020, when he was promoted. At all material times, Mr Cameron was Mr Meikle’s supervisor.

65 Part of Mr Cameron’s role at the Mine was to be appraised of all relevant SOPs and safety procedures, as he was often the first “port of call” for questions by workers.

66 As to the 7 December pre-start meeting, Mr Cameron recalled the discussion of the lightning event. He recalled Mr Meikle raising questions about the Mines Inspectorate or Mines Department, however at the time the purpose of Mr Meikle’s questions was unclear to him, and (in Mr Cameron’s view) Mr Meikle’s questions seemed to confuse the other workers.

67 Mr Cameron gave evidence that he called Mine Control to ask Mr Meikle to attend his office. Mr Cameron did not consider it unusual to direct Mr Meikle to speak to Ms Dow and could not recall who asked him to do so, although it may have been Ms Dow or Mr Gibson.

68 Mr Cameron gave detailed evidence as to the Isolation and Tagging SOP and the tagging incident. Key aspects of that evidence were as follows:

 An out of service tag was required to be put on the truck by Mr Meikle pursuant to the Isolation and Tagging SOP;

 The information tag was incorrectly fitted to the truck by Mr Meikle;

 A practical consequence of placing the wrong tag on the truck or the correct tag in the wrong place, is that someone *could* still operate the truck when it is faulty;

 Mr Cameron told Mr Meikle to replace the information tag with an out of service tag;

 Upon Mr Meikle replacing the tag, Mr Cameron was not aware Mr Meikle had placed it in the incorrect place until informed by at a later time by Mr Newman;

 Mr Cameron raised Mr Meikle’s noncompliance with the Isolation and Tagging SOP in meetings with Mr Meikle on 8 and 9 December 2019; and

 Mr Meikle was given an opportunity to undertake further training.

69 At [31] - [32] of his affidavit Mr Cameron deposed:

31. On 8 December 2019 (I don’t recall the exact time but I recall it was in the early evening), I was in my office with Mr Gibson when Mr Newman came in and reported the Tagging and Isolation Breach to me by saying words to the effect of “*Daryl put the tag for that truck on the stairs, not at the isolation point, so he’s breached the SOP”.* At that point, I was aware Mr Meikle had put the wrong tag on the truck, but not that he had also placed the tag in the wrong place. Mr Newman then said words to the effect of:

*“When I was out with Daryl [Meikle] we had a disagreement regarding traffic rules. Iovertook a stationary vehicle after making pos comms [positive communications] and Daryl’s view was that this was not accordance with our traffic rules because traffic signs always have to be obeyed. I think it was fine because I made pos comms but he has asked me to escalate it to you. What do you think?”*

*…*

32. In response to paragraph 58 of the Meikle Affidavit, I disagree that Mr Meikle came to see me at around 8.00pm on 8 December 2019. My recollection was that, when I was informed by Mr Newman about the Isolation and Tagging Breach, I radioed out to Mr Meikle over the two way to get him parked up and drove out to pick him up, so I could find out from him what had happened in relation to the Isolation and Tagging Breach and he could fill in an incident report regarding the Isolation and Tagging Breach. At some point after I picked him up, Mr Meikle filled out the incident report ad provided it to me. A copy of this incident report is annexed and marked “**JWC-3**”. I agree that, in the car on the way back to my office and in my office, Mr Meikle raised the Overtaking Manoeuvre with me. I cannot remember his exact words, but my general understanding from my discussion with Mr Meikle was that he did not think the Overtaking Manoeuvre could be in compliance with the Traffic Rules, which required traffic control and road signs to be followed at all time. I deny that I said that Mr Newman had not raised this with me (because I had already spoken to Mr New about this) or that I categorically told him I disagreed with him about the Overtaking Manoeuvre, as I would have still been trying to understand why he considered the Overtaking Manoeuvre to be in breach of the Traffic Rules at that stage.

33. In response to paragraph 59 of the Meikle Affidavit, I recall that, when we were in my office, Mr Meikle produced a copy of a SOP and starting flicking through the pages, which he said supported his position that the Overtaking Manoeuvre could not be compliant with the Traffic Rules. I saw from the SOP Mr Meikle produced that it had “SOP-30” written on it, which is the standard SOP number for traffic SOPs at BMA mine sites. However, when I looked at the document more closely, I noticed that the SOP Mr Meikle had produced had “GRM” on the top right hand side of the cover page of the document, rather than BMA. I know from my employment with BMA that GRM stands for Goonyella Riverside Mine (Goonyella), which is another mine site owned and operated by BMA. I also noticed that the formatting on the SOP Mr Meikle had produced looked strange, in that the font looked quite “fuzzy” and I could see binder marks up the left hand side of the document, like it had been photocopied from another document and rebound together. I formed the view at this stage that Mr Meikle had produced a SOP from another mine site and that, given his insistence that the Overtaking Manoeuvre was contrary to the Traffic Rules which did not accord with Mr Newman’s view, he had been relying on an incorrect SOP while at the Mine. I recall that Mr Meikle and I then had a conversation to the following effect:

Mr Cameron: *“Have you been running off this SOP, because this isn’t a Daunia site specific SOP?”*

Mr Meikle:  *“No, this is a SOP, it’s got Daunia there.”*

Mr Cameron: *“Yeah, but what about the Goonyella part?”*

I then said “this is the correct SOP” and looked up and showed Mr Meikle the Traffic Rules on my computer. I do not recall saying at that point that I agreed with Mr Newman’s interpretation of the Traffic Rules, but rather I expressed to Mr Meikle that I thought he was getting confused as he was referring to an incorrect SOP which did not apply at the Mine.

70 Mr Cameron further deposed that following this conversation he advised Mr Meikle that he would like to take some time to speak with Mr Hennessy and Mr Gibson regarding the correct interpretation of the SOPs.

#### Mr Todd Hennessy

71 Mr Hennessy had been employed by BHP since 2003. He had worked at the Mine since 2018 as a Coal Supervisor, Project Supervisor and Production Superintendent. On a typical day to day basis, Mr Hennessy’s role as Production Superintendent included:

 Assessing the future needs of the Mine in consultation with the Mine’s planning teams, including by attending planning meetings;

 Attending pre-start meetings;

 Overseeing human resource matters; and

 Being the point of contact for labour hire firms such as WorkPac.

72 Mr Hennessy noted at [12] of his affidavit:

12. I will also be in contact with the labour hire firms we use at the Mine to discuss any questions or issues I am having with labour resources currently on hire to my team. It is ultimately my decision as to whether a labour hire worker in my team is excluded from the Mine. In making that decision, I act on recommendations provided to me by the relevant worker’s supervisor as to the worker’s conduct at the Mine, given that the supervisor has day-to-day oversight of the worker.

13. I did not have much to do with Mr Meikle as his manager, James Cameron (Mr Cameron), Supervisor, had oversight of any matters relating to Mr Meikle’s day-to-day performance and conduct.

73 Mr Hennessy confirmed that Ms Dow spoke to him regarding the concerns raised by Mr Meikle in relation to hotseat changeovers.

74 Mr Hennessy gave evidence concerning the events of 9 December 2019 at [19]–[30] of his affidavit. Key aspects of Mr Hennessy’s evidence were as follows:

 On the evening of 9 December 2019 Mr Hennessy was not rostered on to work, however Mr Hennessy received a call from Mr Cameron regarding Mr Meikle and the overtaking manoeuvre;

 Mr Cameron advised Mr Hennessy that Mr Meikle had been using the incorrect SOP;

 This was concerning to Mr Hennessy as it was of critical importance that workers used the correct SOPs. In Mr Hennessey’s opinion, the incorrect use of a SOP could result in serious safety issues;

 Mr Hennessy told Mr Cameron to ask Mr Meikle about the issue;

 A short time later Mr Hennessy received a further call from Mr Cameron in which Mr Cameron said words to the effect that “Mr Meikle has refused to answer any questions or be interviewed. He’s saying he won’t take part in an investigation as to why he was using the wrong SOP”;

 Mr Hennessy formed the view that, given Mr Meikle’s refusal to partake in an investigation Mr Meikle was to be sent back to camp;

 Mr Hennessy received a further call from Mr Cameron. During the course of that phone call Mr Hennessy asked Mr Cameron to send him an email outlining what had happened; and

 Mr Cameron sent an email to Mr Hennessy at 9.10pm.

75 Relevantly, the contents of that email were as follows:

On 9 Dec 2019, at 9:10 pm:

Subject: Re: Daryl Meikle

Todd please be advised that Daryl Meikle has been stood aside and taken back to camp due to the following reasons

- Daryl was caught using the BMA Coal SOP SAFE OPERATION OF VEHICLES and MOBILE EQUIPMENT GRM version instead of the BMA Coal SOP SAFE OPERATION OF VEHICLES and MOBILE EQUIPMENT on the 08-12-2019. Then on the 09-12-2019 he blatantly lied to me and stated he wasn’t using that document at all when the GRM version had (Traffic control and road signs are to . [sic] After I advised him that that was a breach he refused to do a statement

- Daryl then refused to accept that Daunia traffic rules section 25 overrides the overtaking section 28 and 29. I proceeded to call the OCE and my supervisor and head trainer for clarification on this and they both agree that that there was no issues. He then refused to except [sic] that as well.

- Daryl also had a breach of out Tagging procedure on the 08-12-2019 last night

- Daryl has had a number of body up alarms and mine control operator noncompliance reports as well.

- Daryl has also had a previous near miss event at the main go line During this whole conversation I was offering him support and training with our head trainer and AI specialist. I have over unacceptable level of risk to himself and other coal miners due to the number of incidents he has been involved in. Daryl has also refused to participate in an investigation.

(**9 December email**)

76 Mr Hennessy wrote back to Mr Cameron and requested Mr Cameron complete a “Vendor Performa” for the breaches outlined in the 9 December email (**10 December email**).

77 On 10 December 2019 at 8.21am Mr Hennessy sent an email to Ms Jessica Kemp, Site Manager at WorkPac, enclosing the completed Vendor Performa.

78 As became clear in cross-examination, there was other contemporaneous email correspondence between Mr Hennessy and Mr Cameron concerning Mr Meikle. I shall turn to this other evidence later in this judgment.

#### Mr Laurie Gibson

79 Mr Gibson was employed by BHP as a Shift Compliance Coordinator and OCE at the Mine. Mr Gibson had held these positions since August 2013, and was typically rostered on the night shift from 5.30pm to 5.30am.

80 Mr Gibson’s evidence covered similar areas as Mr Cameron and Ms Dow regarding the safety health management system at the Mine, and the Severe Weather Procedure.

81 Key aspects of his evidence were as follows:

 During an ordinary shift Mr Gibson often received alerts and/or notifications from BHP’s Integrated Remote Operations Centre regarding weather surrounding the Mine;

 On the night of the adverse weather event Mr Gibson did not recall how he first became aware of the adverse weather, but deposed that ordinarily a controller from the Integrated Remote Operations Centre would contact Mr Gibson with weather alerts, which he would communicate to workers;

 Mr Gibson recalled a number of workers over the course of their shift on 6 December 2019 during the lightning event expressing concern and confusion regarding the Severe Weather Procedure;

 One worker reported a fire at the Mine, presumably a result of lightning, but Mr Gibson did not see that fire upon his inspection of the Mine;

 He was not surprised that there was a degree of confusion;

 On the morning of 7 December 2019 at the handover meeting with Michael North and Ms Dow, it was decided that the pre-start should include a discussion about the lightning event and the Severe Weather Procedure; and

 On the evening of 7 December 2019 Mr Gibson commenced his shift at 5.30pm;

 In relation to the 7 December pre-start meeting Mr Gibson:

* + Did not call many specific details of the meeting;
	+ Recalled that the lightning event and the Severe Weather TARP were discussed;
	+ Recalled Mr Meikle raising a concern regarding the lightning event;
	+ Did not at the time of the meeting understand what Mr Meikle was referring to regarding the directive of the Chief Mines Inspector of Queensland.

82 In light of this evidence I now turn to the factual discrepancies in the proceedings.

## 8 December Dow Meeting

83 The discrepancy between the cases of the parties in respect of the 8 December Dow meeting is important to the applicant in support of its case as it submits that, rather than the Dow Meeting being an attempt to assist and understand a worker’s concerns, it was an attempt to “single out” Mr Meikle.

84 The applicant submitted that the Court should accept the evidence of Mr Meikle. It submitted that whilst there were minor discrepancies between the accounts of Mr Meikle and Ms Dow, Ms Dow was not a witness of credit. The applicant noted in this respect that the “file note” annexed to the affidavit of Ms Dow was doctored so as to remove the date, and the fact that it was actually an email. The applicant questioned the witness’s credibility, given that the witness did not provide an explanation for the editing of the document. It was the applicant’s submission that the reason it was doctored was to conceal the fact that it was sent to Mr Hennessy and Mr Hennessy’s direct manager, Mr Whitney, who was a Manager at the Mine. I note in passing that Mr Whitney was not called to provide evidence.

85 During cross-examination Counsel for the applicant put to Ms Dow that the file note was actually an email, the header of which had been removed, and that Ms Dow had intentionally removed it because she was trying to conceal the interest that senior management at the respondent had in Mr Meikle. This implication was rejected by Ms Dow, who gave evidence that she could not recall why the header had been removed, and she could not recall why, in her affidavit, she did not describe it as an email rather than a file note.

86 I note that, at the hearing, Ms Dow gave evidence that she had sent the “file note” as an email to both Mr Hennessy and Mr Whitney on or about 10 December 2019 (transcript page 158 line 38).

87 While overall I consider that Ms Dow was a credible witness, I find her explanation in relation to the removal of the header from the “file note” unpersuasive. I further consider that the existence of the “file note” suggests interest by senior management in Mr Meikle as submitted by the applicant, possibly because of the undisputed fact that Mr Meikle’s brother was the safety and health representative at the Goonyella mine and that this fact was known to management at the Mine.

88 Further, the applicant submitted that the evidence of Mr Gibson should not be accepted as Mr Gibson admitted to a poor recollection of the events, and was overall inconsistent with other evidence of both the applicant and respondent. Indeed, Mr Gibson conceded at the hearing that he had a relatively poor recollection of the events in question (transcript page 104[10]–105[5]). Similarly, the applicant criticised the evidence of Mr Cameron, as being mostly reconstruction and unreliable.

89 In response, the respondent submitted that the rationale behind the 8 December Dow meeting was clear on the evidence, namely it was intended to understand the concerns of Mr Meikle. It was not, in the respondent’s submission, an attempt to single out Mr Meikle. In any event, as the respondent submitted, whether the 8 December 2019 Dow meeting was an attempt to single out Mr Meikle for raising concerns regarding safety, or merely a mechanism to understand his concerns, this was irrelevant to the applicant’s case in that there was no adverse action pleaded against Ms Dow, and Ms Dow was not a relevant decision-maker in relation to Mr Meikle’s dismissal.

90 It is plausible that Mr Meikle believed he was being distinguished for criticism. Ms Dow’s evidence did not suggest any belief on the part of Mr Meikle to the contrary. However, this belief must be weighed against events prior to the 8 December Dow meeting. In circumstances where Mr Meikle had raised concerns regarding the Severe Weather TARP and the lightning event, it was not unexpected that the respondent – or more precisely, persons like Ms Dow – would consider it important that his concerns be addressed. Ms Dow gave evidence that she “just wanted to understand the concerns that he raised at the pre-start meeting the night before” (transcript p 155 ll 45-47).

91 If Mr Meikle was “singled out” by Ms Dow, it was because he had identified himself as a person with the concerns he had expressed, and it was part of her role to address those concerns. However as I have already observed, the existence of the “file note”, plainly an email from Ms Dow to work colleagues in management who knew Mr Meikle, suggests that there was an existing interest of management of the respondent in Mr Meikle, and that this interest was heightened by Mr Meikle’s questions at the 7 December pre-start meeting. On balance I consider it likely that Mr Meikle was singled out for the questions he asked at the 7 December pre-start meeting and in respect of the meeting he had with Ms Dow.

## Overtaking Manoeuvre and Tagging Incident

92 Mr Newman generally agreed with Mr Meikle’s version of what happened during the overtaking manoeuvre, although he disagreed with Mr Meikle’s characterisation that the incident was unsafe. The discrepancy in the positions of the parties in relation to the overtaking manoeuvre can be summarised as:

(1) Whether Mr Newman said “spotter” or “positive communications”; and

(2) Whether Mr Newman responded to Mr Meikle prior to engaging in the overtaking manoeuvre.

93 Insofar as I understand it, whether Mr Newman used the word “spotter” or “positive communication” is largely unimportant in this case (see transcript p 125 l 33). In fact, Mr Newman conceded that he may have used the term “spotter” (transcript p 125 ll 45-46).

94 It does not appear to be in dispute that the effect of Mr Newman’s comments to Mr Meikle at that time was that, in Mr Newman’s view, it was permissible for one vehicle to go around another vehicle in the relevant circumstances, if radio contact had been made.

95 In relation to the tagging incident, the exact conversation between Mr Newman and Mr Meikle is in dispute. It was common ground that Mr Meikle had identified an oil leak with his vehicle, and it was appropriate that he should place an out of service tag on the vehicle. The dispute arose because Mr Meikle had not placed the tag in the correct place on the vehicle and once the vehicle was attended to by the fitter the question arose as to who was entitled to remove the tag from the vehicle.

96 Mr Newman’s evidence was that, although he later realised his error the fitter had given permission to remove the tag, and he believed that Mr Meikle could remove the tag. Mr Meikle disagreed that he (Mr Meikle) was entitled to remove the tag.

97 I accept that, at the relevant time, Mr Newman believed that Mr Meikle was entitled to remove the tag after attendance by the fitter on the vehicle. However, I also note that Mr Meikle’s evidence was that he insisted to Mr Newman that he was not entitled to remove the tag, as doing so would be contrary to the Isolation and Tagging SOP. Insofar as I understand it, that this was Mr Meikle’s belief at the time, and that he conveyed this belief to Mr Newman, is not in dispute.

## 8 and 9 December Cameron Meetings

98 It was not in dispute that, around 8pm on 8 December 2019, Mr Meikle and Mr Cameron met to discuss both the tagging incident and the overtaking manoeuvre.

99 Mr Meikle gave evidence that on 8 December 2019 he showed Mr Cameron a copy of the “BMA Coal SOP Safe Operation of Vehicles and Mobile Equipment” and the Traffic Rules, however Mr Cameron said he agreed with Mr Newman’s interpretation of the overtaking rules (namely that it was possible to overtake in circumstances if there was a spotter). Mr Meikle further gave evidence that he requested Mr Cameron to provide a copy of the relevant SOPs. Mr Meikle also gave evidence that he told Mr Cameron the same as he had told Mr Newman, namely that the only person entitled to remove an out of service tag was the person who had carried out repairs.

100 Mr Meikle gave evidence that on 9 December 2019 Mr Cameron had asked Mr Meikle to come to his office, and that Mr Cameron had told Mr Meikle that he was being investigated for not knowing the Mine’s Traffic Rules and for following the traffic rules from another mine, and further that Mr Meikle would receive training that evening on the correct Traffic Rules. Mr Meikle deposed that after reading material provided to him by Mr Cameron, Mr Meikle returned to Mr Cameron’s office and said he believed he (Mr Meikle) was correct in the interpretation of the Traffic Rules. Mr Meikle deposed:

72. Mr Cameron's voice and body language changed immediately, and he became more direct and blunt in telling me that he was right. He said he would call Ms Dow, Mr Gibson and Mr Hennessey about the matter and told me to leave his office.

73. A short time later he called me back into his office and told me that he had spoken with the three others and that his interpretation of the Traffic Rules was unchanged.

74. He then told me that he had information from the Maintenance Department that I had a tray up alarm warning come up in my truck and a possible over speed warning. A tray up alarm warns a truck operator if they accelerate over 9-13km/h whilst the tray is still up (or not fully down). The sensors in the trucks often cause false alarms. I believe that any tray up or other abusive alarms, including overspeed alarms, were false alarms. However, this is the first time these issues had been raised with me.

75. I said to Mr Cameron words to the effect of:

*“A lot of trucks have alarms going off often for no reason like hard cornering alarms going off when the truck was standing being loaded by a digger, so I very much doubt what is being reported by you is accurate”*

76. Mr Cameron also raised an allegation that I had put in the wrong delays in the MineStar computer system. I said to Mr Cameron words to the effect of:

*"I struggle to believe that if I put in the wrong Minestar delays that it would have been left until now to tell me as the mine is very production focused and I would have been told about it straight away.”*

77. Among other things, I proceeded to say to Mr Cameron words to the effect of:

*"I believe that all of this is more than a coincidence that you are bringing these things up now. I am being bullied, threatened and intimidated.”*

78. I complained to Mr Cameron about the fact that I had been directed to speak to Ms Dow after the Weather Event. I also asked why the Mine was not following the information brief from the Chief Mines Inspector that was on the notice board in 2018/2019 that stated that a heavy tyred vehicle was not a safe place during an electrical storm.

79. Among other things, I said words to the effect of:

"I find it intimidating and threatening that I was the only coal mine worker that was asked to meet with Angela. I only asked two questions and was the last worker to ask questions. I feel as if I am being singled out and am being bullied, threatened and intimidated and am now in no frame of mind to make any further comment both spoken and written. I am not in a fit frame of mind to operate any trucks on this site and am enacting 275AA of the mining act.·

80. Mr Cameron asked me what I wanted to do and I said words to the effect of:

“*No, what are you going to do about it?”*

81. Mr Cameron offered to have me taken back to the camp and I accepted.

101 Mr Cameron’s evidence was, in summary, that on 8 December 2019:

 He had picked up Mr Meikle to discuss the tagging incident and to allow Mr Meikle to complete an incident report;

 In the car on the way to the office Mr Meikle raised the overtaking manoeuvre with him;

 At that point Mr Cameron was still trying to understand why Mr Meikle considered the overtaking manoeuvre to be in breach of the Traffic Rules;

 He noticed that the SOP relied on by Mr Meikle had the letters “GRM” on the top right hand side rather than “BMA”, and concluded that Mr Meikle had produced a SOP from the Goonyella Riverside Mine rather than the Daunia Mine;

 He showed Mr Meikle the Traffic Rules on his computer and expressed to Mr Meikle that he thought Mr Meikle was getting confused in respect of applicable rules;

 They discussed the tagging incident but were side-tracked into discussing the overtaking manoeuvre;

 He formed the view that the overtaking manoeuvre was in accordance with the Traffic Rules;

 He filled out documents to Workpac in relation to the tagging incident

102 Mr Cameron’s evidence in respect of his meeting with Mr Meikle of 9 December 2019 was, in summary:

 He wanted to meet with Mr Meikle to show him the completed documents the respondents were sending to WorkPac;

 Mr Meikle’s breach of the Isolation and Tagging SOP was severe;

 As soon as he told Mr Meikle that he was going to undertake an investigation in relation to him relying on an incorrect SOP, Mr Meikle became very combative, and a conversation in the following terms ensued:

Mr Meikle: “You’re wrong about that – the SOP is a generic [BMA] document and it’s applicable.”

Mr Cameron: “No, it not – it’s site specific. Show me a copy of the SOP you were referring to yesterday.”

Mr Meikle: “No, I won’t do that.”

 He agreed that he produced a copy of the Traffic Rules and the Traffic Management Plan, but note that this was consistent with the discussion between Mr Cameron and Mr Meikle of 8 December 2019.

103 Mr Cameron gave further evidence as follows:

45. In response to paragraph 69 of the Meikle Affidavit, I recall that Mr Meikle left my office at that point.

46. In response to paragraph 70 of the Meikle Affidavit, I disagree with this and repeat paragraph 36, above.

47. In response to paragraph 71 of the Meikle Affidavit, I recall Mr Meikle coming back into my office to further discuss the Traffic Rules. While I do not recall exactly what we said, my recollection is that Mr Meikle maintained that his interpretation of the Traffic Rules was correct and that the Overtaking Manoeuvre had been contrary to them.

48. In response to paragraph 72 of the Meikle Affidavit, I deny that my voice and body language changed when Mr Meikle maintained that the Overtaking Manoeuvre was not in accordance with the Traffic Rules; however, I had started to become concerned regarding how combative Mr Meikle was being regarding refusing to produce the SOP he had shown me the day before. I deny that I was being more direct and blunt with Mr Meikle, nor was I insisting that I was right – rather, I was trying to convey to him my interpretation of the Traffic Rules based on my review of them and discussions with others at the Mine. I do not recall saying to Mr Meikle that I would call Ms Dow, Mr Gibson and Mr Hennessy about the matter, as I had already spoken to Mr Gibson and Ms Hollingsworth about the Traffic Rules I did not consider I needed to speak to anyone further about that. However, I do recall saying to Mr Meikle that I would need to call Mr Hennessy, who was my one-up supervisor, to get his thoughts on the matter. I asked Mr Meikle to leave my office and telephoned Mr Hennessy…

50. In response to paragraph 74 of the Meikle Affidavit, I agree that I raised with Mr Meikle that he had triggered a number of abusive alarms on his truck. At the time of the meeting, it was a source of focus for the Mine in the safety space to monitor and crack down on the triggering of abusive alarms on the trucks at the Mine. Abusive alarms can be triggered by multiple circumstances but most commonly are triggered if a truck is too close to something (so as to prevent collision), or where the engine revolution (revs) of the vehicle are too high. The abusive alarms are primarily designed to prevent wear and tear to the machines, which in turn has flow on safety effects for the workers using those machines, as long term abuse of the components of the machines could cause malfunction. Supervisors at this time received emails every few days from Mine Control as to who in their teams were triggering multiple abusive alarms on their machines so that, as an education and upskilling piece, the supervisors could have one on one conversations their team members about why this was occurring. An individual who was flagged with me by Mine Control as having a number of abusive alarms triggered was Mr Meikle. I decided to raise this with Mr Meikle at this meeting as we were already discussing safety compliance matters and I thought it was a good opportunity to offer some feedback and some coaching. I had the same conversation with other CMWs over a number of shifts around this time who were also triggering abusive alarms on their machines. I categorically deny that I only raised these issues because of my discussion with Mr Meikle regarding the Overtaking Manoeuvre, but rather I considered our discussion a general conversation regarding safety and compliance issues, particularly in light of the Isolation and Tagging Breach. I cannot recall the exact words I said to Mr Meikle regarding triggering abusive alarms, but it would have been something along the lines of “*we’re cracking down on abusive alarms and you’ve been flagged as having a fair few, so I will need you to keep an eye on that*.”

…

52. In response to paragraph 76 of the Meikle Affidavit, I agree that I then raised with Mr Meikle that he had been delayed in entering his codes into MineStar. Similarly to the triggering of abusive alarms, another source of safety and compliance education we were focusing on at the Mine around this time was ensuring CMWs were entering codes into the MineStar system correctly and in a timely fashion. MineStar is the operational software system in use at the Mine and, among other things, CMWs are required to enter codes into the MineStar system when a truck is stationary for a period of time. This data is then used by Mine Control to make sure Mine Control is assigning resources effectively and to make sure that CMWs are getting to their crib breaks on time – so in addition to being an efficiency issue, there are potential flow on safety issues from inaccurate data being entered into MineStar. Where CMWs have instances of noncompliance (such as being late to their crib breaks or entering codes late), this is noted by Mine Control in their shift log, which supervisors review on a very regular basis. The supervisors are then able to identify who in their team needs more upskilling. Mr Meikle was flagged as delaying in entering codes into MineStar and could use some more upskilling so that he was entering his data appropriately. Part of the reason I had asked Ms Hollingsworth to attend the office that day to speak to Mr Meikle was to provide him with some further training in relation to MineStar. Similar to the abusive alarm issue, I raised the MineStar issue with Mr Meikle in this meeting as I thought it was a good opportunity to have a general catch up about some deficiencies identified in relation to Mr Meikle’s safety compliance. I categorically deny that I only raised these issues because of my discussion with Mr Meikle regarding the Overtaking Manoeuvre, but rather I considered our discussion a general conversation regarding safety and compliance issues, particularly in light of the Isolation and Tagging Breach. I disagree that Mr Meikle said the words attributed to himself in paragraph 76 of the Meikle Affidavit.

104 Mr Cameron also denied that Mr Meikle had said words to the effect that he thought he was being bullied, threatened and intimidated at that time – rather Mr Meikle was becoming more combative as the discussion progressed.

105 The respondent relied on the 9 December email which is convenient to reproduce here:

Todd please be advised that Daryl Meikle has been stood aside and taken back to camp due to the following reasons

- Daryl was caught using the BMA Coal SOP SAFE OPERATION OF VEHICLES and MOBILE EQUIPMENT GRM version instead of the BMA Coal SOP SAFE OPERATION OF VEHICLES and MOBILE EQUIPMENT on the 08-12-2019. Then on the 09-12-2019 he blatantly lied to me and stated he wasn’t using that document at all when the GRM version had (Traffic control and road signs are to . After I advised him that that was a breach he refused to do a statement

- Daryl then refused to accept that Daunia traffic rules section 25 overrides the overtaking section 28 and 29. I proceeded to call the OCE and my supervisor and head trainer for clarification on this and they both agree that that there was no issues. He then refused to except that as well.

- Daryl also had a breach of out Tagging procedure on the 08-12-2019 last night

- Daryl has had a number of body up alarms and mine control operator noncompliance reports as well.

- Daryl has also had a previous near miss event at the main go line. During this whole conversation I was offering him support and training with our head trainer and AI specialist. I have over unacceptable level of risk to himself and other coal miners due to the number of incidents he has been involved in. Daryl has also refused to participate in an investigation.

(errors in original)

106 The applicant submitted that Mr Cameron was not a reliable witness, and that I should not accept his evidence as to the discussions between him and Mr Meikle of 8 and 9 December 2019. In particular the applicant submitted that, during his cross-examination, Mr Cameron gave various answers which were either inconsistent with or contained material which was not in his affidavit account of the meeting, for example:

(a) Mr Cameron admitted that the Safe Operation of Light Vehicles and Mobile Equipment Standard Operating Procedure that Mr Meikle had in his possession provided on the front page that it was adopted at both the Mine and the Goonyella Riverside Mine. However, he claimed he did not look at the date on which that document had been approved at either Mine;

(b) Mr Cameron claimed, contrary to the second paragraph at [33] of this affidavit, when seeing the SOP being relied upon by Mr Meikle, he called up the allegedly correct SOP on his computer. In his affidavit, Mr Cameron asserts that he called up the Traffic Rules which was a separate document;

(c) Mr Cameron claimed that there were substantive differences in the text of the SOP being relied upon by Mr Meikle verses the SOP which Mr Cameron was able to identify. None of those alleged differences were identified in the affidavit.

107 The applicant also asserted various other divergences in the evidence of Mr Cameron and Mr Meikle, and further that Mr Cameron plainly had difficulty recalling various events during cross-examination, such that his evidence was reconstructed.

108 Considering this evidence I make the following observations.

109 First, I note that Mr Cameron’s version of events was consistent with the contents of the 9 December email. I note however that, as became apparent during the cross-examination of Mr Hennessy, there were numerous other emails sent by Mr Cameron to Mr Hennessy on 9 December 2019 which were not included in Mr Cameron’s affidavit or the subject of his evidence. This was at best a curious omission, but also potentially a matter which reflected poorly on Mr Cameron’s credit. I note that Mr Cameron properly conceded that his recollection of relevant events had diminished with the passage of time, however this does not explain the absence of reference to other communications from him concerning Mr Meikle of 9 December 2019 in Mr Cameron’s affidavit evidence.

110 Second, and as a general proposition, while Mr Meikle may have had concerns with risks and safety on the Mine site, I note that it is equally – if not more – reasonable that Mr Cameron would have had concerns about such issues on the Mine site. As Mr Cameron stated in cross-examination, coal mine workers referred safety issues to him every day (transcript p 310 ll 5-6).

111 Third, I consider it likely that both Mr Meikle and Mr Cameron would have become combative during the course of their conversations on 8 and 9 December 2019. I consider credible Mr Meikle’s assessment of Mr Cameron’s body language as irritated when Mr Meikle continued to challenge Mr Cameron’s interpretation of the relevant SOPs. I also consider it likely that Mr Meikle would have felt intimidated at the meeting of 9 December 2019 when issues were raised for the first time concerning other alleged breaches by him, and when Mr Cameron insisted on an interpretation of the SOPs which Mr Meikle believed to be wrong.

112 On balance, I prefer Mr Meikle’s version of the events of 8 and 9 December 2019. I considered Mr Meikle to be a credible witness, who took a very precise view of the world and his work, in particular in relation to issues relating to the workplace. I also note that in his affidavit, and during cross-examination, he gave evidence on matters which to him were of primary and personal importance. This does not mean that the issues the subject of discussion between Mr Cameron and Mr Meikle were not of importance to Mr Cameron – rather I consider it likely that such issues not uncommonly came to Mr Cameron for consideration and that the discussion would have been less memorable for him than it was for Mr Meikle.

113 I now turn to the question whether the relevant SOPs and rules were “workplace instruments”.

# WORKPLACE INSTRUMENT

114 “Workplace instrument” is defined by s 12 of the FW Act as meaning an instrument that:

(a) is made under, or recognised by a workplace law; and

(b) concerns the relationships between employers and employee.

115 The applicant pleads that the following standard operating procedures (SOPs) were “workplace instruments”:

(1) The Traffic Management Plan and Traffic Rules;

(2) The Isolation and Tagging SOP; and

(3) The Work Inspections SOP.

116 The respondent denied that the any of these instruments were “workplace instruments” for the purposes of s 12 of the FW Act.

117 It is common ground that the CMSH Act and the *Coal Mining Safety and Health Regulations 2017* (Qld) (CMSH Regulations) are “workplace laws” within the meaning of the FW Act.

118 Section 42(d) of the CMSH Act provides that the site senior executive of the coal mine must develop and implement a safety and health management system for all persons at the Mine. Section 41 of the CMSH Act prescribes an obligation on the operator of a Mine (in this case, BMA) to ensure that the safety health management system is put in place. Regulation 6 of the CMSH Regulations sets out the basic elements of the safety and health management system, namely:

(1) Risk identification and assessment;

(2) Hazard analysis;

(3) Hazard management and control;

(4) Reporting and recording relevant safety and health information and data.

119 Section 14 of the CMSH Act provides:

 **14 Meaning of standard operating procedure**

"**standard operating procedure**" at a coal mine is a documented way of working, or an arrangement of facilities, at the coal mine to achieve an acceptable level of risk, developed after consultation with coal mine workers.

120 Further, reg 10 of the CMSH Regulations provides a detailed procedure for the consultation and development of standard operating procedures. Sections 39 and 43 of the CMSH Act bind coal mine workers to comply with the safety health management system, put into practical effect by the SOPs.

121 In relation to the Traffic Management Plan and Traffic Rules, reg 76 of CMSH Regulations provides as follows:

**76 Using mobile plant**

(1) A coal mine **must have a standard operating procedure for using mobile plant.**

(2) The procedure must include ways of minimising risks from the following—

**(a) light and heavy vehicle interaction;**

**(b) overtaking and parking vehicles.**

(3) The procedure must have regard to the design and construction of the mine’s roads.

(emphasis added)

122 Material aspects of the Traffic Rules include:

**Positive Two-Way Radio Communication**

17 Positive two-way radio communication requires contact between two or more vehicles (or mobile equipment), to clearly communicate the intentions of each driver or operator

….

25 Traffic control and road signs must be followed at all times.

…

**Overtaking**

28 No overtaking of vehicles or mobile equipment is permitted in the MIA, Coal Handling Preparation Plant (CHPP) and Workshop Areas.

29 All overtaking and passing manoeuvres require positive communication with the exception of:

a Heavy mobile equipment overtaking Graders with GET engaged and performing road maintenance if safe to do so at a maximum speed of 30 km/hr.

b Road maintenance operations with less than 200 meters clear vision in both directions is deemed to be not safe to overtake without positive communications.

123 In relation to the Isolation and Tagging SOP, the CMSH Regulations requires pursuant to reg 78 that:

**78 Isolating and tagging procedures**

(1) A coal mine must have a standard operating procedure for the following—

(a) controlling the risk of an unplanned release of energy from plant, including positively isolating the energy source;

(b) if an electrical or mechanical energy source is positively isolated—testing for zero potential;

(c) taking plant out of service;

(d) returning plant to service.

(2) Without limiting subsection (1) , the standard operating procedure may provide for the use of danger, isolation, operational, out of service, personal and restriction tags for particular circumstances.

(3) If the safety or health of a person is directly affected by the operation or non-operation of plant, the procedure must also provide for the person to personally control, by attaching a danger tag or lock to the plant, the plant’s change in status from non-operational to operational.

(4) For subsection (1) (a) , the method for positively isolating the energy source for plant provided for in the standard operating procedure must—

(a) for plant that is electrical equipment—be a manually initiated operation that—

(i) isolates all active power conductors of the plant being isolated from the electricity supply; and

(ii) prevents unintended re-energisation, including re-energisation through inadvertent operation of the plant or component failure; and

(b) for other plant—be the operation of a manually operated device that—

(i) is installed in the energy supply for the plant and, when operated, isolates the plant from its energy source; and

(ii) requires a manually initiated operation for the supply of energy to the plant to be resumed; and

(c) require the isolation device be clearly marked as being the positive means of isolating the plant.

(5) In this section—

"isolation device" means—

(a) for plant that is electrical equipment—the device used manually to initiate the operation mentioned in subsection (4) (a) ; or

(b) for other plant—the device mentioned in subsection (4) (b) .

124 The first page of the Isolation and Tagging SOP provides:

STANDARD OPERATING PROCEDURE

BMA Coal SOP ISOLATION AND TAGGING

Document Owner: Site SSE

Coal Mining Safety and Health Regulations 2017

Section 78

This SOP has been separately adopted at each of the following mines, as that mine’s SOP. This followed separate risk assessments and consultations with a cross section of workers at each mine, incorporation of feedback and technical inputs (if applicable), decision of any non-consensus matters by each mine’s SSE, and finally endorsement of the final SOP by each mine’s SSE – each in accordance with the requirements of s10 of the CMSH Regulation.

125 Notably, the Isolation and Tagging SOP was implemented at the Daunia and Goonyella Riverside Mines.

126 Key aspect of the Isolation and Tagging SOP relating to this case include:

64. Out of Service tags will be primarily yellow and use the standard hazard warning symbol (black exclamation mark inside a black triangle) on both sides have the words “OUT OF SERVICE” and “DO NOT OPERATE”.

65. Out of Service tags are applied to faulty or unsafe equipment to warn personnel of a potential hazard or to prevent further damage to equipment.

…

67. Out of Service tags prohibit any person from attempting to operate equipment and must be placed as close as practical to any operational controls and on any isolation points until the equipment has been deemed fit for use.

…

69. Out of Service tags must only be removed by an authorised person who has carried out repairs, maintenance or inspected the equipment and deemed the equipment in a condition fit for use; Tags must be destroyed and disposed of when finished with.

75. Information tags will be green with a primary worded message of “INFORMATION TAG”.

76. Information tags are used to alert personnel of important information, or convey a safety message. They must be located in a conspicuous location.

77. Information contained on this tag must include who the tag was placed by, the equipment it relates to, the date and time the tag was placed and information detailing why the tag has been placed. Information tags must remain legible for the life that they are fitted, e.g. laminate the tag.

78. This tag is not intended to prevent operation of the equipment and must not be a substitute for any other tag.

127 In relation to the Work Inspection SOP, the CMSH Regulations requires pursuant to reg 6 that:

**Basic elements**

A coal mine’s safety and health management system must provide for the following basic elements—

(a) risk identification and assessment;

(b) hazard analysis;

(c) hazard management and control;

(d) reporting and recording relevant safety and health information and data.

128 The applicant submitted that the SOPs clearly formed part of the mandated safety and health management system by virtue of s 62(5)(d) of the CMSH Act. However the respondent submitted it did not necessarily follow that every policy, procedure or manual developed by an employer to comply with its obligations under those workplace laws (including the relevant SOPs) constitutes a “workplace instrument” within the meaning of s.12 of the FW Act. In particular, the respondent submitted that the relevant SOPs were not “concerned with the relationships” between employees of BMA and BMA itself. Rather, the object of the SOPs was that of mine safety by the imposition of certain obligations and processes.

129 On a plain reading the CMSH Act and CMSH Regulations expressly require the development of the SOPs. I note in particular that a person failing to meet these requirements, and failing to make available a copy of the safety and health management system, will find themselves subjected to a penalty under the CMSH Act. In addition, I note the detailed consultation process for the creation of SOPs and requisite consultation regarding the safety and health management system.

130 I am satisfied that the relevant SOPs are made under, or recognised by, a “workplace law”. They are objectively “given legal effect or legal life”; *Barnett v Territory Insurance Office* (2011) 196 FCR 166 at [31]-[32]. I am satisfied that the SOPs meet the first limb of the definition of “workplace instrument”.

131 In relation to the second limb of the definition, the respondent submitted that the SOPs did not “concern” the relationship between an employee and employer, but rather merely regulated mine safety. The respondent relied on the decision of Logan J in *ALAEA v Sunstate Airlines (Qld) Pty Ltd* (2012) FCR 306 in which his Honour found that the *Civil Aviation Regulations 1988* (Cth) were not a “workplace law” because the objective of *that* regulation was not the relationship between employee and employer. Moreover, Logan J considered that those regulations merely regulated air safety.

132 In addition, relying on *ALAEA* at [34] the respondent submitted that, because “workplace instrument” is not defined by reference to occupational health and safety matters, the relevant SOPs were not workplace instruments.

133 I am satisfied that the SOPs “concern” the relationship between employers and employees as submitted by the applicant, including by prescribing the way employees perform duties for the employer, and directions the employer may give to the employee regarding the performance of those duties. The legislation and regulations before me differed from those before Logan J. The applicant submits, in my view correctly, that these instruments are made in consultation with employees and employers through an extensive process of which the employee and employer are subsequently bound to follow.

134 I am satisfied that the SOPs are workplace instruments within the meaning in s 12 of the Fair Work Act.

# ADVERSE ACTION

## Did BMA take adverse action against Mr Meikle within the meaning of s 342 Fair Work Act?

135 The applicant complained that BMA took adverse action within the meaning in s 342 of the FW Act against Mr Meikle by excluding him from the Mine, resulting in the refusal to make use of services offered by WorkPac under Item 3(d).

136 Section 342 of the Fair Work Act sets out circumstances in which a person takes adverse action against another person. Materially, Item 3 provides:

Adverse action is taken by…

A person (the ***principal***) who has entered into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor:

If…

The principal:

(a) Terminates the contact; or

(b) Injures the independent contractor in relation to the terms and conditions of the contract; or

(c) Alters the position of the independent contractor to the independent contractor’s prejudice; or

(d) Refuses to make use of, or agree to make use of, services offered by the independent contractor; or

(e) Refuses to supply, or agree to supply, goods or services to the independent contractor.

137 The applicant submitted that the words “against a person employed or engaged” found in column 1 of Item 3 were sufficiently broad to encompass the taking of adverse action by a principal against an employee of an independent contractor. It would otherwise be impossible for adverse action to be made against an employee of an independent contractor as contemplated in column 1, and contrary to the implied intention of the legislators.

138 In summary, the respondent submitted that s 342 Item 3 of the FW Act did not apply to the circumstances of the case, and accordingly no adverse action was taken against Mr Meikle, because:

 The contract between Workpac and the respondent had not been terminated;

 Workpac as the independent contractor did not allege any injury, prejudice, or refusal within the meaning of s.342 Item 3 of the FW Act; and

 Section 342 Item 3 of the FW Act does not contemplate “adverse action” being taken against an employee of Workpac by the principal. Rather, the relevant protection is afforded to Workpac itself. It does not provide the applicant or Mr Meikle with standing to allege (on behalf of Workpac) any of the above.

139 I do not accept the respondent’s construction of s 342 of the FW Act, or that exclusion of Mr Meikle from the Mine by the respondent could not be “adverse action” by the respondent against Mr Meikle within the meaning of s342 Item 3 of the FW Act. Item 3 plainly contemplates a principal taking adverse action against an independent contractor *or a person employed or engaged by the independent contractor*, such as Mr Meikle, by a principal, such as the respondent. I further reject the respondent’s submission that the relevant protection under s 342 Item 3 could relate only to conduct on the part of the respondent which affected WorkPac.

140 In my view, in respect of the respondent’s conduct in excluding Mr Meikle from the Mine, the applicant has substantiated that the respondent had taken adverse action against Mr Meikle.

# WORKPLACE RIGHTS

141 “Workplace right” is defined by s 341 of the FW Act as follows:

(1) A person has a workplace right if the person:

(a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or

(b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or

(c) is able to make a complaint or inquiry:

(i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or

(ii) if the person is an employee--in relation to his or her employment.

142 The applicant claims that on 9-10 December 2019 Mr Meikle exercised workplace rights relating to two matters, namely Mr Meikle’s:

(a) complaints in respect of the unsafe overtaking manoeuvre and adherence to the Traffic Rules SOP; and

(b) refusal to improperly remove the out of service tag when he had no authority to do so under the Isolation and Tagging SOP.

143 The respondent admitted that each of the complaints made by Mr Meikle formed the exercise of a workplace right insofar as it was a complaint about his employment. However as became clear at the hearing, the applicant’s case was that Mr Meikle had a workplace right in terms of s 341(1)(a), namely that Mr Meikle was entitled to the benefit of, or had a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body, being the relevant SOPs or s 39(1)(b), (c) and/or 39 (2)(c) of the CMSH Act (transcript p 327). The respondent denied that Mr Meikle’s conduct constituted the performance or discharge of such a role or responsibility.

144 In relation to the overtaking manoeuvre, the applicant alleged that Mr Meikle’s complaints constituted a workplace right in three different ways, namely:

 the performance of or a discharge of a role or responsibility conferred by s. 39 of the CMSH Act, being a workplace law;

 the performance or discharge of a role or responsibility conferred by the Workplace Inspection SOP, being a workplace instrument; and

 a complaint in respect of his employment.

145 In relation to Mr Meikle’s refusal to remove the out of service tag, the applicant contended that this constituted the exercise of a workplace right in that it was the performance or discharge or a role or responsibility conferred or imposed by the Isolation and Tagging SOP which was a workplace instrument.

146 I have found that the CMSH Act and the CMSH Regulations were workplace laws, and the relevant SOPs were workplace instruments. The key question is whether Mr Meikle was discharging a role or responsibility conferred or imposed by s. 39 of the CMSH Act and/or the Workplace Inspection SOP (in relation to the overtaking manoeuvre), or the Isolation and Tagging SOP (in relation to his refusal to remove the out of service tag).

## Complaint as to overtaking manoeuvre

147 The applicant alleges that s 39 (1) and (2)(c) of the CMSH Act imposed an obligation on Mr Meikle to take any course of action which is reasonable and necessary to ensure that others are not exposed to risk. In discharging that responsibility,

148 The respondent submits that Mr Meikle’s complaint in relation to the overtaking manoeuvre had no foundation in the manoeuvre being “unsafe” but rather it was a complaint that there had been a failure to comply with the relevant SOP and Traffic Rules.

149 Section 39 of the CMSH Act relevantly provides:

**39 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) …

(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) …

(b) …

(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;

…

150 The applicant submitted that in this case Mr Meikle had witnessed an act in contravention of the Traffic Rules, the non-compliance needed to be addressed to reduce the risk that the operator posed to other workers at the Mine, and Mr Meikle was obliged to act on the information he had.

151 I accept that, in relation to his complaint concerning the overtaking manoeuvre, Mr Meikle was exercising a workplace right. Although the respondent submitted that Mr Meikle’s complaints largely turned on his interpretation of the relevant SOP and Traffic Rules and at no stage did Mr Meikle assert anything about the overtaking manoeuvre being “unsafe”, in fact the element of safety was intrinsic to Mr Meikle’s complaint. In particular, his complaint was that the conduct was inherently unsafe and also breached the relevant SOP and Traffic Rules. The language of s 39 (1)(b) and (c) of the CMSH Act impose an obligation on a coal mine worker, such as Mr Meikle, to pass on information such as information concerning suspected dangerous driving to management.

152 I further note that the Workplace Inspections SOP was not in evidence (transcript page 328), however the nature of the obligations imposed by it were agreed by the parties at para 21 of the Statement of Agreed Facts filed on 8 April 2021. In particular, the parties agreed that:

Pursuant to clause 7 of the Workplace Inspections SOP, if hazards or hazardous conditions are found:

(a) the hazard is to be made safe (where possible);

(b) all hazards/ events must be immediately reported to the relevant supervisor; and

(c) hazards are to be recorded in accordance with the site Risk Management Process.

153 I accept the submission of the applicant that, in this case, Mr Meikle had a right to make the relevant complaint to management of the respondent concerning the overtaking manoeuvre.

##  Refusal to remove out of service tag

154 In relation to Mr Meikle’s refusal to remove the out of service tag on the basis that he had no authority to do so, the respondent submitted that, because the placing of the out of service tag by Mr Meikle did not comply with clause 67 of the Isolation and Tagging SOP:

 the tag was not operational;

 clause 69 of the Isolation and Tagging SOP did not apply; and

 Mr Meikle’s refusal to remove the tag could not amount to the performance or discharge of a role or responsibility under the SOP.

155 I am satisfied that, in refusing to remove the out of service tag, Mr Meikle was exercising a responsibility given to him by a workplace instrument, namely the Isolation and Tagging SOP.

156 The Isolation and Tagging SOP was annexed to the affidavit of Mr Newman. Clause 65 of the instrument provided that such tags are applied to faulty or unsafe equipment to warn personnel of a potential hazard or to prevent further damage to equipment. Importantly, cl 69 provides:

Out of Service tags must only be removed by an authorised person who has carried out repairs, maintenance or inspected the equipment and deemed the equipment in a condition fit for use; Tags must be destroyed and disposed of when finished with.

157 The SOP plainly contemplates that out of service tags could only be removed by an authorised person, being (for example) a repairer or “fitter”. While the SOP makes provision for the placement of the tag, I am not satisfied that even an improperly applied out of service tag could be removed from equipment other than by an authorised person. Mr Meikle was acting consistently with the responsibility imposed by cl 69 of the Isolation and Tagging SOP, and exercised a workplace right in refusing to remove the out of service tag.

# PROHIBITED REASON

158 The applicant has established that Mr Meikle exercised a workplace right or rights, and the respondent took adverse action against him by excluding him from the Mine. The onus now rests on the respondent to establish that its action in excluding Mr Meikle from the Mine was for a reason other than a reason prohibited by s 361 of the FW.

159 Before turning to the evidence of the respondent and the reasons proffered by the relevant decision-maker, it is helpful to outline the evidence given by Mr Meikle and Ms Rakitovszky in relation the disciplinary process that followed. I note, of course, that this evidence is not an explanation by any means of the reasons of the respondent - that rebuttal rests solely on the respondent - however the evidence put forward by the applicant assists in understanding the relevant course of events.

### Mr Daryl Meikle

160 Relevantly, Mr Meikle deposed:

82. On 10 December 2019 I received a telephone call from Ms Liz Rakitovszky, National Industrial Relations Manager for WorkPac. She told me that I was being stood down.

83. On 17 December 2019, I received a show cause notice (the **Notice**) from WorkPac. Annexed hereto and marked "**DM-5**' is a copy of the Notice dated 17 December 2019.

84. The Notice contained two allegations. The allegations were in the following terms:

(a) that on 8 December 2019 I placed an 'out of service' tag on the ladder of the truck that I was operating, and, as a result of the incorrect placement of the tag, the fitter that was to undertake work on the truck did not identify the tag and therefore did not remove it during repair. This caused the fitter to have to return to the truck to remove the tag. As a result of this, the truck was out of service for longer than necessary. The extended delay therefore caused a productivity loss for BMA. Additionally, It alleged that I had breached section 67 of the 'BMA Coal Standard Operating Procedure Isolation Tagging', which provides that "*out of service tags…must be placed as close as practical lo any operational control and on any isolation points until the equipment has been deemed fit for use*" (together **Allegation One**); and

(b) that on 8 December 2019 I observed a truck perform an unsafe overtaking manoeuvre and reported it is a traffic incident to my supervisor on the basis that it constituted a breach of the relevant SOPs. On Inspection by the supervisor it was identified that the SOP that I referred to was an SOP from GRM and the supervisor queried the application of the SOP to the Mine. I insisted that the SOP applied to all BMA mines. The supervisor showed me the correct SOP for the Mine. It was alleged that by utilising an SOP that does not form part of the Site's Safety and Health Management System (SHMS) I had:

i. breached section 39(1 )(a) of the CMSH Act, which provides that a coal mine worker "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";

ii. failed to comply with my notice of offer, which provided that "it is a term of employment that you comply with each of the Client's policies and procedures and any other requirements which apply at the Client’s Site"; and

iii. failed to comply with the 'Terms & Conditions', specifically that:

1.  *a "failure to comply with site policies and procedures may result in the termination of your employment and/or assignment" and;*

2. *the ''employee (FTM) must inform themselves of and strictly follow all NES operating procedures and safety systems of work specified for each site for particular tools, equipment and tasks”.*

(together **Allegation Two**)

161 The applicant represented Mr Meikle in relation to these allegations and the show cause process. Key events of the show cause process were outlined in Mr Meikle’s 25 September 2020 affidavit, with minor corrections in the November 2020 affidavit. Relevantly, those events included:

 On 17 December 2019 Mr Meikle attended a meeting with, amongst other WorkPac employees and representatives of the applicant, Ms Rakitovszky to discuss the allegations; and

 On 23 December 2019 Mr Meikle received an email from Ms Rakitovszky advising that WorkPac was not pressing Allegation Two because upon investigation it was determined that the SOPs referred to applied at both the Goonyella Riverside Mine and the Mine;

 On 8 January 2020 Mr Meikle submitted a written respondent to the allegations in which he denied any wrongdoing;

 On 16 January 2020 Mr Meikle attended a further meeting with Ms Rakitovsky, amongst others, during which he received correspondence titled ‘Close Out of Investigation – First Written Warning’ and ‘Finalisation of Assignment’ (**16 January 2020 meeting**).

162 Notably, the Close Out of Investigation correspondence concluded:

…WorkPac is satisfied that your conduct in placing the ‘out of service tag’ on the ladder of the relevant vehicle is a breach of the Isolation and Tagging SOP in that the 'out of service' tag was not placed as close as practical to any operational controls and/or on any isolation points.

In making this finding, WorkPac notes that the placement of the ‘out of service' tag on the ladder was an inadvertent error and that, at all material times, you were candid In your admission that the 'out of service tag’ could have been placed in a different position,

In circumstances where WorkPac has determined that your conduct was in breach of the Isolation and Tagging SOP, it necessarily follow that your conduct was also in breach of the WorkPac Assignment and Basic Safety Guide (the Guide), the Casual Employee (FTM) Terms & Conditions of Employment (Terms & Conditions) and your Notice of Offer of Casual Employment (Notice of Offer), all of which provide that you are required to comply with applicable Site policies, procedures and practices."

163 The Finalisation of Assignment correspondence provided:

…I now confirm that during the time WorkPac was investigating the above allegations, [BMA] has advised that your access to the Site has been revoked.

…

As above, WorkPac has, on a number of occasions during this process, sought further information and clarification from [BMA] including in relation to its decision to exclude you from Site.

As you are aware however, [BMA] as occupier of the Site, holds ultimate discretion as to whether it exercises its rights to exclude you from Site.

In circumstances where [BMA] has exercised this discretion, your casual assignment at Site has not come to an end, effective 16 January 2020.

While your assignment with [BMA] may have come to an end, WorkPac will continue to work with you to identify any alternate assignment opportunities…

164 Mr Meikle then provided evidence concerning subsequent unsuccessful attempts to obtain further roles with WorkPac.

### Ms Elizabeth Mary Rakitovszky

165 Ms Rakitovszky was the National Industrial Relations Manager of WorkPac. She described the business of WorkPac “at a basic level” as a labour hire business which deployed its employees to perform work for a client on an assignment basis under a services contract.

166 Ms Rakitovszky gave evidence on behalf of WorkPac by way of an affidavit dated 23 October 2020, prior to the discontinuance of proceedings against it. Ms Rakitovszky was then subpoenaed to give evidence by the applicant.

167 Relevantly, Ms Rakitovszky deposed at [14] of her affidavit:

14. I made the decision to stand Mr Meikle down with pay so that the investigation could occur. I did so because in my judgment this was the most appropriate way to ensure that the investigation proceeded efficiently, so that we could understand whether the allegations were substantiated before Mr Meikle was deployed to further work and because Mr Meikle had been stood aside from his duties at the Daunia Mine and we had no other work to which he could be immediately deployed.

15. At approximately 9.30am, I had a telephone conversation with Mr Meikle. I explained to Mr Meikle in words to the following effect that WorkPac had been made aware of some incidents which may have occurred on site and that he was being stood down with pay pending an investigation.

168 Ms Rakitovszky gave evidence of WorkPac’s investigation into Mr Meikle. Key aspects of Ms Rakitovszky’s evidence were as follows:

38. I was the relevant decision-maker in relation to the investigation.

39. Based on the information available to me my conclusions were as follows:

(a) Mr Meikle had placed an 'information tag' on the stairs to a truck after noticing an oil leak on 8 December 2019;

(b) after speaking with his supervisor, Mr Meikle replaced the 'information tag' on the stairs to the truck with an 'out of service' tag;

(c) the Isolation and Tagging SOP required that the out of service tag 'must be placed as close as practical to any operational controls and on any isolation points until the equipment has been deemed fit for use.'

(d) Mr Meikle had admitted in his Incident Statement dated 8 December 2019 that he had a lapse in concentration when placing the out of service tag on the stairs of the truck and not on an operational control or on an isolation point;

(e) the stairs to the truck was not considered to be an 'operational control' or an 'isolation point';

(f) the fitter who subsequently undertook work on the truck did not identify the out of service tag when conducting the repair. The fitter had to return to the truck and remove the tag at a later time, leading to a delay and, on BMA's view, productivity loss because the truck was out of service for longer than it needed to be. However given the lack of specific evidence, I did not consider there was sufficient evidence to conclude that the delay caused production loss;

(g) there was no suggestion that Mr Meikle's conduct in placing the out of service tag on the stairs was a deliberate breach of the Isolation and Tagging SOP; and

(h) Mr Meikle had accepted that he could have placed the out of service tag in a different position, and one in which the fitter may have more likely identified it.

40. In all the circumstances, I concluded that Mr Meikle had breached the Isolation and Tagging SOP. In doing so, that was also in breach of the terms and conditions of his employment with WorkPac which required Mr Meikle to comply with applicable Site policies, procedures and practices such as the Isolation and Tagging SOP.

41. I accepted that Mr Meikle's conduct was inadvertent and not deliberate. I did not consider that Mr Meikle's conduct in breaching the Isolation and Tagging SOP was so serious as to warrant termination of employment. However, it was a breach of the Isolation and Tagging SOP.

42. For those reasons, I considered that a first written warning was an appropriate disciplinary outcome. This was consistent with other disciplinary outcomes involving breaches of tagging and isolation procedures of similar severity that I was aware of.

43. My conclusion about the appropriate disciplinary outcome did not occur because Mr Meikle (either directly or via the CFMMEU) had raised any complaints with WorkPac about the conduct of BMA employees. My conclusion was solely based on the matters set out in paragraphs 39 to 42 above. I did not have regard to any other matters when coming to my conclusion about the appropriate disciplinary outcome.

169 Mr Rakitvoszky then turned to BMA’s decision to exclude Mr Meikle from the Mine. Notably she deposed:

**BMA’s decision to exclude Mr Meikle from the Dauina Mine**

45. Having completed my investigation into Mr Meikle's conduct, I provided an update to BMA in relation to WorkPac's findings.

46. I was ultimately advised on 15 January 2020 when I attended a meeting on site that BMA had made the decision to exclude Mr Meikle from the Daunia Mine. I spoke with Blair (whose last name I do not recall) and advised him that WorkPac had concluded its investigation into the allegations against Mr Meikle and had concluded that Mr Meikle had breached the Isolation and Tagging SOP but that the breach was not so serious so as to warrant Mr Meikle's termination. Blair's response was to the effect that he considered a breach of the Isolation and Tagging SOP to be a very serious matter and did not understand why it did not warrant termination. Blair also said words to the effect that Mr Meikle would not be allowed back on site.

47. Other than the information provided to me by Blair, I do not know the reasons why BMA made its decision to exclude Mr Meikle from the Daunia Mine. I did not agree that the conduct as I had concluded had occurred warranted his exclusion form the Daunia Mine, however I have no reason to doubt that Blair accurately indicated BMA's reasons for excluding Mr Meikle from further work at the Daunia Mine.

48. As a result of that exclusion, WorkPac was no longer able to deploy Mr Meikle to his casual assignment at the Daunia Mine.

170 At the hearing, Ms Rakitvoszky corrected paragraph [46] of her affidavit to read ‘Mr Blair Whitney’.

## Evidence of the Respondent

171 Relevantly, the respondent relied on the evidence of Mr Cameron and Mr Hennessy in relation to their rebuttal as to whether adverse action was taken for a prohibited reason. In this respect, Mr Hennessy, direct supervisor of Mr Cameron, was considered the “ultimate” decision-maker.

### Mr James Cameron

172 Mr Cameron gave the following reasons for standing Mr Meikle aside:

59. As set out in my email to Mr Hennessy, my reasons for standing Mr Meikle aside were:

(a) Mr Meikle was relying on an incorrect SOP in respect of the Overtaking Manoeuvre and when I asked him further about it, he was in my view dishonest about it and refused to privde a statement to me about it;

(b) Following on from that, he was intransigent about accepting the interpretation of the Traffic Rules that I provided after consultation with relevant individuals at the Mine;

(c) The Isolation and Tagging Breach;

(d) The triggering of abusive alarms and the MineStar non-compliance; and

(e) The Go Line Incident.

60. I noted in that email that combination of the above reasons led me to believe that Mr Meikle posed an unacceptable safety risk.

173 The “go-line” incident referenced by Mr Cameron refers to an incident at approximately 10.40pm on 17 September 2019 where Mr Meikle, when driving a truck, accidentally turned into an exit lane rather than the entry lane. Mr Meikle radioed in the incident over the two-way radio. Mr Cameron stated at [19]:

I recall having a conversation with Mr Meikle directly after the Go Line Incident after he had completed his drug and alcohol testing and, while I do not recall exactly what was said, I recall that I asked Mr Meikle if he was alright and asked him how the Go Line Incident happened. Mr Meikle acknowledged that the Go Line Incident was his mistake and I told him he would need to fill out an incident report and submit this to me, in accordance with our usual practice. Annexed and marked “JWC-2” is a copy of the incident report as completed by Mr Meikle in relation to the Go Line Incident.

174 Mr Cameron further deposed:

61. I categorically deny that the reason I stood Mr Meikle aside and reported this matter to Mr Hennessy had anything to do with the issues Mr Meikle raised in respect of:

(a) the Severe Weather Event;

(b) the Overtaking Manoeuvre (insofar as it related to Mr Meikle’s right to raise a concern that the Overtaking Manoeuvre had been contray to the Traffic Rules); and

(c) who was authorised to remove the Out of Service tag under the Isolation and Tagging SOP.

…

64. The sole reason I recommended that Mr Meikle be stood aside and noted in my email to Mr Hennessy that I considered him an unacceptable safety risk was because he attempted to rely on another mine’s SOP in respect of the Overtaking Manoeuvre and then, when he was challenged on this, he refused to accept that he could not do this and would not participate in an investigation. While the decision regarding Mr Meikle continuing to work at the Mine rests ultimately with Mr Hennessy, my genuine view is that, had Mr Meikle been upfront with me about relying on another SOP and been cooperative with an investigation in relation to that, I would have given serious consideration to him remaining in my team. This is supported by the fact that I asked Ms Hollingsworth to come to my office on 9 December 2019 to upskill Mr Meikle on these matters. I cannot see why I would have organised this and told Mr Meikle that she was there for that purpose if my intention was to try to get rid of him.

65. I never had any issue with Mr Meikle raising issues about the interpretation of the Mine’s SOPs or anything else, but when you have a situation where a CMW is telling you that something on site is or is not allowed using another mine’s SOP and then when questioned about this, totally shuts down and refuses to participate in further discussions on this, this is not something we can tolerate. The consequence of having someone at the Mine who is not across their obligations pursuant to the SHMS (and won’t be challenged on it) is too much of a risk to have on site. That is the crux of it for me.

### Mr Todd Hennessy

175 The respondent submitted that Mr Hennessy was the relevant decision-maker. Mr Hennessy’s evidence for the reasons Mr Meikle was excluded from the Mine were set out in his affidavit dated 23 October 2020 as follows:

**Decision to exclude Mr Meikle from the Mine**

31. I am aware that, in these proceedings, the CFMMEU alleges that BMA made the decision to exclude Mr Meikle from site because he alleges he at various times exercised his workplace rights (as that term is defined in the FW Act) in relation to:

(a) the Lightning Event (as that term is defined in the CFMMEU’s Amended Statement of Claim filed on 8 June 2020 (ASoC));

(b) the Unsafe Overtaking Manoeuvre (as that term is defined in that ASoC); and

(c) the Out of Service Tag Issue (as that term is defined in the ASoC).

32. In relation to each of these, my knowledge (including who reported this to me) can be summarised as follows:

(a) In relation to the Lightning Event, at the time I made the decision to exclude Mr Meikle from the Mine, I was aware from my brief discussion with Ms Dow that Mr Meikle had had a conversation with Ms Dow in relation to some concerns he held regarding the Severe Weather Procedure, but the extent of my recollection of this conversation is outlined at paragraph 17 above. I was not aware of the substance of Mr Meikle’s concerns. To my knowledge, CMWs regularly raise safety questions and concerns with their supervisors and this is actively encouraged in the Mine. I was also not aware of any of his complaints in relation to the Lightning Event raised at the pre-start meeting. I did not take this into account when making my decision to exclude Mr Meikle from the Mine.

(b) In relation to the Unsafe Overtaking Manoeuvre, my visibility over this was limited to the conversation I had with Mr Cameron as outlined at paragraphs 19 to 23 of this affidavit. This matter was raised with me by Mr Cameron in the context of Mr Meikle relying on an incorrect SOP. The only matter of relevance relating to the UnsafeOvertaking Manoeuvre that I took into account when deciding to exclude Mr Meikle from the Mine was, as Mr Cameron set out in his email to me on 9 December 2019, Mr Meikle refused to accept that the overtaking manoeuvre he had witnessed was in accordance with the relevant traffic rules even when he had been told by a number of senior people at the Mine that it was.

(c) In relation to the Out of Service Tag Issue, I had no knowledge of this at the time I made the decision to exclude Mr Meikle from the Mine.

33. After reviewing the information Mr Cameron provided to me on 9 December 2019, I decided that, when taken together, the matters outlined by Mr Cameron meant that Mr Meikle could no longer remain at the Mine, because he posed an unacceptable safety risk. The most serious matter outlined in Mr Cameron’s email from my perspective, and the factor that was most persuasive to me in determining that Mr Meikle should be excluded was that Mr Meikle refused to participate in an investigation regarding his reliance on an incorrect SOP. I understand that people make mistakes and may be incorrectly relying on the wrong documents but to shut down and refuse to engage in discussions with us about this – particularly given there were a number of other safety incidents Mr Meikle was involved in while on hire to BMA – indicated to me that Mr Meikle did not sufficiently comprehend his obligations with respect to maintaining a safe workplace at the Mine.

34. I categorically deny that my decision to exclude Mr Meikle from the Mine had anything to do with his discussions with various people at the Mine regarding the Lightning Event, the Unsafe Overtaking Manoeuvre (except as outlined above at paragraph 32(b)), or the Out of Service Tag Issue.

**Communications with Workpac**

35. After I made the decision to exclude Mr Meikle from site, I telephoned my usual contact from Workpac, Jessica Kemp (Ms Kemp), at approximately 8am to communicate to her that I had decided that, pending Workpac’s investigation, Mr Meikle should be excluded from the Mine by saying words to the following effect “I wanted to let you know that Daryl Meikle will no longer be required by us. I will send you more information setting out why.” I emailed her this document at 8.21 am on 10 December 2019. A copy of this email with attachments is annexed and marked “TWH-3”.

36. At approximately 9am, Ms Kemp telephoned me and asked me to provide additional information regarding my view that Mr Meikle should be excluded from the Mine. I sent Ms Kemp the following documents by email at 9.53am, 9.57am, 10am and 10.10am respectively:

(a) The BMA Isolation and Tagging SOP;

(b) A photograph of the truck Mr Meikle drove the wrong way up the go-line;

(c) Mr Meikle’s completed incident statement in relation to driving the wrong way up the go-line, dated 19 September 2019; and

(d) A screenshot of Mr Meikle’s event record showing that he had triggered “Body Up while Machine in Motion”, “Transmission Abuse Warning” and “Machine Uplift to prevent Engine Overspeed” alarms on eight occasions between 11 November 2019 and 7 December 2019. This event record was generated by Mine Control on a weekly basis and sent to supervisors (in Mr Meikle’s case, Mr Cameron) so the supervisor could speak to the relevant CMW regarding the abusive alarms they were triggering. This was the most recent event record for Mr Meikle at the time I made the decision to exclude Mr Meikle from the Mine.

37. Copies of these emails to Ms Kemp are annexed and marked “TWH-4”. I recall that Mr Cameron gathered and sent these documents to me, but I have not been able to locate the covering email where Mr Cameron sent me these documents.

## Consideration

176 Taking into account the evidence as a whole, notwithstanding the contentions of the respondent that it has not taken adverse action against Mr Meikle within the terms of s 342 of the FW Act, I am satisfied that the respondent took adverse action against Mr Meikle for reasons which included, as a substantive and operative reason, his exercise of workplace rights, thus contravening s 340 of that Act. I have formed this view for the following reasons.

177 First, Mr Hennessy gave evidence that, in the course of his role with the respondent, he made the decision to exclude Mr Meikle from the Mine. I am satisfied that Mr Hennessy was the relevant decision-maker. His evidence as to why he made that decision is crucial in determining whether the respondent has discharged its onus. As French CJ and Crennan J observed in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500:

44. There is no warrant to be derived from the text of the relevant provisions of the Fair Work Act for treating the statutory expression "because" in s 346, or the statutory presumption in s 361, as requiring only an objective enquiry into a defendant employer's reason, including any unconscious reason, for taking adverse action. The imposition of the statutory presumption in s 361, and the correlative onus on employers, naturally and ordinarily mean that direct evidence of a decision-maker as to state of mind, intent or purpose will bear upon the question of why adverse action was taken, although the central question remains "why was the adverse action taken?”

(footnotes omitted)

178 Second, Mr Hennessy’s evidence was that he made the decision to exclude Mr Meikle from the Mine after reviewing the information Mr Cameron provided to him on 9 December 2019, and concluding that Mr Meikle was an unacceptable safety risk because Mr Meikle refused to participate in an investigation regarding his reliance on an incorrect SOP. He denied that his decision had anything to do with the lightning event”, the overtaking manoeuvre, or the tagging incident. The difficulty with this evidence however is that it is inconsistent with other communications to Mr Meikle from both Ms Dow and Mr Cameron concerning Mr Meikle in the days leading up to the decision to exclude Mr Meikle, as well as evidence of Mr Hennessy and Mr Cameron concerning the usual approach by the respondent to incorrect tagging and evidence of Ms Rakitovszky concerning the seriousness of Mr Meikle’s conduct. As French CJ and Crennan J continued in *Barclay*:

45. … Direct evidence of the reason why a decision-maker took adverse action, which may include positive evidence that the action was not taken for a prohibited reason, *may be unreliable because of other contradictory evidence given by the decision-maker or because other objective facts are proven which contradict the decision-maker's evidence…*

(footnotes omitted, emphasis added)

179 In particular I note the following.

180 As I have already observed, Ms Dow had plainly sent a detailed email to Mr Hennessy on 10 December 2019, labelled as a “Copy of File Note” in her evidence. It is convenient to set out the body of the email here:

On Saturday night 07/12/19 @ 6:45pm approx, I spoke to N/S OCE Laurie Gibson on the phone to see how the prestart had gone as there had been a weather event the night before and a decision had been made to roll out sections of the lightning TARP due to some confusion and concerns expressed by CMWs. The level 3 and 4 of the TARP was communicated by the Supervisors including the assurance that if anyone felt unsafe, they could exercise their rights to stop operations.

Laurie’s feedback to me was that there was a few CMWs that had expressed concern in the prestart relating to the level 4 TARP regarding the potential of rubber tyred equipment being struck by lightning. He also made a point of mentioning that Darryl Meikle was vocal in the prestart about this matter including previous directives/ recommendations that the Inspectorate had issued to the industry.

Laurie had concerns that Darryl’s comments were confusing the crew further and at that point, I asked Laurie if he could organize with Darryl’s Supervisor if he could be made available at the end of the shift so I could catch up with him to understand his concerns and talk through the DNM severe weather procedure and TARPs in the morning.

When I arrived on Sunday morning to the Main Go Line office, Darryl was waiting for me and I greeted him with a hello and said lets catch up for a chat. Darryl inquired why I wanted to see him and I advised that I was made aware that he had concerns regarding our severe weather procedure and Lightning TARP and I wanted to understand his concerns.

We had a chat for approx. half an hour on not just this matter as he also raised other concerns such as CMWs not conducting prestart inspections correctly, the time allocated to do hot seat prestart inspections and sections of the coal mining legislation relating to “all persons obligations generally.”

I believe the discussion with Darryl was an informal chat in which I told him on a couple of occasions that my door is always open to him and other CMWs if they have concerns or are wanting any documentation relating to the site SHMS.

The OCE office door was left open during our discussion and OCE Michael North was witness to some of this discussion after he had completed a handover with the N/S OCE Laurie Gibson.

At no time, did I speak to Darryl in a way that was disrespectful or not aligned to the BMA Charter Values.

Regards,

Angela Dow

Shift Compliance Coordinator - OCE

BMA Operations - Daunia Mine

BHP Billiton Mitsubishi Alliance

…

181 The applicant submitted, in summary, that Ms Dow’s inability to explain why she had removed the header from the document and substituted “diary note” was suspicious, in that it was an attempt to obscure the existing level of interest Mr Hennessy and Mr Whitney had in matters involving Mr Meikle as at 10 December 2019. As I have noted, the respondent submitted in turn that the attack on Ms Dow was somewhat of a “red herring”, because there was no evidence nor any suggestion that she was involved in the decision-making process to exclude Mr Meikle from the Mine. I accept that Ms Dow was not involved in the decision-making process concerning Mr Meikle’s exclusion, however as I have already observed I consider it reasonable to infer that Ms Dow sent an email containing the material in her “diary note” to management of the respondent at the MineI consider it further reasonable to infer that Ms Dow had done so in light of an already existing interest in Mr Meikle on the part of management –at the Mine prior to 10 December 2019.

182 In addition to my findings in relation to the “diary note” sent by Ms Dow, at the hearing the applicant produced a further email sent by Ms Dow forwarding an email to “Mr Nicholls” at approximately 10am on 8 December 2019, notably, after her meeting with Mr Meikle. The contents of the forwarded email was an earlier email sent to Ms Dow from Mr Whitney, regarding the outcome of the lightning event and enclosing information on lightning strikes. Relevantly, Ms Dow wrote in her email:

Interesting times – More complaints last night and the morning started as soon as I walked in the office with a 35 min discussion with Darryl [sic] Meikle who is an operator on nightshift questioning me on the 101 and what was delivered a [sic] prestart.

Of Note – His surname……………

AD.x

183 During cross-examination Counsel for the applicant suggested to Ms Dow that she was unhappy to have had a 35 minute conversation with Mr Meikle, followed by the insinuation that there was a connection between Mr Meikle and his brother, Mr Jason Meikle, who happened to be another employee of BMA or associated with BMA. In making this insinuation, Counsel for the applicant submitted that Ms Dow was attempting to convey by the series of dots after the words “His surname”, and in the context of the email, that Mr Meikle was a “troublemaker”.

184 Although Ms Dow insisted there was nothing untoward in relation to the dots, I do not consider this entirely persuasive. Rather, it supports the applicant’s contention that there was an, albeit undefined, interest in Mr Meikle by management.

185 More pertinently however, Mr Hennessy’s evidence of his reasons for excluding Mr Meikle from the Mine was not credible. Mr Hennessy gave evidence that the only email he had received from Mr Cameron concerning Mr Meikle was late on the evening of 9 December 2019, and that he therefore formed the conclusion that Mr Meikle was a safety risk because he was, in essence, unco-operative in relation to a proposed investigation. However during cross-examination of Mr Hennessy, Counsel for the applicant put to him the existence of numerous other emails sent to Mr Hennessy by Mr Cameron on the morning of 9 December 2019 from 4.43am through until 6.01am, to which Mr Hennessy had not referred in his affidavit. During cross-examination, Mr Hennessy admitted that on the morning of 9 December 2019 he knew that Mr Meikle had had an incident the night before involving the removal of the out of service tag, and that Mr Hennessy had had a meeting with his own supervisor Mr Whitney to discuss Mr Meikle (transcript pp 208-209). When pressed by Counsel as to why Mr Hennessy had not also referred to previous correspondence between Mr Cameron and Mr Hennessy concerning Mr Meikle, Mr Hennessy’s evidence was as follows:

Well, you didn’t tell her Honour about them, did you?---No, I was – when I had done my affidavit, I didn’t have them emails at the time. My – my emails in my inbox might only last about three months, and they go into the archive somewhere, so yes, I didn’t have them when I done my affidavit; I didn’t have those emails with me, no. I had done it to the best of my recollection.

(transcript p 214 ll 6-10)

186 In my view Mr Hennessy’s explanation is implausible, given that Mr Hennessy had plainly had access to the email sent to him by Mr Cameron on the evening of 9 December 2019. No convincing reason exists as to why he would not have had access to other contemporaneous correspondence. Mr Hennessy subsequently conceded this point at the hearing (transcript p 215-216).

187 Further, the fact that Mr Hennessy’s evidence did not include reference to the discussions with his own supervisor, Mr Whitney, regarding Mr Meikle is concerning. Mr Hennessy conceded that Mr Whitney had sent him an email at 11.33am on 9 December 2019 in the following terms:

You will have to talk me through this so I understand correctly. Sounds like there are multiple issues that have occurred here. Not following delay processes properly, and removing a tag when not authorised to do so.

188 Mr Hennessy also conceded that he had met with Mr Whitney shortly thereafter to discuss Mr Meikle. That Mr Hennessy did not refer to this correspondence or meeting in his evidence not only damages his credibility as a witness, it further fuels the inference that the management of the respondent had a pre-existing interest in Mr Meikle.

189 Further, as became apparent during cross-examination of both Mr Cameron and Mr Hennessy, neither were honest at the time of Mr Meikle’s exclusion from the Mine in relation to Mr Meikle’s alleged error in relying on the “incorrect” SOP and the overtaking manoeuvre. It is no longer in dispute that the relevant Daunia SOP was exactly the same as the relevant Goonyella Riverside SOP , that the same document was approved at both mines, and to the extent that Mr Meikle had referred to an SOP with “GRM” on the cover it was the same as that approved at the Mine. It appears that, at the time Mr Cameron called Mr Hennessy on the night of 9 December 2019 to discuss Mr Meikle, he knew that Mr Meikle’s position was that the SOP had been approved at both mines, however Mr Cameron did not tell Mr Hennessy this (transcript p 302, 303).

190 Perhaps even more egregiously, Mr Hennessy gave evidence that at the time of WorkPac’s investigation of Mr Meikle, Mr Hennessy knew that the allegation of Mr Meikle relying on the “wrong” SOP was false, but did nothing to retract it. I note in particular the following evidence of Mr Hennessy as emerged during cross-examination:

Now, you can see in her email that Ms Kemp is seeking copies of the traffic management SOP for Daunia, which is the SOP that applies at your mine?---Yes.

And a copy of the SOP for Goonyella Riverside Mine, which is the one which Mr Meikle was alleged to have used. Correct?---Yes. Yes.

And in response you send her the attachment, and you say you do not have a copy of the GRM SOP. That’s in the front page?---Yes.

So you obviously went and dug out from the system the SOP that applies at Daunia, correct?---Correct.

Now, on the first page of that SOP it says, doesn’t it:

*This SOP has been separately adopted at each of the following mines as that mine’s SOP.*

And then it says:

*This followed separate risk assessments and consultations and so on.*

---Mmm.

And then there is a table which identifies the mines and the dates on which it was adopted. Correct?---Correct.

And it’s right to say, isn’t it, that it was adopted at Daunia on 14 December 2018?---Correct.

And this very document was adopted at Goonyella Riverside on 4 June 2019?---Correct.

So as at 8 or 9 December 2019, Goonyella Riverside Mine and Daunia Mine had exactly the same SOP in respect of the operation of vehicles and mobile equipment. Correct?---It appears correct, yes.

And you would have seen that when you sent – when you dug that out for Ms Kemp, correct?---I didn’t necessarily read that. I would have pulled up the procedure then attached and sent it to him.

It’s on the front page, Mr - - -?---Yes. But when she wanted – I wouldn’t have read the document. I would have pulled the document out and sent it to the right people.

Well, can I suggest to you that at the moment you sent that SOP to Ms Kemp you were aware that the allegation that Mr Meikle had been using the wrong SOP had no foundation?---It appears that way, yes.

And did you write to WorkPac at that point withdrawing the allegation against Mr Meikle?---No.

That’s not treating Mr Meikle with fairness, is it?---It’s not.

And did you take any disciplinary action against Mr Cameron?---No.

You understand that Mr Cameron started you down this path, didn’t you?---Well, he’s my reporting supervisor. So everything gets – he sends to me, yes.

And it would appear that about 20 seconds worth of work on Mr Cameron’s part would have revealed that there was no substance in his allegation, wouldn’t it?---For that one, yes.

And did you take any action against Mr Cameron for that?---No.

191 Finally, although both Mr Cameron and Mr Hennessy in their evidence sought to convey that the alleged breach by Mr Meikle in respect of the out of service tag was serious, they also conceded that such conduct would be at the lower end of any disciplinary outcome, usually involving some form of counselling or a written warning (transcript p 187 ll 15-21, p 259 ll39-40). Indeed, Mr Hennessey gave evidence during cross-examination that exclusion of a WorkPac employee from the Mine was considered to be a significant step that was not to be taken lightly. In particular, Mr Hennessey also noted that training new staff was time consuming and costly and therefore it was in the interest of BMA to keep staff turnover at a minimum.

192 Mr Hennessy was unable to give a convincing reason why, in the case of Mr Meikle, what he conceded to be a relatively minor matter warranted escalation to discussion with Mr Whitney (transcript p 201 ll 31-38). In so noting I also have regard to evidence of Ms Rakitovszky, who in relation to the incorrect placement of the out of service tag deposed as follows:

40. In all the circumstances, I concluded that Mr Meikle had breached the Isolation and Tagging SOP. In doing so, that was also in breach of the terms and conditions of his employment with WorkPac which required Mr Meikle to comply with applicable Site policies, procedures and practices such as the Isolation and Tagging SOP.

41. I accepted that Mr Meikle's conduct was inadvertent and not deliberate. I did not consider that Mr Meikle's conduct in breaching the Isolation and Tagging SOP was so serious as to warrant termination of employment. However, it was a breach of the Isolation and Tagging SOP.

42. For those reasons, I considered that a first written warning was an appropriate disciplinary outcome. This was consistent with other disciplinary outcomes involving breaches of tagging and isolation procedures of similar severity that I was aware of.

193 Returning to Mr Hennessy’s claimed reasons for his decision to exclude Mr Meikle from the Mine, his alleged belief that Mr Meikle posed an unacceptable safety risk at the Mine has no substance, and is simply implausible. Rather, the evidence indicates that Mr Meikle insisted on exercising workplace rights at the Mine, and that in so doing he essentially aggravated management at the Mine, including Mr Cameron and Mr Hennessy.

194 The FW Act is contravened if it can be established that a prohibited reason comprised a substantial and operative reason, or reasons including the reason, for the relevant adverse action: s 360 of the FW Act, *Board of Bendigo Regional Institute of Technical and Further Education v Barcla* [2012] HCA 32; (2012) 248 CLR 500 at 535 [104]. To the extent that the respondent has sought to meet the onus on it to rebut the presumption that the adverse action taken against Mr Meikle by the respondent was for a reason prohibited by the FW Act, it has been unsuccessful.

# CONCLUSION

195 As the applicant has been successful in its case against the respondent, I understand that the applicant does not press its alternative secondary case pursuant to s 362 of the FW Act, that the respondent contravened the FW Act by encouraging, advising or inciting WorkPac to dismiss Mr Meikle from his employment because he had exercised those same workplace rights.

196 The applicant is entitled to the declaratory relief it has sought against the respondent.

197 I will ask the parties to liaise and submit draft case management orders for hearing of further relief sought

|  |
| --- |
| I certify that the preceding one hundred and ninety-seven (197) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Collier. |

Associate:

Dated: 30 January 2023