AIR Bulletin

3 April 2008 Volume 12/08 with the Decision Summaries for the week ending Friday, 28 March 2008.

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Award Modernisation Request

Workplace Relations Act 1996

s.576D(1) – publication of award modernisation request

INDUSTRIAL REGISTRAR WILLIAMS

MELBOURNE, 2 APRIL 2008

I, Douglas S. Williams, Industrial Registrar, having received a copy of an award modernisation request from the President hereby publish the request under sub-section 576D(1) of the Workplace Relations Act 1996.

D. S. Williams

Industrial Registrar
REQUEST UNDER SECTION 576C(1) – AWARD MODERNISATION

I, JULIA GILLARD, MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS, pursuant to section 576C(1) of the Workplace Relations Act 1996 (the Act), request that the President of Australian Industrial Relations Commission (the Commission) undertake award modernisation in accordance with this request.

This award modernisation request is to be read in conjunction with Part 10A of the Act.

Objects

1. The aim of the award modernisation process is to create a comprehensive set of modern awards. As set out in section 576A of the Act, modern awards:

   (a) must be simple to understand and easy to apply, and must reduce the regulatory burden on business; and

   (b) together with any legislated employment standards, must provide a fair minimum safety net of enforceable terms and conditions of employment for employees; and

   (c) must be economically sustainable and promote flexible modern work practices and the efficient and productive performance of work; and

   (d) must be in a form that is appropriate for a fair and productive workplace relations system that promotes collective enterprise bargaining but does not provide for statutory individual employment agreements; and

   (e) must result in a certain, stable and sustainable modern award system for Australia.

2. The creation of modern awards is not intended to:

   (a) extend award coverage to those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have traditionally been award free. This does not preclude the extension of modern award coverage to new industries or new occupations where the work performed by employees in those industries or occupations is of a similar nature to work that has historically been regulated by awards (including State awards) in Australia;

   (b) result in high-income employees being covered by modern awards;

   (c) disadvantage employees;

   (d) increase costs for employers;

   (e) result in the modification of enterprise awards. This does not preclude the creation of a modern award for an industry or occupation in which enterprise awards operate. However section 576V of the Act provides that a modern award is to be expressed not to bind an employer who is bound by an enterprise award in respect of an employee to whom the enterprise award applies.
Performance of functions by the Commission

3. In accordance with section 576B of the Act, the Commission must have regard to the following factors when performing its functions under Part 10A of the Act and this award modernisation request:

(a) the creation of jobs and the promotion of high levels of productivity, low inflation, high levels of employment and labour force participation, national and international competitiveness, the development of skills and a fair labour market;

(b) protecting the position in the labour market of young people, employees to whom training arrangements apply and employees with a disability;

(c) the needs of the low paid;

(d) the desirability of reducing the number of awards operating in the workplace relations system;

(e) the need to help prevent and eliminate discrimination on the grounds of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin and to promote the principle of equal remuneration for work of equal value;

(f) the need to assist employees to balance their work and family responsibilities effectively and to improve retention and participation of employees in the workforce;

(g) the safety, health and welfare of employees;

(h) relevant rates of pay in Australian Pay & Classification Scales and transitional awards;

(i) minimum wage decisions of the Australian Fair Pay Commission; and

(j) the representation rights, under the Act or the Registration and Accountability of Organisations Schedule, of organisations and transitionally registered associations.

Award modernisation process

4. When modernising awards, the Commission is to create modern awards primarily along industry lines, but may also create modern awards along operational lines as it considers appropriate. In creating modern awards, and as indicated at paragraph 3(d) above, the Commission must have regard to the desirability of reducing the number of awards operating in the workplace relations system.

5. Division 3 of Part 10A of the Act deals with the terms of modern awards, including the provisions that may be included and must not be included in modern awards. Subject to paragraphs 25-40 below, modern awards may also include provisions relating to the proposed National Employment Standards (proposed NES).

6. As soon as practicable after receiving this award modernisation request, the President will consult with the major employer and employee representative bodies on the best process to be followed by the Commission when creating modern awards. The President will then release a clear program and timetable for completing the award modernisation process.
7. Individual Commission members may be directed by the President in the award modernisation process.

8. The Commission will identify the type of work, industry and/or occupations covered by a modern award and the application of each award.

9. The Commission is to have regard to the desirability of avoiding the overlap of awards and minimising the number of awards that may apply to a particular employee or employer. Where there is any overlap or potential overlap in the coverage of modern awards, the Commission will as far as possible include clear rules that identify which award applies.

10. The Commission will prepare a model flexibility clause to enable an employer and an individual employee to agree on arrangements to meet the genuine individual needs of the employer and the employee. The Commission must ensure that the flexibility clause cannot be used to disadvantage the individual employee.

11. Each modern award will include the model flexibility clause with such adaptation as is required for the modern award in which it is included.

12. The Commission may include transitional arrangements in modern awards to ensure the Commission complies with the objects and principles of award modernisation set out in this award modernisation request.

Consultation

13. The President will consult with the Australian Fair Pay Commission and State industrial tribunals as appropriate.

14. The Commission will prepare an exposure draft of each modernised award. The Commission will, as appropriate, hold a conference or conferences with major employer and employee representative bodies for the purpose of informing the preparation of each exposure draft.

15. The Commission is to publish exposure drafts of each modernised award for the purpose of further consultation and to ensure that all stakeholders and interested parties have a reasonable opportunity to comment upon the exposure drafts. In so far as practicable, the exposure drafts will be electronically published for comment.

16. Consultation on exposure drafts of modern awards will be open and transparent.

Creating modern awards

17. Upon completion of the consultation processes in relation to an exposure draft, the Commission will prepare the modern award.

18. The President may establish one or more Full Benches for the purpose of creating modern awards. Each modern award is to be created by a Full Bench.

Timing

19. The Commission is to complete the award modernisation process by 31 December 2009.

20. To that end, the Commission should endeavour by 30 June 2008 to have identified a list of priority industries or occupations for award modernisation, developed a timetable for
completing the award modernisation process and developed a proposed model award flexibility clause. In developing its priority list, the Commission will have regard to those industries and occupations with high numbers of Australian Workplace Agreements and Notional Agreements Preserving State Awards (NAPSAs).

21. In identifying a list of priority industries or occupations for award modernisation, developing a timetable for completing the award modernisation process and developing a proposed model award flexibility clause, the Commission is to consult with major workplace relations stakeholders and other interested parties. It is acknowledged that the Commission will require the full support and cooperation of major workplace relations stakeholders and other interested parties in order to conduct that consultation.

22. In developing a timeframe for completing the award modernisation process, the Commission should endeavour to have created by the end of December 2008 modern awards for each of the priority industries or occupations it has identified following the consultations with key workplace relations stakeholders.

**Reporting on the progress of award modernisation**

23. The President is to publish a quarterly report outlining:

(a) those industries or occupations undergoing or about to commence award modernisation, including the Commission member responsible, under the auspices of the Full Bench, for those industries and/or occupations;

(b) the progress of award modernisation, including any significant developments during the quarter, key issues or developments scheduled for the next quarter and any adjustments made to the timetable determined by the President for the award modernisation process; and

(c) any other matters which the President considers appropriate.

24. The first quarterly report should relate to the June quarter 2008.

**Interaction with the proposed National Employment Standards**

25. The proposed NES consist of 10 legislated minimum conditions of employment for all employees covered by the federal system. The proposed NES will establish a simple legislative framework of minimum entitlements with straightforward application or machinery rules that are essential to the operation of each entitlement. The proposed NES will operate in conjunction with a relevant modern award to provide a fair safety net of minimum entitlements for award covered employees.

26. The proposed NES will be finalised prior to 30 June 2008 and provided to the Commission for the purpose of conducting the award modernisation process.

27. A modern award may cross reference a provision of the proposed NES. A modern award may replicate a provision of the proposed NES only where the Commission considers this essential for the effective operation of the particular modern award provision. Where a modern award replicates a provision of the proposed NES, NES entitlements will be enforceable only as NES entitlements and not as provisions of the modern award.

28. A modern award cannot exclude a term of the proposed NES or operate inconsistently with a term of the proposed NES.
29. Subject to paragraph 32 below, a modern award may include industry-specific detail about matters in the proposed NES.

30. Subject to paragraph 32 below, a modern award may build on entitlements in the proposed NES where the Commission considers it necessary to do so to ensure the maintenance of a fair minimum safety net for employees covered by the modern award, having regard to existing award entitlements for those employees.

31. In creating a modern award, the Commission is to assess whether additional machinery rules in relation to NES entitlements are necessary for the applicable industry or occupation. An example of a machinery provision could be rules about taking double the period of annual leave on half pay.

32. In relation to long service leave, the Australian Government will, in co-operation with state governments, develop a national long service leave entitlement under the NES. In doing so, the Australian Government will also consult with major employer and employee representative bodies. Until then, long service leave entitlements derived from various sources will be protected. So as to not pre-empt the development of a nationally consistent approach, the Commission must not include a provision of any kind in a modern award that deals with long service leave.

33. Other than expressly authorised under this request (see paragraphs 29-31), the Commission must not include a term in a modern award on the basis that it would be an allowable modern award matter where the substance of the matter is dealt with under the proposed NES.

*Shift workers and piece workers*

34. The proposed NES apply to shift workers and provide that a shift worker is entitled to an additional week of annual leave – that is, five weeks of annual leave for each year of completed service.

35. The proposed NES rely on a modern award to define, where required, a shift worker as appropriate for the particular industry covered by the award.

36. In modernising awards, the Commission must have regard to whether it is appropriate to include a definition of shift worker in a modern award that applies to these types of employees for the purposes of the proposed NES annual leave entitlements.

37. The proposed NES apply to a piece worker.

38. The proposed NES rely on modern awards to define a piece worker and set out rules relating to the payment of NES entitlements (based on ordinary hours of work) for a piece worker.

39. In modernising awards, the Commission must have regard to whether it is appropriate to include:

   (a) a definition of piece worker in a modern award that applies to these types of employees (if an employee is employed on the basis of hours worked, it is not expected that such employees would be defined as piece workers); or
(b) a provision that would provide a calculation of payment, a payment rate, or a payment rule in relation to a piece worker employee with respect to paid leave or paid absence under the proposed NES. For example, a method for making payment to a piece worker employee when that employee is absent on annual leave.

Ordinary hours of work

40. Many entitlements in the proposed NES rely on modern awards to set out ordinary hours of work on a weekly or daily basis for an employee covered by the modern award. The Commission is to ensure that it specifies in each modern award the ordinary hours of work for each classification of employee covered by the modern award for the purpose of calculating entitlements in the proposed NES.

Minimum wages

41. In accordance with section 576J of the Act, minimum wages are a matter that may be dealt with in modern awards. In dealing with minimum wages in modern awards, the Commission is to have regard to the desire for modern awards to provide a comprehensive range of fair minimum wages for all employees including, where appropriate, junior employees, employees to whom training arrangements apply and employees with a disability in order to assist in the promotion of employment opportunities for those employees.

[Signed]

THE HON JULIA GILLARD
MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS
28 March 2008
Decisions of the Australian Industrial Relations Commission

Summaries of decisions signed and filed in the Australian Industrial Registry during the week ending Friday, 28 March 2008.

1 TERMINATION OF EMPLOYMENT – other termination proceedings – whether duplication of proceedings – whether vexatious or lacking in substance – ss643, 646, 672 Workplace Relations Act 1996 – Rule 13, AIRC Rules – Full Bench – appeal – terminated employee first applied to AIRC and then immediately afterwards to Dept of Education Disciplinary Appeals Board – Commission stayed AIRC proceedings pending outcome of Board proceedings – Board ordered 3 months pay but not reinstatement – applicant then sought to revive AIRC proceedings – Commission at first instance dismissed application – held Board proceedings were ‘other termination proceedings’ under s672 – however Commission was unable to dismiss application under s672 because application lodged in AIRC before application lodged with Board – application dismissed on basis that further litigation in AIRC vexatious under s646 – appeal – appeal by former employee – policy implicit in s672 is that an applicant under s643 ought not be permitted to pursue parallel proceedings in another jurisdiction – applicant preferred to pursue Board proceedings – applicant took benefit of Board’s decision to obtain 3 months pay – Board’s decision prima facie valid – vexatious – applicant was aware that respondent mistakenly believed that Board proceedings were filed first but applicant failed to correct that mistaken belief – as result of that misapprehension the respondent participated in Board proceedings in good faith – hence applicant was clearly vexatious when sought to revive AIRC proceedings – appeal cannot succeed – appeal lodged late – no acceptable reason for delay – application for extension of time dismissed.

Austin v State of Victoria (Department of Education and Training)

C2008/7
Giudice J
Blain DP
Blair C
Melbourne
26 March 2008

[2008] AIRCFB 202

2 TERMINATION OF EMPLOYMENT – remuneration cap – award derived conditions – whether manager covered by award – evidence – expert evidence ordinarily inadmissible regarding award classifications – ss638, 642 Workplace Relations Act 1996 – applicant’s remuneration exceeded remuneration cap – whether applicant employed under award derived conditions (meaning both wages and conditions of employment) – this issue squarely within Commission’s specialist expertise – no expert evidence required or admissible on issue – whether employee covered by award requires assessment of principal purpose for which employee employed [Goonyella] – irrelevant that applicant identified in common law contract and letter of offer as ‘non award employee’– parties cannot contract out of award obligations – where employer bound by award and common law contract the award prevails to extent it confers superior entitlements – respondent bound by award (regarding conditions of employment) and Australian Pay and Classification Scale derived from award (regarding wages) – applicant within award classification –
applicant employed under award derived conditions – jurisdictional objection dismissed.

Mainerd v Sydney Airport Corporation Ltd
U2007/6285 [2008] AIRC 262
Lawler VP Sydney 28 March 2008

3 REGISTERED ORGANISATIONS – change of name – alteration of eligibility rules – s158 Schedule 1 Workplace Relations Act 1996 – application to change name to Australasian Convenience and Petroleum Marketers Association and to alter eligibility rules to extend membership to convenience retailing – in prior decision Commission suggested insertion of implied terms into proposed eligibility rules to remove ambiguity [Re Federated Miscellaneous Workers’ Union] – no opposition by APADA or objectors to insertion of implied terms – Commission consented to change of name and eligibility rules effective 1 April 2008.

Australian Petroleum Agents and Distributors Association
D2006/72 & 73 [2008] AIRC 261
Lacy SDP Melbourne 25 March 2008

4 TERMINATION OF EMPLOYMENT – operational reasons – redundancy – restructure – similar positions advertised after termination – ss643, 649 Workplace Relations Act 1996 – applicant asserted that redundancy not genuine because vacancies for similar positions advertised soon after termination – respondent asserted that vacancies were at related outsourcing company not respondent – satisfied reduction in workload – satisfied genuine operational reasons – application dismissed.

Higgs v GoTalk P/L
U2007/7638 [2008] AIRC 82
Richards SDP Brisbane 27 March 2008

5 TERMINATION OF EMPLOYMENT – frivolous, vexatious or lacking in substance – ss643, 646 Workplace Relations Act 1996 – respondent sought dismissal of application on grounds application frivolous, vexatious or lacking in substance – respondent did not establish its contention – rather written submission related to whether or not termination harsh, unjust or unreasonable – satisfied applicant’s case arguable – motion to dismiss refused – s650(2) certificate to be issued.

Chisholm v QM Technologies Ltd
U2008/2526 [2008] AIRC 271
Bacon C Brisbane 28 March 2008

6 TERMINATION OF EMPLOYMENT – contract for specified term – s643 Workplace Relations Act 1996 – applicant signed 5 month contract but had expectation of on-going employment – contract expressly superseded prior arrangements – applicant was notified employment would cease when contract expired – a decision not
to offer a further contract is not termination at initiative of employer – no jurisdiction – motion to dismiss granted.

Spray v Dance House Inc

U2008/2077 Melbourne 26 March 2008

7 WORKPLACE AGREEMENTS – termination of agreement – after nominal expiry date – s170MH Workplace Relations Act (pre-reform) – application by union to terminate agreement – submitted agreement reached nominal expiry date over 3 years ago – evidence that employees of view that they would be better off under award and wage rates set by Australian Fair Pay Commission – termination not contrary to public interest – application granted – agreement terminated.

Hurstbridge Bowling and Recreation Club Enterprise Agreement 2001

AG2008/1023 Melbourne 28 March 2008

8 TERMINATION OF EMPLOYMENT – qualifying period – casual – s643 Workplace Relations act 1996 – employed less than 6 months – applicant did not respond to Commission request to address apparent non completion of qualifying period – meanwhile respondent filed motion to dismiss on grounds applicant a casual less than 12 months – applicant precluded from making application under s643(6) – application dismissed.

Webster v Transit Foods P/L

U2008/2252 Canberra 27 March 2008

9 TERMINATION OF EMPLOYMENT – extension of time – genuine operational reasons – s643 Workplace Relations Act 1996 - 2 days late – applicant submitted medical incapacity caused delay – medical evidence persuasive – acceptable explanation for delay – however no merit in application – applicant unable to return to work or perform duties and downturn led to his termination in any case – extension not granted – substantive application dismissed.

Quinn v HeyDay Group P/L

U2007/7159 Sydney 28 March 2008

10 ENTERPRISE BARGAINING – protected action ballot – failure to notify employer within timeframe – whether requirement can be waived – ss111, 451, 454, 457 Workplace Relations Act 1996 – union failed to give employer copy of ballot application within 24 hours of lodging application in Commission as required by s454 – Commission unable to waive requirement under s111 – application did not comply with s454 – application dismissed.
Canning and Fremantle Port Authority

BP2008/2062
Williams C
Perth
28 March 2008
Decisions of Other Jurisdictions

Summaries of decisions of jurisdictions other than the Australian Industrial Relations Commission received by the Australian Industrial Registry during the week ending Friday, 28 March 2008. The majority of Summaries have been prepared by the jurisdiction of origin.

Industrial Relations Commission of New South Wales

11 Termination of employment – unfair dismissal - applicant sought orders applying to hearing of outstanding s84 costs applications on 5 and 6 June 2008, preventing publication of privileged evidence on basis primarily that s106 proceedings, also filed by applicant should not be prejudiced by awareness of negotiations to settle s84 case IRC 3135 of 2006 – submissions in support of draft orders included coverage of s164A providing for such confidentiality, and reference to real potential for perceived prejudice to judge hearing s106 matters – respondent did not object, subject to caveats – held in interests of justice that orders sought be granted, subject to caveats agreed to by applicant's representative.

Veney and NSW Local Government, Clerical, Administrative, Energy, Airlines & Utilities Union

3135 of 2006
Murphy C
[2008] NSWIRComm 1024
11 March 2008


Graham v BlueScope Steel Ltd

IRC 1903 of 2007
Connor C
[2008] NSWIRComm 1018
20 March 2008

13 Unfair dismissal – employee worked at quarry site for about 30 years – employee involved in 2 work accidents whilst driving heavy mobile vehicles over last 18 months of employment – employee transferred to work in Primary Crusher Plant – Respondent transferred employee back to driving mobile equipment – employee had third accident whilst driving heavy mobile vehicle – employee suspended from duty on pay – employee's ability to work elsewhere in the quarry considered by employer – medical opinion sought on employee's ability to work in quarry environment – employee has Meniere's Disease – employee dismissed – employee seeks order from Commission to be placed in Primary Crusher Plant – Commission found dismissal to be harsh as employee able to work in Crusher Plant – re-employment ordered – Commission rejected Respondent's submission that no "position" existed at law – orders for remuneration and continuity of service made.
William Pepper v Hanson Construction Materials P/L

1215 of 2007
Macdonald C

[2008] NSWIRComm 1006
19 March 2008
Websites of Interest

**Australian Industrial Relations Commission (AIRC)** - [http://www.airc.gov.au/](http://www.airc.gov.au/) – includes hearing lists, rules, forms, major decisions, termination of employment information and student information. Related websites include:


**Australian Fair Pay Commission** – [http://www.fairpay.gov.au](http://www.fairpay.gov.au) – established to set and adjust the federal minimum wage to promote the economic prosperity of the people of Australia;


**ComLaw** - [http://www.comlaw.gov.au/](http://www.comlaw.gov.au/) - legislative repository that has replaced SCALEplus, contains:

- Commonwealth primary legislation, as well as other ancillary documents and information, in electronic form; and
- the new Federal Register of Legislative Instruments (FRI) which was established on 1 January 2005 under the [Legislative Instruments Act 2003](http://www.comlaw.gov.au/comlaw/management.nsf/lookupindexPagesByid/IP200403482/) as the authoritative source for legislative instruments and compilations of legislative instruments;

**Department of Employment and Workplace Relations (DEWR)** - [http://www.dewr.gov.au/](http://www.dewr.gov.au/) - provides general information about DEWR and its Ministers, including their media statements;


**Tasmanian Industrial Commission** - [http://www.tic.tas.gov.au](http://www.tic.tas.gov.au);


**Work Choices** – [https://www.workchoices.gov.au/](https://www.workchoices.gov.au/) – provides pay and conditions information for employees and employers of constitutional corporations and the Commonwealth, those in the ACT, Northern Territory, Christmas and Cocos (Keeling) Islands, and most employees and employers in Victoria;

**Workplace Authority** - [http://www.workplaceauthority.gov.au](http://www.workplaceauthority.gov.au) - primary role is to accept lodgments of workplace agreements; includes information regarding Australian Workplace Agreements (AWAs), development and lodging procedures;

**workplace.gov.au** – [http://www.workplace.gov.au](http://www.workplace.gov.au) - provides access to online employment and workplace relations services and information, including government assistance, jobs, careers, training, working conditions and Indigenous Employment Centres;


The Australian Industrial Registry Bulletin is a weekly publication that includes information on the following topics:

- information concerning notice of matters before the Commission;
- Practice Directions concerning the practice and procedure of the Commission;
- weekly decisions summaries;
- details of procedural changes and developments within the Registry; and
- advice regarding the rights and obligations of organisations registered under the *Workplace Relations Act 1996*.

For inquiries regarding publication of the Bulletin please contact the Registry’s Information Help Desk - Postal address: GPO Box 1994, Melbourne Vic 3001, Tel: (03) 8661 7807, Fax: (03) 9655 0406.

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