AIR Bulletin

19 June 2008 Volume 23/08 with the Decision Summaries for the week ending Friday, 13 June 2008.

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Applications to Vary and Extend the Expiry Date of a Pre-Reform Certified Agreement

The Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 introduced new provisions allowing parties to extend and/or vary pre-reform certified agreements.

New Forms for the making of applications to extend the expiry date and vary pre-reform certified agreements were part of the amendments to the AIRC Rules made in May.

Many applicants are seeking to vary the terms as well as extend the expiry date of a pre-reform agreement and have sought advice as to how to make such an application.

If a person bound by a pre-reform certified agreement wishes to extend and vary the pre-reform agreement at the same time, they are advised to complete Form R49A and include both the extension and variation of agreement.
Award Modernisation—Amended Request

On 16 June the Minister for Employment and Workplace Relations sent to the AIRC a letter outlining a variation to the formal award modernisation request. The Minister also provided a consolidated version of the request and enclosed new National Employment Standards which will be used in the award modernisation process.
Decisions of the Australian Industrial Relations Commission

Summaries of decisions signed and filed in the Australian Industrial Registry during the week ending Friday, 13 June 2008.

1 CASE PROCEDURES – evidence – order for production of documents or things – internal deliberations – amended directions – workplace determination - ss423, 503, 504 Workplace Relations Act 1996 – Commission previously terminated various bargaining periods – subsequent Full Bench proceedings to make workplace determination under ss503 – in relation to those proceedings parties sought orders to produce relevant documents - 2 orders to produce – HSU’s order – HSU sought documents from employers relating to budgets, classifications and pay rates - parties agreed to terms of order save for 3 clauses – modification warranted to narrow scope of exercise required to comply with order – order amended to remove reference to individual payslips and other documents limited to an individual employee – documents pertaining to approval of salary increases of senior management allowed – Employers’ order – employers sought production of internal HSU documentation – HSU opposed on basis documents relate to internal union deliberations – approach set out in 1975 National Wage Case – material may have relevance but seeks disclosure of internal deliberations – Commission will not in normal circumstances allow investigation of deliberative processes leading to tactical decision taken – proposed order is directed to information wholly of nature of internal deliberations - Commission has consistently refused such orders and will not depart from that approach in this matter - amended directions to be issued.

Health Services Union v Austin Health & Ors
BP2007/4059 & ors [2008] AIRC 530
Watson SDP Melbourne 13 June 2008

2 TERMINATION OF EMPLOYMENT – probationary period – 100 employees or fewer – ss643, 659, 661 Workplace Relations Act 1996 – applicant terminated while on probation – satisfied less than 100 employees – unfair dismissal grounds and s661 grounds of application dismissed – unlawful dismissal grounds under s659 listed for conciliation.

Walton v Lavrin & Lawrence Orthodontics
U2008/3875 [2008] AIRC 519
Ives DP Melbourne 10 June 2008

Hill v Adult Multicultural Education Services
U2007/4517 [2008] AIRC 490
Hamilton DP Melbourne 11 June 2008


Butler v Vic Juke Entertainment
U2008/3673 [2008] AIRC 515
Lewin C Melbourne 10 June 2008


Rajkovski v Le Desire
U2008/3305 [2008] AIRC 468
Lewin C Melbourne 11 June 2008

6 WORKPLACE AGREEMENTS – dispute over application of agreement – recognition of supervisory duties – alleged discrimination against shop steward – s170LW Workplace Relations Act 1996 (pre-reform) – union asserted employee should be appointed to co-ordinator position as he successfully carries out duties of co-ordinator – union asserted failure to appoint because employee is union shop steward – Commission does not put itself in role of management unless obvious unfairness – lack of leadership and effort by employee – employee did not understand or appreciate seriousness of responsibilities associated with role of co-ordinator – not satisfied discrimination made out as another co-ordinator is a shop steward – Commission not prepared to recommend or determine employee be promoted.

Krzystek v Achieve Foundation

U2008/4197 [2008] AIRC 520
Cargill C Sydney 11 June 2008


Construction, Forestry, Mining and Energy Union and Rail Corporation NSW (RailCorp)

BP2008/3314 [2008] AIRC 536
Larkin C Sydney 13 June 2008

9 ENTERPRISE BARGAINING – protected ballot order – whether secret ballot must include copy of bargaining notice – whether genuinely seeking agreement – whether wage claims contrary to State government wages policy – prohibited content – ss451, 461, 704 Workplace Relations Act 1996 – employer objected to secret ballot on basis that (1. proposed secret ballot did not provide employees with copy of bargaining period notice which would advise employee’s of legal ramifications of industrial action, (2. unions not genuinely seeking agreement because they were seeking higher wages than NSW state government wages policies allow, (3. proposed agreement contains prohibited content (salary sacrifice and consultation provisions) and (4. union refused to participate in alternative dispute resolution under s704 – objections rejected – no requirement under Act that employees be provided with particulars of bargaining period notice during secret ballot - fact that RailCorp subject to governmental policy does not prevent public servants applying for secret ballot – nor does any such application mean parties not genuinely bargaining – furthermore, if argument was accepted (regarding state wages policy) then public servants and/or their union would find it difficult to defend a case made against them under s430 - refusal to participate in voluntary ADR under s704 does not prove that a party is not genuinely seeking
agreement - legislative requirements met – application granted – secret ballot ordered.

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union & Ors and Rail Corporation NSW (RailCorp)

BP2008/91 & ors [2008] AIRC 524
Larkin C Sydney 11 June 2008

10 TERMINATION OF EMPLOYMENT – extension of time – s643 Workplace Relations Act 1996 - 1 year late - applicant unfit for substantial portion of period – claimed inaction due to agreement between union and respondent to review case when he was fit – no supporting evidence of such agreement – applicant gained employment with other company when declared fit – difficult to see why applicant did not insist on employment with respondent – not satisfied acceptable explanation for delay – extension refused – application dismissed.

Stikovic v Toll Ipec

U2008/3794 [2008] AIRC 514
Raffaelli C Sydney 13 June 2008

11 TERMINATION OF EMPLOYMENT – extension of time – s643 Workplace Relations Act 1996 – 6 days late – after termination applicant chose to focus on gaining another job and undertaking training for new position – applicant made inquiries but rejected such because of cost – prior to termination family member of applicant became seriously ill – not submitted that family member’s illness contributed to delay – clear that applicant was able to pursue other issues competently at that time – no acceptable reason for delay – extension refused – matter not properly before Commission and cannot proceed further.

Griffiths v Bunnings Warehouse

U2008/3575 [2008] AIRC 517
Williams C Perth 9 June 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, 13 June 2008. The majority of Summaries have been prepared by the jurisdiction of origin.

Federal Magistrates Court of Australia

12 TERMINATION OF EMPLOYMENT – unlawful dismissal – costs – whether unreasonable act or omission – whether proceedings instituted vexatiously or without reasonable cause – ss347, 666, 824 Workplace Relations Act 1996 – ss3, 42 Federal Magistrate’s Act 1999 (Cth) – Court previously dismissed former employee’s unlawful dismissal application – former employer sought costs under s666 on grounds that: (1. former employee’s failure to follow directions and file documents was unreasonable act or omission, and (2. former employee instituted proceedings vexatiously or without reasonable cause – FM Court to operate informally – Federal Magistrate’s Act and Rules provide that the FM Court should operate as informally as possible, use streamlined procedures, resolve proceedings justly and economically, and avoid undue delay, expense and technicality [Goodall] – in light of those principles not satisfied it is appropriate to award costs in relation to alleged unreasonable act or omission – vexatious or without reasonable cause – former employee’s grounds for original application included discrimination under s659 WR Act and application for damages for breach of Australian Fair Pay Commission (AFPC) Standards – distinction between claims and proceedings – if claims relating to breach of AFPC Standards were separate proceedings then costs may be available under s824 – however those claims were part of larger proceedings under s663 that included claims relating to unlawful dismissal – whether whole of proceeding without reasonable cause – costs can only be ordered under s666 if it has been demonstrated that “the whole of the proceeding was instituted vexatiously or without reasonable cause” [Hadgkiss] – former employer has not demonstrated this – application for costs dismissed.

Bognar v Merck Sharp & Dohme (Australia) P/L (No.2)

MLG 1485 of 2006 [2008] FMCA 749
O’Sullivan FM Melbourne 10 June 2008

13 WORKPLACE AGREEMENTS – AWA’s – coercion – whether employees coerced into signing AWA – whether AWA’s below minimum standards – breaches – penalties – s400 Workplace Relations Act 1996 – whether employer coerced employees into accepting AWA’s – whether AWA’s below minimum standards – whether AWA’s stripped weekend
penalty rates - agreed statement of facts – although Darrell Lea is large company it appears to be surprisingly unsophisticated about human resources issues - declarations that respondent engaged in breached – penalties imposed for breaches of s400(5) only - consideration of matters relevant to penalty – large size of business – acquiescence of senior management in contraventions – youth of employees affected – significance of amounts to employees – cooperation of respondent – not case requiring special deterrence – totality principle taken into account – appropriate for penalty of $10,000 per offence – penalty of $120,000 ordered.

Brobbel v Darrell Lea Chocolate Shops P/L
MLG 873 of 2007 [2008] FMCA 714
Burchardt FM Melbourne 13 June 2008

Industrial Relations Commission of New South Wales


Mullins v Department of Education and Training
IRC 440 of 2008 [2008] NSWIRComm 115
Schmidt J 10 June 2008

15 Victimisation claims by former employee – notice of motion to dismiss claims for want of prosecution – history of proceedings – numerous interlocutory decisions – medical evidence – proceedings before the Full Bench of the Commission – applicant seeks indefinite adjournment of substantive proceedings – claims of being unable to prepare and prosecute proceedings due to ill health – allegations of procedural unfairness – same medical evidence as before the Full Bench – Full Bench considers medical evidence highly qualified and unable to be tested – extent of activities of applicant – other proceedings before Administrative Decisions Tribunal being prepared and prosecuted – unlikely applicant's doctor given complete information – failure to comply with directions – failure to attend proceedings – proper administration of justice – balancing interests of the parties – costs sought by respondent – relevant principles – held that current medical evidence insufficient – medical evidence unable to be tested – reliance on earlier medical evidence – adoption of approach of the Full Bench – applicant's bona fides in question – applicant's doctor unlikely to have been told complete information – desirability of concluding proceedings as quickly and cost effectively as possible – allegations of procedural unfairness rejected – balancing of interests of the parties favours respondent – proper administration of justice – applicant
failed to prosecute proceedings with due diligence – notice of motion granted – 3 victimisation applications dismissed for want of prosecution – application for costs listed for directions.

Simjanovska and Roads and Traffic Authority of New South Wales (No. 5)
IRC4554 of 2005 & ors  [2008] NSWIRComm
Sams DP  10 June 2008

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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 (FRLI) which was established on 1 January 2005 under the *Legislative Instruments Act 2003* as the authoritative source for legislative instruments and compilations of legislative instruments;


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


Western Australian Industrial Relations Commission -
http://www.wairc.wa.gov.au/;

Work Choices – 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 - 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 - provides access to online employment and workplace relations services and information, including government assistance, jobs, careers, training, working conditions and Indigenous Employment Centres;


Workplace Relations Act 1996 -
Registry Addresses

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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
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