FWC Bulletin

5 June 2014 Volume 22/14 with the Decision Summaries for the week ending Friday, 29 May 2014.

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Consultation, Forms, General protections

The President of the Commission recently decided that the current Form F8—General Protections Application should be separated into two forms: Form F8 (involving dismissal) and Form F8C (not involving dismissal).

Drafts of the two forms, and of an amended Form F8A—Response to General Protections Application, were made available for public comment.

Feedback received on the draft forms has been considered and incorporated, and revised drafts are now available for further public consultation.

The draft forms are available on the Consultation page of the Commission's website. Any feedback on the proposed forms should be emailed to amod@fwc.gov.au by Tuesday, 10 June 2014.

Reserved decisions, agreement approval applications, timeliness benchmarks

The Commission has published its Timeliness benchmarks for the delivery of reserved decisions and for dealing with agreement approval applications. The benchmarks show the Commission's performance for the 6 months to April 2014.

Quarterly report

Quarterly statistical reports for the second and third quarter of 2013–14 are now available.

The reports can be accessed from the quarterly reports page in the About the Fair Work Commission section of this website. They cover the periods 1 October 2013 to 31 December 2013 and 1 January 2014 to 31 March 2014 respectively.

An Information note accompanies the reports. It provides details about the sources of the data contained in the reports.
Decisions of the Fair Work Commission

The summaries of decisions contained in this Bulletin are not a substitute for the published reasons for the Commission's decisions nor are they to be used in any later consideration of the Commission's reasons.

Summaries of selected decisions signed and filed during the week ending Friday, 29 May 2014.

1 ENTERPRISE AGREEMENTS – approval – s.185 Fair Work Act 2009 – application for approval of single-enterprise agreement – agreement provided for incorporation of annual leave loading into hourly rate of pay – issue whether agreement provision excluded NES entitlement – as a result of 'conflict in reasoning' between Jeld-Wen and majority ruling in Hull-Moody application referred to Full Bench for determination – applicant submitted 'paid annual leave' in the FW Act only distinguished annual leave from leave without pay – payment for annual leave could be dealt with in an enterprise agreement as a term ancillary or incidental to the NES – Ai Group and ACCI generally agreed with applicant's interpretation of the Act – Ai Group submitted the agreement provision provided full annual leave entitlements provided by the NES – payment in advance authorised by s.55(4) – such an ancillary or incidental term may include a term when payment is made – further Ai Group submitted access to early payment a benefit for employees – ACCI submitted ss.87 and 90 did not specify when payment for annual leave be paid – payment in advance did not render leave taken 'unpaid' – ACTU contended the provision excluded the NES entitlement – agreement provision constituted cashing out of the annual leave only retaining an entitlement to unpaid annual leave – agreement could not be approved in current form irrespective of pre-payment of annual leave issue – s.90(1) of the FW Act requires payment for annual leave made at employee's base rate at time leave is taken – agreement permitted payment at an earlier and lower rate than at the time leave taken – contrary to s.55(1) – issue could be addressed with an undertaking – consideration whether pre-payment of annual leave excludes the NES entitlement – Division 6 consistently uses expression 'paid annual leave' meaning annual leave with pay – clear s.90 requires payment of annual leave at time leave taken – agreement provision did not constitute paid annual leave as intended by the FW Act – additionally agreement provision was a cashing out provision requiring retention of four weeks paid leave and a separate written agreement – cannot be satisfied terms of the agreement did not contravene s.55 – applicant given opportunity to provide undertakings.

Canavan Building P/L

AG2013/10430       [2014] FWCFB 3202
Ross J               Melbourne   29 May 2014
Hatcher VP
Acton SDP
Cargill C
Wilson C
CASE PROCEDURES – appeals – ss.604, 739 Fair Work Act 2009 – appeal – Full Bench – appeal against decision relating to dispute arising under enterprise agreement – dispute concerned whether an employee was entitled to an additional week’s leave – agreement clause provided that any employee rostered to work 27 Sundays or more in a 12 month period was entitled to additional one week annual leave in that year – Commissioner held type of work performed by relevant employee did not form part of any roster but was clearly voluntary overtime – application dismissed at first instance – appellant did not demonstrate it was in public interest to grant permission to appeal Commissioner’s decision – Full Bench accepted respondent’s submission that Commissioner’s interpretation was correct – employee’s voluntary work performed on a Sunday did not fall within meaning of term ‘rostered to work’ for purposes of relevant clause – given nature of the Sunday work performed, and that it was not allocated until the afternoon before it commenced, the work could not be said to fall within ordinary meaning of term ‘rostered’ – Commissioner not in error – first instance decision did not manifest any injustice – decision did not warrant revisiting – permission to appeal refused.

Appeal by Transport Workers’ Union of Australia against decision of Roberts C of 25 February 2014 [[2014] FWC 835] Re: Wymap Group P/L

C2014/3444
Catanzariti VP
Gostencnik DP
Bull C
Sydney 26 May 2014

GENERAL PROTECTIONS – extension of time – ss.365, 604 Fair Work Act 2009 – appeal – Full Bench – original application received one day after 21 day expiry period – Commissioner found no exceptional circumstances – Full Bench found Commissioner considered required factors in FW Act concerning exceptional circumstances and properly applied statutory test – Full Bench not satisfied any error in decision making process or otherwise established – not in the public interest – application for permission to appeal dismissed.

Appeal by Jonathan Hart against decision of Gregory C of 20 March 2014 [[2014] FWC 1744]

C2014/4000
Watson VP
Kovacic DP
Blair C
Melbourne 30 May 2014

TERMINATION OF EMPLOYMENT – genuine redundancy – ss.385, 389, 596 Fair Work Act 2009 – application for unfair dismissal remedy – respondent required to restructure business due to economic downturn and changes in operational requirements – changes in workers compensation legislation negatively impacted the enterprise – applicant’s job not required to be performed by anyone – applicant made no serious challenge to dismissal – respondent has not employed or engaged any other person in applicant’s role since dismissal and does not intend to – applicant not covered by any award or enterprise agreement due to nature of her managerial/executive role – respondent unable to redeploy applicant to another position within enterprise – genuine case of
5  TERMINATION OF EMPLOYMENT – extension of time – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant believed application made within 21 day time limit – respondent believed the application was made outside the 21 day time limit – parties provided with substantial background information relative to the application and extension of time issue – application lodged two days outside of the 21 day time limit – no exceptional circumstances found – extension of time refused – application dismissed.

Aiken v Kittredge P/L t/a The Roxby Tavern

U2014/6522  [2014] FWC 3531
O’Callaghan SDP  Adelaide  27 May 2014

6  TERMINATION OF EMPLOYMENT – extension of time – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – application made five days outside 21 day time limit – directions issued by the Commission requesting submissions be lodged – respondent did not comply with directions – applicant requested extension of time – respondent did not attend phone conference – respondent under administration – no exceptional circumstances found – extension of time refused – application dismissed.

Sickerdick v New Milo Mining P/L

U2014/6105  [2014] FWC 3569
O’Callaghan SDP  Adelaide  28 May 2014

7  TERMINATION OF EMPLOYMENT – termination at initiative of employer – s.394 Fair Work Act 2009 – applications for relief from unfair dismissal – respondent raised issue with applications that applicants were volunteers not employees – also that the school is not an employer covered by the FW Act – also raised that if dismissal took place application for unfair dismissal remedy was made out of time – Commission found applicants were expected to perform teaching duties regularly, received remuneration and were under the control of the school – applicants regarded as employees – respondent asserts they are not covered by s.14 of FW Act as they do not fall under definition of national system employer – Commission found respondent is not excluded from definition – applicants were within jurisdiction to make unfair dismissal applications – dismissal was consequence of a misunderstanding – applicants dismissed at initiative of employer via letter – effective date of termination was when termination letter received by applicants – application lodged within statutory time limit – respondents objections to application dismissed – applications will be listed for consideration on merits.
8  

**TERMINATION OF EMPLOYMENT** – termination at initiative of employer – ss.386, 394 Fair Work Act 2009 – applicant casual employee for the respondent – applicant ceased working for respondent in December 2013 – matter for consideration whether applicant resigned at own initiative or whether dismissed by employer – matter turned on assessment of credit of two parties concerned because no other witnesses and no contemporaneous notes or memoranda – FWC accepted evidence of respondent because more credible and more dense – evidence of applicant too simplistic in context – FWC held no reason to conclude respondent dismissed applicant at own initiative or by course of respondent’s conduct forced applicant to resign – FWC held no dismissal – application dismissed.

Fisher v Andergrove Van Park t/a Merson Properties P/L

U2013/17210  
Richards SDP  
Brisbane  
27 May 2014

9  

**TERMINATION OF EMPLOYMENT** – valid reason – remedy – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – respondent objected on grounds applicant only employed 20 weeks and respondent employed ten employees – also that applicant no longer required as duties had been outsourced – respondent did not provide submissions in relation to objection – Commission advised respondent matter would be determined on available materials in event it did not appear at hearing – respondent did not attend – respondent’s failure to provide material support for objection matter of serious concern – sufficient opportunity for respondent to make out claim – Commission inferred no material basis to objection – respondent’s material contradictory in relation to number of employees – objection dismissed – substantive application to be determined in respondent’s absence – applicant injured in non-work related accident – was offered position at lower wages – respondent later informed applicant it could not afford to pay wages – applicant provided medical certificate allowing light duties – then provided respondent with medical clearance for return to usual duties – respondent then advised applicant it wished him to convert to a subcontractor arrangement – nothing in materials to persuade Commission respondent had valid, defensible or sound reason for dismissal – applicant dismissed harshly, unjustly or unreasonably – applicant not notified of reason for dismissal in advance and given no opportunity to respond – no allegation of unsatisfactory performance – strong probability size of employer’s enterprise and lack of dedicated human resource management expertise impacted on procedures followed – applicant employed for 20 weeks – applicant person protected from unfair dismissal – applicant did not seek reinstatement – no evidence order for compensation would affect respondent’s viability – reasonable expectation applicant would have been employed for further two months – compensation reduced by 75% due to applicant’s failure.
to mitigate his losses – no evidence of misconduct – compensation of two weeks’ remuneration ordered.

Campbell v Groovy Freighters

U2013/14309
Richards SDP
Brisbane
27 May 2014

[2014] FWC 3458

10 CASE PROCEDURES – application dismissed on FWC's own initiative – ss.394, 587 Fair Work Act 2009 – application for relief from unfair dismissal – failure to prosecute – failure to respond to jurisdictional objection – applicant given reasonable opportunity to present case – did not file materials – application dismissed.

Ahsan v Polar Fresh Cold Chain Services

U2014/1054
Richards SDP
Brisbane
27 May 2014

[2014] FWC 3464

11 INDUSTRIAL ACTION – order against industrial action – s.418 Fair Work Act 2009 – application to stop alleged unprotected industrial action – CFMEU sought adjournment to seek instructions – employer sought issue of interim order – contest between parties as to scope of Commission to make interim order under s.589 FW Act taking into account s.420 – Commission opinion s.420 and s.589 can be read together and that provisions operate comfortably [Thiess] – consideration of interim order must have regard to safety and public interest – whether interim decision should be made with effect of interim order until substantive matter can be heard – decisions can be orders in terms of effect depending on scope and context – within Commission’s power to make interim order in appropriate circumstances however interim order not made in this case – practical utility of such order ceased to exist – Commission satisfied unprotected industrial action previously occurred and was occurring – stoppages of work appeared to arise from contest over manner in which site manager should be treated following two safety breaches – CFMEU sought site manager be stood aside and re-induced in safety procedures – employer contended it and site manager had done enough to demonstrate future commitment to safety on site – unless matter generates immediate or imminent threat to employees’ safety and health, not exempted from meaning of industrial action under s.19 FW Act – action appears to be unprotected – orders previously issued have expired – site remains unstable and exposed to further stoppages of work – order extending to contractual completion date to be made – personal engagement of CFMEU organiser with issues together with presence at relevant meetings sufficient to cause Commission to reasonably infer CFMEU is organising industrial action – other conduct of CFMEU organiser evinced desire to agitate issues – order to be binding on CFMEU as well as employees of employer and employees of subcontractors – order issued.
INDUSTRIAL DISPUTE – dispute resolution procedure – s.739 Fair Work Act 2009 – employer raised jurisdictional question in relation to dispute application – whether stepped requirements in agreement dispute provision complied with – originally the subject of three applications only CFMEU pursued matter on behalf of applicants – dispute previously subject of s.418 application – dispute related to adequacy of safety procedures resulting in a stoppage of work – agreement subsequently reached – s.418 application withdrawn – dispute notifications filed in relation to non-payment of wages for period of stoppage – CFMEU contended the use of 'may' in the dispute provision allowed for the matter to be escalated to Commission without adherence to preliminary stages – applicant relied on authorities in Cordelle to support the meaning of 'may' in the context of the dispute procedure – Commission satisfied construction of dispute term common and reasonable – no evidence dispute resolution process adhered to – Commission without jurisdiction to deal with application – application dismissed.

Tarentino v Thiess P/L

C2014/3514  [2014] FWC 2922
Richards SDP Brisbane 29 May 2014

CASE PROCEDURES – application dismissed on FWC's own initiative – ss.394, 587 Fair Work Act 2009 – application for relief from unfair dismissal – no attendance by applicant at directions conference – request for explanation sent to applicant – no response received – application dismissed pursuant to s.587.

Bagorski v Midwest Auto Group P/L

U2014/4469  [2014] FWC 3363
McCarthy DP Perth 27 May 2014

CASE PROCEDURES – application dismissed on FWC's own initiative – ss.394, 587 Fair Work Act 2009 – application for relief from unfair dismissal – directions issued – no response from applicant – request for explanation sent to applicant indicating that if no response received it would be presumed that he had discontinued his application – applicant advised respondent had made application for matter to be dismissed due to failure to comply with directions – no response received – application dismissed pursuant to s.587.

Anning v Carnarvon Medical Service Aboriginal Corporation t/a Carnarvon Medical Aboriginal Corporation

U2014/3618  [2014] FWC 3470
McCarthy DP Perth 27 May 2014

TERMINATION OF EMPLOYMENT – application to dismiss by employer – ss.394, 399A Fair Work Act 2009 – application for relief from unfair dismissal – applicant failed to comply with directions to file materials – respondent lodged application to dismiss the unfair dismissal application – applicant unreasonably failed to comply with the directions of the Commission –
**McLean v Ensign Services (Aust) P/L t/a Spotless**

U2014/3958decsumm

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<th>McCarthy DP</th>
<th>Perth</th>
<th>27 May 2014</th>
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<tr>
<td><strong>16</strong></td>
<td>TERMINATION OF EMPLOYMENT – extension of time – date of dismissal – s.394 Fair Work Act 2009 – effective date of dismissal disputed – applicant summarily dismissed for serious misconduct – respondent sent termination letter after applicant failed to attend disciplinary interviews – letter sent by express post which Australia Post receipt indicated was delivered on 30 December 2013 – applicant’s evidence she witnessed the postman delivering letter on 8 January 2014 – while Commission did not doubt the authenticity of the receipt, was not convinced letter was received or delivered to applicant on the date as claimed – Commission preferred evidence of applicant to respondent – determined effective date of dismissal was 8 January 2014 – application lodged within time – jurisdictional objection dismissed – matter to proceed to hearing on merits.</td>
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**Hudson v Thompson Health Care P/L t/a Macleay Valley House Residential Care**

U2014/4038

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<th>Booth DP</th>
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<td><strong>17</strong></td>
<td>TERMINATION OF EMPLOYMENT – extension of time – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – application made 63 days outside 21 day time limit – directions issued by the Commission requesting submissions be lodged – applicant requested extension of time – respondent objected to extension of time – no exceptional circumstances found – extension of time refused – application dismissed.</td>
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**Scully v Tinko P/L t/a The Koorabup Motel**

U2014/5571

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<td><strong>18</strong></td>
<td>TERMINATION OF EMPLOYMENT – application to dismiss by employer – ss.394, 399A Fair Work Act 2009 – application for unfair dismissal remedy – matter not resolved at conciliation – listed for hearing – applicant did not comply with directions – applicant did not attend non-compliance hearing – respondent made oral application for dismissal under s.399A – Commission accepted respondent oral application – Commission advised applicant if no response received in relation to objection then matter would be dismissed – applicant did not file any material in opposition – application dismissed pursuant to s.399A FW Act.</td>
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**Beattie v JI & KIK Lugg Family Trust t/a Lugg Glass P/L**

U2013/17781

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ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – s.739 Fair Work Act 2009 – union argued decision to terminate Defined Benefits Division inconsistent with agreement – Lend Lease Project Management & Construction/CFMEU Joint Development Agreement Mark 8 2012-16 – union sought interim order to stop closure of Division – Commission to determine whether dispute resolution procedure followed, whether interim order should be made and whether order can be directed to subsidiary and principal employer-sponsor – respondent argued no employee had sought to resolve dispute – union argued discussions had taken place between employees and company and between union and company – Commission found dispute resolution procedure followed, union able to raise disputes in own right under dispute resolution procedure – to decide whether to issue interim order, Commission to determine whether there was serious issue to be tried and whether balance of convenience favoured issuing order [Crown Casino] – Commission found respondent not the party to prevent termination of Division – Commission not satisfied there was arguable case – Commission satisfied balance of convenience was in favour of making interim order again – respondent ordered to take all steps possible to stop relevant parties from closing division – Commission not satisfied it had power to make orders against subsidiary and principal employer-sponsor – those parties had not consented to have dispute resolved by private arbitration – respondent to draw attention of other parties to interim order.

Construction, Forestry, Mining and Energy Union v Lend Lease Building P/L (formerly known as Lend Lease Project Management and Construction Australia P/L)

C2014/4292
Gooley DP Melbourne 28 May 2014

ANTI-BULLYING – likely to continue – s.789FC Fair Work Act 2009 – application for order to stop bullying – employee dismissed after application lodged – application to dismiss lodged by respondent because application for order to stop bullying has no reasonable prospect of success – observations in Spencer considered – no risk of continued bullying at work – application to dismiss upheld – application dismissed.

Shaw v Australia and New Zealand Banking Group Limited t/a ANZ Bank and Anor

AB2014/1091
Gostencnik DP Melbourne 26 May 2014

ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – s.739 Fair Work Act 2009 – union sought interim orders – when considering whether to issue interim orders Commission applied same principles as those by courts in applications for interlocutory relief – two considerations to be balanced, whether serious issue to be tried and whether balance of convenience favoured making order – union submitted its case had reasonable chance of success – Commission formed view there was serious question to be tried – question to be tried whether clause 15.5 fettered absolute discretion given to company in respect of size and composition of workforce – company argued balance of convenience favoured finding in company’s favour as it supported vast majority of employees who
elected to transfer or accept redundancy – Commission formed view that balance of convenience favoured company – Commission found balance of convenience factor outweighed serious question to be tried factor – Commission found greater human and financial prejudice resulted from decision to restrain company – Commission declined discretion to issue interim orders sought by unions.

The Maritime Union of Australia v Patrick Stevedores Holdings P/L

C2014/3370 and C2013/7789 [2014] FWC 3349
Cribb C Melbourne 27 May 2014

22 ENTERPRISE AGREEMENTS – ambiguity or uncertainty – s.217 Fair Work Act 2009 – application for variation of the ACT Public Service Nursing and Midwifery Enterprise Agreement 2013-2017 – issues regarding cross referencing, consultation clause and clause relating to discrimination – changes supported by unions – principles in Fosterville applied – Commission not satisfied current clause relating to discrimination ambiguous or uncertain – variation to cross referencing and consultation clause approved.

ACT Government as represented by the Health Directorate

AG2014/1010 [2014] FWCA 3617
Deegan C Canberra 30 May 2014

23 CASE PROCEDURES – representation – s.596 Fair Work Act 2009 – application for unfair dismissal remedy – respondent objected to applicants being represented by CFMEU – CFMEU contended, on behalf of applicants, that as they are not an applicant in proceedings they do not need to prove ‘coverage’ in order to appear – CFMEU also argued that an organisation is not required to seek leave to represent according to s.596 of FW Act – respondents argued that CFMEU was not able to represent the applicants as they were not entitled to be members of CFMEU – Commission needed to consider whether CFMEU was able to represent the applicants, and if so, whether they should be granted permission to do so – s.596 of FW Act is unambiguous and states a person is not taken to be represented by a lawyer or paid agent if that lawyer or paid agent is an officer of the organisation representing that person – the CFMEU is an organisation – Commission found CFMEU can appear for the applicants and were permitted to appear in the matter representing the applicants.

McCarthy v CDJV Construction P/L; McCarthy v CDJV Construction P/L

U2013/1487; U2013/1488 [2014] FWC 3072
Spencer C Brisbane 28 May 2014

24 TERMINATION OF EMPLOYMENT – national system employer – ss.14, 394 Fair Work Act 2009 – application for unfair dismissal remedy – whether respondent a national system employer – whether respondent a constitutional corporation as mentioned in s.14(1)(a) FW Act – considered Lawrence and Anor, Bankstown and Pellow in relation to question of what is a ‘trading corporation’ – applicant did not challenge respondent’s submissions as to how service agreement originated, how respondent operated and
involvement of Disability Services Commission (DSC) in respondent’s day to day operation – vast majority of funding for respondent came from DSC – evidence did not support finding that respondent is involved in commercial activity with view to earning revenue – no evidence that anything that could be viewed as commercial activity was other than a peripheral activity generating minor sundry income – purpose of respondent not to trade, but to provide guidance, assistance and services to individuals with disabilities – respondent’s activities reflected that purpose – respondent had limited control over purpose for which funding received was used – use of funding largely directed and decided by DSC – respondent not a trading corporation – respondent not a national system employer within meaning of s.14 FW Act – no jurisdiction to consider application – application dismissed.

Collins v Lower Great Southern Family Support Association t/a Lower Great Southern Family Support Association (LGSFSA)

U2013/15566  [2014] FWC 3383
Williams C  Perth  26 May 2014

TERMINATION OF EMPLOYMENT – contractor or employee – s.394 Fair Work Act 2009 – application for relief from unfair dismissal – respondent argued applicant not employed by respondent but provided services on sub-contract basis – applicant put on notice of jurisdictional objection but did not address objection – evidence of respondent clear and strongly supportive of conclusion that applicant not employed by respondent but engaged by another business which had a contract with respondent to provide various services – no evidence suggested contractor arrangement between applicant and respondent in some way a sham and that true relationship was of employer and employee – real substance of relationship was of principal and contractor – held applicant not an employee of respondent and so not able to make application – application dismissed.

Lindner v Hanssen P/L t/a Hanssen P/L

U2013/13356  [2014] FWC 3456
Williams C  Perth  30 May 2014

INDUSTRIAL DISPUTE – dispute resolution procedure – s.739 Fair Work Act 2009 – dispute about matters arising under enterprise agreement and NES – Alcoa World Alumina Australia W.A. Operations (Mechanical Trades) Agreement 2013 – respondent proposes to reallocate some shift workers to day workers – applicant contends agreement must be between itself and respondent or alternatively with each employee to whom the change will apply – conversely the respondent submits the proposed changes do not require agreement by the applicant, are not prevented by the enterprise agreement or by the relevant contracts of employment – satisfied the proposed changes do not vary established methods of working shifts provided for in the agreement – not satisfied applicant has proven employee contracts prevent proposed decision – Commission satisfied respondent can enforce proposed changes to shift patterns under the agreement and without agreement between parties.
TRANSFER OF BUSINESS – enterprise agreement – ss.318, 319

Fair Work Act 2009 – application made by GHD P/L – orders for transferrable instrument to not apply to transferring and non-transferring employees – applicant submitted comprehensive affidavit addressing ss.318 and 319 of the FW Act – evidence accepted by Commission – majority of employees support the application – Commission satisfied employees would not be disadvantaged – little or no business synergy – some public interest – allow previous employer to change operations without disadvantaging affected employees – satisfied appropriate to grant application – order issued.

Horizon Power/ASU Salaried Employee Enterprise Agreement 2013

ENTERPRISE AGREEMENTS – approval – s.185 Fair Work Act 2009 – application for approval of single-enterprise agreement – CPSU and MEAA challenged terms contained in agreement and agreement making process – additionally Commission identified apparent non-compliance of signature requirements – parties provided submissions with respect to the signature issue as requested – consideration whether Commission had discretionary power to allow correction pursuant to s.586 – discretionary power not exercised – refusal arisen from the nature and extent of concerns asserted by CPSU and MEAA – application not made in accordance with signature requirements – application dismissed.

Sky Channel Enterprise Agreement 2014

TERMINATION OF EMPLOYMENT – misconduct – s.394 Fair Work Act 2009 – application for unfair dismissal – applicant involved in incident with another employee – applicant summarily dismissed – contested facts around incident – satisfied applicant had threatening physical contact with another employee – employer had valid reason for dismissal – applicant given opportunity to respond – applicant had received training on workplace behaviour – employer’s dedicated human resource management did not properly address procedural activities relating to dismissal – no formal disciplinary procedures documentation submitted – managers who conducted investigation not part of human resource department – managers had no training in human resources – perceived bias of managers conducting investigation – one manager partially witnessed incident – managers had been involved in previous investigation of applicant’s behaviour – perception of preconceived view about incident – investigation and disciplinary meeting rolled into one – allegations not put in written form to applicant – re-enactment conducted without applicant able to take part or respond – personal circumstances of
applicant not taken into account – dismissal was harsh, unjust and unreasonable – applicant sought reinstatement – reinstatement not appropriate – applicant’s actions destroyed fundamental trust and confidence in relationship with employer – some elements of applicant’s evidence doubtful – employer had grounds to question ongoing honesty of applicant – order for compensation to be made after hearing submissions from both parties.

Fitzpatrick v Bunnings Group Ltd t/a Bunnings

U2013/14425
Cloghan C
Perth
26 May 2014

30 TERMINATION OF EMPLOYMENT – genuine redundancy – ss.385, 389, 394 Fair Work Act 2009 – applicant submitted not genuine redundancy because not offered redeployment opportunities and was suitably qualified and experienced to have been offered at least one of the vacant positions – applicant submitted not genuine redundancy because applicant’s portfolio of clients now serviced by new business development manager and retained key accounts manager – downturn in respondent’s business resulted in total of 200 redundancies – FWC satisfied respondent wanted job performed by applicant to be abolished because of changes in operational requirements – consultation provisions generally contained in modern awards complied with – FWC satisfied that respondent considered redeployment of applicant within enterprise – dismissal was genuine redundancy – application dismissed.

Windt v Ampcontrol P/L t/a Ampcontrol WA P/L

U2014/4790
Cloghan C
Perth
27 May 2014

31 INDUSTRIAL ACTION – order against industrial action – s.418 Fair Work Act 2009 – interim order issued to stop industrial action by certain employees and MUA as bargaining representative from organising industrial action by employees – decision provides reasons for issuing interim order – MUA made two applications for protected action ballot orders (PABOs) – PABOs made – employees endorsed taking of action – action in relation to first order did not take place – negotiations for proposed enterprise agreement occurred within context of broader offshore oil and gas industry negotiations – AMMA as bargaining representative for several employers including Tidewater lodged application seeking bargaining orders – Tidewater made s.418 application in this context – Full Bench quashed original PABO – originating application referred back to Commissioner Cloghan to determine whether MUA genuinely trying to reach agreement – expression ‘genuinely trying’ concerned with authenticity of applicant's efforts to reach goal – turns to motivation, the intention, object or purpose – difficult to conceive of circumstances where it could be properly found a party not genuinely trying to reach agreement unless there is cross examination [JJ Richards] – Commission unable to determine application fairly – interim order made – interim order not contrary to public interest – Commission entitled though not obliged to take into consideration wider enterprise bargaining context of application if it exists – evaluation of overall picture of negotiations of assistance in exercising discretion to
provide interim relief and adjourn proceedings.

Tidewater Marine Australia P/L v Maritime Union of Australia

C2014/4553
Cloghan C
Perth
28 May 2014

32 TERMINATION OF EMPLOYMENT – contractor or employee – s.394 Fair Work Act 2009 – respondent objected on three grounds – first that applicant was a contractor – second that applicant not dismissed – third that applicant had not served minimum employment period – Jiang Shen Cai and Stevens considered in relation to contractor question – clear respondent exercised control over work of applicant – applicant did not have separate place of work – applicant did not supply own tools – work could not be subcontracted – applicant paid hourly rate – applicant did not spend remuneration on business expenses – indicia set out in On Call Interpreters considered – Commission satisfied applicant not an independent contractor – applicant dismissed after a physical altercation with managing director the respondent – Commission accepted applicant not actually told he had been dismissed but told not to return to work until contacted – satisfied applicant dismissed – respondent small business employer – satisfied applicant employed for more than one year – jurisdictional objections dismissed – matter to be listed for hearing in relation to merit.

Adalopoulos v CMC International P/L

U2013/8792
Ryan C
Melbourne
27 May 2014

33 TERMINATION OF EMPLOYMENT – valid reason – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant employed as casual cleaner – respondent is small business – applicant commenced Certificate III in Aged Care traineeship and claimed to have commenced permanent part-time employment around this time – applicant dismissed because services ‘no longer required’ – respondent raised issues regarding alleged lateness and use of a mobile phone during work hours to support dismissal – Commission not satisfied alleged lateness of applicant constituted valid reason for dismissal – Commission not satisfied that applicant’s alleged excess use of the mobile phone occurred – Commission found dismissal not consistent with Small Business Fair Dismissal Code – no valid reason for dismissal – total lack of process followed in effecting dismissal – dismissal harsh, unjust and unreasonable – reinstatement not appropriate remedy – some amount of compensation appropriate remedy – order issued for payment of compensation by respondent of $2,061.73 gross plus 9% superannuation less tax as required by law.

Attard v Violet Nominees P/L t/a Melton Willows SRS

U2013/13234
Lee C
Hobart
30 May 2014

National Union of Workers v Atlas Specialty Metals P/L

B2014/96

[2014] FWC 3509

Sydney 27 May 2014

TERMINATION OF EMPLOYMENT – extension of time – s.394 Fair Work Act 2009 – application for unfair dismissal remedy – application 38 days out of time – Commission considered if exceptional circumstances existed to allow further period for filing application – respondent objected to extension of time – applicant’s submission provided some information however did not wholly explain delay in filing – Commission found explanation to be inadequate – no exceptional circumstances found – extension of time refused – application dismissed.

Stanes v Aero-Care Flight Support P/L

U2014/4824

[2014] FWC 3525

Melbourne 28 May 2014
Websites of Interest

**AUSTLII** - [www.austlii.edu.au](http://www.austlii.edu.au) - a legal site including legislation, treaties and decisions of courts and tribunals.


**Fair Work Ombudsman** - [www.fairwork.gov.au](http://www.fairwork.gov.au) - provides information and advice to help you understand your workplace rights and responsibilities (including pay and conditions) in the national workplace relations system.


Industrial Relations Commission of New South Wales -

- provides technical assistance primarily in the fields of vocational training and
t vocational rehabilitation, employment policy, labour administration, labour law
and industrial relations, working conditions, management development, co-
operatives, social security, labour statistics and occupational health and safety.

Queensland Industrial Relations Commission -

Road Safety Remuneration Tribunal—www.rsrt.gov.au

South Australian Industrial Relations Court and Commission -


range of online Australian legal information.

Western Australian Industrial Relations Commission -

Workplace Relations Act 2009 -
# Fair Work Commission Addresses

<table>
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<tr>
<th>Australian Capital Territory</th>
<th>New South Wales</th>
<th>Northern Territory</th>
<th>Queensland</th>
<th>South Australia</th>
<th>Tasmania</th>
<th>Victoria</th>
<th>Western Australia</th>
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<tr>
<td>2nd Floor, CML Building 17-21 University Avenue Canberra 2600 GPO Box 539 Canberra City 2601 Tel: (02) 6209 2400 Fax: (02) 6247 9774 Out of hrs emergency: 0419 318 011 Email: <a href="mailto:canberra@fwc.gov.au">canberra@fwc.gov.au</a></td>
<td>Sydney Level 8, Terrace Tower 80 William Street East Sydney 2011 Tel: (02) 8374 6666 Fax: (02) 9380 6990 Out of hrs emergency: 0419 318 011 Email: <a href="mailto:sydney@fwc.gov.au">sydney@fwc.gov.au</a></td>
<td>Newcastle Level 3, 237 Wharf Road, Newcastle, 2300 PO Box 805, Newcastle, 2300</td>
<td>Newcastle</td>
<td>Northern Territory 10th Floor, Northern Territory House 22 Mitchell Street Darwin 0800 GPO Box 969 Darwin 0801 Tel: (08) 8936 2800 Fax: (08) 8936 2820 Out of hrs emergency: 0418 563 601 Email: <a href="mailto:darwin@fwc.gov.au">darwin@fwc.gov.au</a></td>
<td>Level 14, Central Plaza Two 66 Eagle Street Brisbane 4000 PO Box 5713 Central Plaza Brisbane 4001 Tel: (07) 3000 0399 Fax: (07) 3000 0388 Out of hrs emergency: 0419 335 202 Email: <a href="mailto:brisbane@fwc.gov.au">brisbane@fwc.gov.au</a></td>
<td>Level 6, 90 Crown Street, Wollongong, 2500</td>
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<td></td>
<td>Wollongong</td>
<td>Queensland</td>
<td>South Australia</td>
<td>Tasmania 1st Floor, Commonwealth Law Courts 39-41 Davey Street Hobart 7000 GPO Box 1232M Hobart 7001 Tel: (03) 6214 0200 Fax: (03) 6214 0202 Out of hrs emergency: 0418 124 021 Email: <a href="mailto:hobart@fwc.gov.au">hobart@fwc.gov.au</a></td>
<td>Level 4, 11 Exhibition Street Melbourne 3000 GPO Box 1994 Melbourne 3001 Tel: (03) 8661 7777 Fax: (03) 9655 0401 Out of hrs emergency: 0419 960 157 Email: <a href="mailto:melbourne@fwc.gov.au">melbourne@fwc.gov.au</a></td>
<td>Western Australia Floor 16, 111 St Georges Terrace Perth 6000 GPO Box X2206 Perth 6001 Tel: (08) 9464 5172 Fax: (08) 9464 5171 Out of hrs emergency: 0448 275 936 Email: <a href="mailto:perth@fwc.gov.au">perth@fwc.gov.au</a></td>
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The address of the Fair Work Commission home page is: www.fwc.gov.au/

The FWC Bulletin is a weekly publication that includes information on the following topics:

- information concerning notice of matters before the Fair Work Commission;
- Practice Directions concerning the practice and procedure of the Fair Work Commission;
- weekly decisions summaries;
- details of procedural changes and developments within the Fair Work Commission; and
- advice regarding the rights and obligations of organisations registered under the Fair Work (Registered Organisations) Act 2009.

For inquiries regarding publication of the FWC Bulletin please contact the Fair Work Commission by email: FWCsubscriptions@fwc.gov.au.

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