

IR Bulletin

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100 Not Out

This year marks the centenary of the *Conciliation and Arbitration Act 1904*, and therefore 100 years of the Australian Industrial Relations Commission and its predecessors.

During that time there have been numerous important decisions dealing with the Constitutional and statutory powers governing successive Commonwealth industrial relations legislation. The most recent of these is the High Court *Electrolux* decision handed down last month.

Electrolux is an important decision in the industrial relations arena. It will have widespread implications for enterprise bargaining and may impact on the validity of current certified agreements. We consider the lessons for employers to which it gives rise.

Union rights of entry continue to be a contentious matter. We look at two recent decisions which consider the exercise of right of entry provisions in the *Workplace Relations Act 1996*.

Other articles in this edition consider when a casual employee will be excluded from bringing an unfair dismissal claim, continuing debate over the ambit of the NSW unfair contracts jurisdiction and the introduction of superannuation choice of fund legislation. We also consider a number of recent decisions having an impact in the coal mining industry in Queensland.

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100 Not Out _____ 1

Bargaining and Certified Agreements Must Pertain to the Employment Relationship _____ 2

State Versus Federal Rights of Entry _____ 5

Broad Right of Entry Powers Recognised by Full Bench _____ 6

Exclusion of Casual Employees From Unfair Dismissal Provisions _____ 8

Limiting the Ambit of the Unfair Contracts Jurisdiction _____ 9

Queensland Coal Mining Safety and Health Rulings _____ 10

Prosecuting Unions For Breach of Industrial Instruments: New South Wales _____ 11

Employee Choice: Superannuation Funds _____ 12

in this issue



Bargaining and Certified Agreements Must Pertain to the Employment Relationship

The High Court of Australia handed down its decision in *Electrolux Home Products Pty Limited v The Australian Workers' Union and Others* on 2 September 2004. The case concerned claims by the AWU and other unions for inclusion of a bargaining agent's fee clause in a certified agreement and industrial action in support of that claim.

Key Rulings

The key rulings of the High Court were:

- A claim that non-union members be required under the terms of their employment to pay a bargaining agent's fee to a particular union is not a claim about matters pertaining to the employment relationship.
- The presence of a term in a proposed certified agreement which is not about matters pertaining to the employment relationship makes the agreement not one about such matters and therefore one which is not capable of being the subject of an application for certification by the Australian Industrial Relations Commission.
- Industrial action taken by a union in support of claims in respect of a proposed certified agreement will not be protected action under the *Workplace Relations Act 1996* where one of the substantive claims does not pertain to the employment relationship.

- Such industrial action in this case constituted a breach of section 170NC of the Act which prohibits coercion in support of claims about the making, etc, of a certified agreement.

The High Court's ruling was made by a 6 to 1 majority. Chief Justice Gleeson and Justices McHugh, Gummow, Hayne, Heydon and Callinan were in the majority. Justice Kirby dissented.

The High Court's ruling overturned a unanimous decision of the Full Court of the Federal Court and reinstated the orders made by the Federal Court trial judge, Justice Merkel.

Background

During the course of negotiations for an enterprise agreement to govern Electrolux Home Products, a whitegoods manufacturer in South Australia, the unions took industrial action in support of claims which included a claim for a bargaining agent's fee.

A bargaining agent's fee would:

- impose an obligation on the employer to advise employees prior to commencing work for the employer that the fee is payable to the union;
- place an obligation on the employee under his or her employment contract to pay an annual fee to the union, apparently for the provision of bargaining services by the union whether or not the employee wished to receive those services; and
- require the employer to provide a payment facility to pay the bargaining agent's fee to the union.

Electrolux, supported by the Commonwealth Minister for Employment and Workplace Relations as intervener, argued that industrial action taken in support of this claim was not capable of being protected action. This was the view which had been accepted by Justice Merkel. The unions argued the contrary, and had carried the day before the Full Court of the Federal Court.



Lessons for employers

- Industrial action will not be protected if it is in support of claims which include a substantive claim for something outside the employment relationship.
- Employers will need to ensure, as best they can, that unions specify their claims so that the question whether any industrial action is entitled to protection can be tested. If necessary, directions should be sought from the Industrial Relations Commission requiring that unions specify their claims or produce a draft of the agreement proposed. If the union has not specified what it seeks in the form of a draft agreement, there may be scope to say that no protected action is yet available.
- Care should be taken in the preparation of agreements to see that matters not capable of pertaining to the employment relationship are excluded and those which are capable of so pertaining are written in a form which does not give rise to an avoidable concern.
- If there is reason to doubt the validity of a current agreement, consider the best strategy to assure employees that their entitlements are secure and to receive assurance that claims will not be advanced mid-term by unions or employees.

The High Court's analysis of the issues

The first and pivotal question was whether the bargaining agent's fee claim pertained to the employment relationship in the manner required by section 170LI of the Act. Section 170LI describes the agreements capable of being certified under Division 2 of Part VIB of the Act.

The High Court has consistently held that the rejection of demands of an academic, political, social or managerial nature does not create a dispute about matters pertaining to the relationship between employer and employee. Neither does the rejection of a demand that the employer act as a financial agent for employees in their dealings with the union create a dispute pertaining to the employment relationship.

These decisions had been reached in connection with the definition of industrial disputes where the language used is similar but not identical to that in section 170LI

of the Act. The High Court considered that, in the words of the Chief Justice:

"There is no occasion to depart from those authorities, and every reason to follow them."

The suggestions made by the Full Court of the Federal Court, and in a decision of the Full Bench of the Commission (*Re Unilever*, 31 October 2003, PR940027), that those decisions may not be applicable in an enterprise bargaining context have been dismissed.

The second question was if a bargaining agent's fee provision did not pertain to the employment relationship, did its inclusion in an agreement render that agreement incapable of being certified? The Full Court of the Federal Court considered that such an agreement might still be certifiable. Justice Merkel had taken the view that it would not be certifiable if the provision in question was a substantive one, as would be the case with the bargaining agent's fee provision. The High Court agreed with Justice Merkel.



agent's fee

The third question was whether industrial action taken genuinely in support of claims believed to be capable of being dealt with in a certified agreement could be protected industrial action where, as a matter of law, the particular provisions sought could not be included in a certified agreement. The Full Court of the Federal Court had considered this was so, but Justice Merkel had considered that it was not so. Again, the High Court considered that Justice Merkel had the matter right and the Full Court had it wrong.

An observation of particular interest in the bargaining context appears in the joint judgement of Justices Gummow, Hayne and Hayden. It is that for protected action to be available there must be a *proposed agreement* (ie a document in a form capable of being certified if agreed to) in existence in support of which the industrial action is taken. This is potentially an important point. It suggests that an early softening-up round of industrial action may sometimes not be lawful.

The final substantive question was whether section 170NC (prohibiting coercion in connection with a proposed agreement) applied where the claims advanced included the impermissible bargaining agent's fee claim. If there could be no protected action in support of a proposed agreement which included a bargaining agent's fee provision, it was argued by the unions (and held by the Full Court of the Federal Court) that coercion to enter such a non-conforming agreement would not be caught by section 170NC. The High Court approached this issue purposively – the mischief Parliament was addressing in the section was coercion in support of claims about a certified agreement even if the agreement was not capable of being certified in a particular form.

Implications of the decision

The ruling that protected action is not available in support of claims which include something not pertaining to the employment relationship is especially important. This is because of the impossibility, in the general run of affairs, for the employer to know what is in the mind of union officials and employees embarking upon industrial action.

The ruling means that there is both a subjective and objective touchstone when determining the availability or otherwise of legal protection for industrial action. Not only must industrial action genuinely be for the purpose of supporting claims to be included in a certified agreement, but those claims must objectively be capable of being so included.

The particular issue in this case was a bargaining agent's fee. But the implications of the case go much wider to other issues which might be supported by a union – for example, green bans over environmental issues, claims about coal prices to be required by Australian coal exporters, political strikes over matters of foreign or domestic governmental policy, etc.

There are other implications of this important decision. An application for certification of an agreement will not be valid if the agreement contains substantive provisions which do not pertain to the employment relationship. This is clearly relevant for the future. Particular care should be taken in the preparation of agreements to see that matters not capable of pertaining to the employment relationship are excluded and those which are capable of so pertaining are written in a form which does not give rise to an avoidable concern.

The same point also has an important implication for current certified

agreements. The validity of many agreements which have been certified may now be open to question. In *Atlas Steels* (29 April 2002, PR917092 – see *IR Bulletin* June 2002, pages 2-4, available at www.bdw.com), a Full Bench of the Commission ruled that while a claim in respect of payroll deductions for union fees did not pertain to the employment relationship, an agreement about such a matter could pertain because it affected the disposition of an employee's wages. This ruling must now be regarded as wrong, and agreements certified in reliance on it, while perhaps entitled to a presumption of regularity, are open to doubt. So too are other agreements providing for things beyond industrial matters such as wages and conditions of employment.

This means that there is a potential for unions or employers during the life of a current (invalid) certified agreement to serve a bargaining notice and to take industrial action in support of claims for a new agreement. It also means that employees may have a legitimate concern about whether their employer will honour a current agreement.

Employers should give these matters thought and, in appropriate cases, take advice. If there is reason to doubt the validity of a current agreement, thought may need to be given to the best strategy to assure employees that their entitlements are secure and to receive assurance that claims will not be advanced mid-term by unions or employees.

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An application for certification of an agreement will not be valid if the agreement contains substantive provisions which do not pertain to the employment relationship.

State Versus Federal Rights of Entry

On 29 July 2004, Justice French of the Federal Court determined that a State-registered union could exercise rights of entry under the *Industrial Relations Act 1979 (WA)* in respect of employees who were subject to Australian workplace agreements: *BGC Contracting Pty Ltd v The Construction, Forestry, Mining and Energy Union of Workers* [2004] FCA 981.

Background

In January of this year, representatives of the State registered Construction, Forestry, Mining and Energy Union of Workers sought to enter a construction site on the Burrup Peninsula in Western Australia. They asserted they had a right to enter under provisions of the *Industrial Relations Act 1979 (WA)* (the State Act). The State Act authorises union representatives holding the relevant authority to enter premises for the purpose of holding discussions with workers on a site and for the purpose of investigating suspected breaches of certain State industrial instruments, where union members or persons eligible to become union members work.

Entry was refused by the contractors undertaking the construction, arguing that, as their employees were party to Australian workplace agreements (AWAs) made under the *Workplace Relations Act 1996 (Cth)* (the Federal Act), the State Act provisions did not apply.

Section 109 of the Commonwealth Constitution provides, "when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency,

be invalid." The contractors sought a declaration from the Federal Court that the representatives of the Union had no right of entry under the State Act. They argued that there was inconsistency between the State Act and the Federal Act with regard to union rights of entry and that, accordingly, only the rights of entry under the Federal Act could be exercised.

Decision

Justice French held that there was no inconsistency between the provisions of the Federal Act and the State Act. His Honour found:

"The rights of entry conferred by the State Act are conferred upon State-registered organisations for purposes related to the State Act. The rights of entry conferred by the Federal Act are conferred upon federal unions and ... the Employment Advocate, for purposes related to federal awards and agreements. One does not impair the other."

Justice French also found, however, that the exercise of rights of entry under the State Act for the purpose of "discussions" could not interfere with the performance of work under an AWA.

Lessons for employers

- Employers considering the legitimacy of a union representative's right to enter a site where work is being undertaken that is the subject of a federal industrial instrument may need also to recognise rights of entry under State legislation.
- Even if a representative of a State union has a right to enter premises, the exercise of powers under State legislation may still be inconsistent with either a requirement under the Federal Act or with provisions of an applicable federal industrial instrument.

He held that an AWA employee could participate in discussions so long as in doing so obligations under the AWA were satisfied; and that discussions conducted during a meal break would not involve a breach of an AWA.

One other ruling in this case of significance in light of the *Electrolux* decision was that a union right of entry provision is not within the expression "terms and conditions of employment" as used in section 170LZ of the Federal Act. This suggests that such provisions may not be able to be included in certified agreements as they may not pertain to the employment relationship.

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Broad Right of Entry Powers Recognised by Full Bench

The Full Bench of the Australian Industrial Relations Commission has recognised the broad powers given to union officials under the *Workplace Relations Act 1996* to access workplaces and interview employees in relation to suspected breaches of the Act, an award, an order of the Commission or a certified agreement: *Australia and New Zealand Banking Group Limited v Finance Sector Union of Australia* (8 September 2004, PR951766).

Background

The case arose out of dispute between ANZ and the FSU about the right of the FSU under section 285B of the *Workplace Relations Act* to enter ANZ's Melbourne premises and interview employees about alleged underpayment of wages to labour hire workers. Section 285B gives union officials who are "permit holders" the right to enter premises and interview employees in order to investigate suspected breaches of the Act, awards, orders of the Commission or certified agreements.

The FSU sought to "walk through" ANZ's premises and approach employees directly at their workstations in order to interview them or invite them to be interviewed.

ANZ sought to establish a different regime to allow the FSU to interview employees wishing to be interviewed in private interview rooms supplied by ANZ. ANZ objected to the "walk

through" planned by the FSU officials. It also relied upon the application of the *Privacy Act 1988* (Cth) as a basis for limiting the manner in which the FSU officials exercised their right of entry.

The Commission has a power under section 285G to resolve disputes about rights of entry in a manner consistent with the statutory regime. The matter came to the Commission in this way.

Decision

Commissioner Smith dealt with the matter at first instance. He found that while under section 285B it was necessary that a union's suspicion was *bona fide*, the union does not have to particularise its suspicion to the employer.

In relation to ANZ's suggested alternative method of allowing employees to be interviewed, Commissioner Smith said:

"It does not follow ... simply because an alternative is available, even a reasonable one, that a proposal advanced by a union for right of entry is unreasonable."

In rejecting ANZ's concerns about privacy, Commissioner Smith pointed to people engaged by ANZ through labour hire companies that were contracted to work on the premises. These contracts provided for undertakings in relation to confidentiality. He saw no reason why union officers could not be subject to similar undertakings.

Finally, in relation to ANZ's argument that employees would be uncomfortable if confronted at their workstations, he found that the evidence presented by ANZ did not allow him to make adverse findings against the conduct of the FSU or the impact of FSU officers entering the premises.



The rights of union officials to access an employer's premises under section 285B of the *Workplace Relations Act* – though very wide – are not unrestricted.

Commissioner Smith found that it was unnecessary to issue an order permitting a "walk through" of the site as that would suggest that such action is not open to the FSU under the *Workplace Relations Act* as it stands. Rather, he restricted the FSU's access to 2 visits over a 6 week period.

Appeal

ANZ sought leave to appeal against this decision to the Full Bench of the Commission. The Minister for Employment and Workplace Relations intervened and made submissions in the public interest.

The Full Bench – Senior Deputy President Watson, Deputy President Hamilton and Commissioner Lewin – rejected the application for leave. In the process, however, the Full Bench expressed views on the matters in issue. It said:

"It is clear that right of entry under section 285B (or C) of the Act is not at large. It is for specified purposes and subject to specified conditions ... It follows that there is no warrant for imposing further conditions upon the statutory right of entry. There is also no warrant for inferring a condition that the permit holder identifies the suspected breach to the employer. Nor is there any warrant for importing a condition that the right of entry for the purpose of interviewing employees during working hours may not be at the worksite. With respect, we do not agree with the ANZ's contention that the location of interviews ... is entirely at the employer's prerogative. Any additional condition not evident in

section 285C of the Act might be seen to detract from the purpose of the provision and exercise of a statutory right of entry.

The statutory right to an interview should not be negated and should be substantively implemented, and the Commission may make orders to facilitate that if a dispute occurs. We think it likely that the Commission has a broad discretion as to the location of an interview that it designates in any order, if it issues an order. Factors have to be balanced, and factors such as the need not to disrupt a business, privacy or health and safety considerations may conceivably lead to a range of locations for an interview being ordered, but always having regard to the need for the statutory rights to be substantively implemented."

The Full Bench took issue with the use of the phrase "walk through", instead focusing on the right of union officers to enter a premises in order to interview employees:

"The terminology of a 'walk through' is more likely to cause confusion and error than to be helpful in the process of determining the Commission's relevant jurisdiction and the discretionary exercise of its dispute settlement function provided for by section 285G of the Act. The right of entry and the exercise of the power conferred upon an authorised person by section 285B of the Act is conditioned by the object of an interview and not otherwise."

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Lessons for employers

- The rights of union officials to access an employer's premises under section 285B of the *Workplace Relations Act* – though very wide – are not unrestricted. Amongst other things, exercise of those rights must in fact be for the purpose of investigating a suspected breach of award, etc.
- The permit holder is not required to identify the suspected breach to the employer.
- It may be appropriate for an employer to insist on precautions being taken to deal with privacy, safety and other concerns. These might include, for example, a requirement that the visiting union official give an undertaking to maintain confidentiality.
- The employer cannot necessarily dictate where or how the interviews, etc, will be conducted. If there is a dispute about such issues, the Commission may resolve the dispute. In doing so, the Commission will balance issues arising from privacy, safety and other applicable legislation while also giving effect to the right of entry as contemplated in the statutory scheme set out in Part IX of the Act.
- There is no "walk through" entitlement, as such, created by the union right of entry provisions.

Lessons for employers

- A casual employee who has been employed on a regular and systematic basis for less than 12 months will be excluded from seeking relief in respect of termination on the ground of unfair dismissal.
- However, such an employee is not excluded from seeking relief in respect of termination on the ground of unlawful termination. That is, such a casual employee can bring a claim based on one of the grounds in section 170CK of the *Workplace Relations Act* (eg that the termination is due to temporary absence on account of illness, or due to considerations such as union membership, race, sex or age).

Exclusion of Casual Employees From Unfair Dismissal Provisions

The Full Bench of the Australian Industrial Relations Commission has upheld a decision of Commissioner Hingley that a casual employee who had worked regularly and systematically for less than 12 months was a short term employee and, therefore, was not entitled to make an unfair dismissal claim: *Nightingale v Little Legends Childcare* (23 June 2004, PR948229).

Background

Ms Nightingale was an administrative worker at Little Legends Childcare. She was initially employed to work one day a week. However, in the 8 months prior to her dismissal, she worked 5 days a week, from 9.30 am to 5.00 pm. Following her dismissal, Ms Nightingale lodged an application in the Australian Industrial Relations Commission on the basis that her termination was harsh, unjust and unreasonable and in breach of section 170CK (unlawful termination) and section 170CM (notice requirements) of the *Workplace Relations Act 1996*.

At first instance, Ms Nightingale's application was dismissed for want of jurisdiction on the basis that she had been a casual employee engaged for a short period within the meaning of section 170CBA(3) of the Act and was therefore excluded from the operation of the unfair dismissal provisions. This was despite the fact that, but for the termination, Ms Nightingale had a reasonable expectation of continuing employment.

Appeal decision

On appeal, the Full Bench gave consideration to sections 170CBA(1)(d) and (3) of the Act which provide that a casual employee engaged for a short period is excluded from the operation of, among other things, Subdivision B (which includes the unfair dismissal provisions) and section 170CM of the Act. A casual

employee is engaged for a short period unless the employee is engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months and has, or but for the termination would have had, a reasonable expectation of continuing employment. The Full Bench ruled that Ms Nightingale was a casual employee and could not, therefore, pursue an unfair dismissal proceeding.

The Full Bench then dealt with the question of whether a casual employee engaged for a short period is able to bring an application based on an alleged breach of section 170CK which makes dismissals in particular circumstances unlawful. The Full Bench said that section 170CBA(1) is ambiguous and obscure on this point. By reference to Parliamentary materials, however, the Full Bench concluded that the legislature intended that a casual employee engaged for a short period, while unable to pursue an application on the basis that the termination was harsh, unjust or unreasonable, is able to pursue an application based on an alleged breach of section 170CK.

Accordingly, leave to appeal was granted and an order made that the application be dismissed except to the extent that it was based on an alleged breach of section 170CK.

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... a casual employee who had worked regularly and systematically for less than 12 months was a short term employee and, therefore, was not entitled to make an unfair dismissal claim ...

Limiting the Ambit of the Unfair Contracts Jurisdiction

In the April 2004 edition of the *IR Bulletin*, we commented on the wide-ranging ambit of the unfair contracts jurisdiction of the Industrial Relations Commission of New South Wales under section 106 of the *Industrial Relations Act 1996 (NSW)* (see page 9, also available on our website, www.bdww.com).

In recent months, the New South Wales Court of Appeal has expressed concerns about the Commission's willingness to intervene in commercial arrangements which lack an "industrial colour or flavour". The Court of Appeal has expounded some limitations on the Commission's jurisdiction to vary work contracts and collateral arrangements. In this edition of the *IR Bulletin*, we consider a recent Court of Appeal decision given in connection with a mere application for relief under section 106.

Background

The Court of Appeal's decision in *Solution 6 Holdings Limited v Industrial Relations Commission of NSW* [2004] NSWCA 200 found that the Commission did not have jurisdiction to vary a Share Sale Agreement. Under the Share Sale Agreement, Mr Fish sold his business to Solution 6 for \$19 million, \$18.5 million of which was paid in Solution 6 shares. It was a requirement of the Share Sale Agreement that Mr Fish sign an employment contract with Solution 6, which he did. However, the shares granted to him under the Share Sale Agreement fell significantly in price.

Mr Fish applied to the Commission for a variation to the Share Sale Agreement to insert a floor price mechanism so that he was entitled to the full value of the purchase price. There is a privative provision in the *Industrial Relations Act* which limits the capacity of a party to challenge a decision of the Commission in another court. Before any steps were taken in the Commission proceedings, however, Solution 6 asked the Court of Appeal to prohibit the Commission from hearing the claim.

Proposed limits on unfair contract claims

For the Commission to exercise its jurisdiction under section 106, the contract or arrangement, or related condition or collateral arrangement, must be one "whereby work is performed". The Court of Appeal said the test requires that the contract must directly envisage the performance of work, and have a recognisable impact on the conditions of that employment or work. Once jurisdiction is established, the Commission's power to vary is restricted to aspects of the contract or arrangement which are closely related to the performance of work.

The Court of Appeal considered that the Share Sale Agreement was only a contract for the sale and purchase of a business. It did not require or directly lead to the performance of work by Mr Fish, did not have as its purpose the performance of work and did not have a recognisable impact on the terms of the employment contract Mr Fish signed with Solution 6.

The Court of Appeal considered that the statutory privative provision did not exclude its power to intervene in this

Lessons for employers

- To fall within the unfair contracts jurisdiction, the contract or arrangement in question must lead directly to the performance of work.
- Even where the Commission has jurisdiction, it can only vary those aspects of the contract or arrangement which are closely related to the performance of work.
- The privative provisions in the *Industrial Relations Act* which protect a Commission decision may, in some circumstance, not prevent a challenge to the Commission exercising jurisdiction if the point of decision has not yet been reached.

case because the provision is directed at decisions of the Commission, not a mere application.

On these grounds, the Court of Appeal ordered that the Commission should take no further steps in the proceedings.

An application has been made to the High Court for special leave to appeal the Court of Appeal's decision. In the meantime, there will be some continuing uncertainty in relation to unfair contract applications which involve commercial transactions beyond the traditional relationship of employer and employee.

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Lessons for employers

- The coal mining industry in Queensland needs to review the design of underground coal mines. It may mean, in a practical sense, that the obligation imposed by regulation 296(1) requires a minimum of 2 escapeways, both of which are intake or fresh air.
- A person who exercises power under section 167 may breach other provisions of the Act (for example, the obligation not to impede production unnecessarily) if a broad direction is issued in circumstances where a more narrow or targeted directive would have been appropriate to deal with the particular unacceptable level of risk.

Queensland Coal Mining Safety and Health Rulings

There have been 2 recent decisions by the Queensland Supreme Court dealing with coal mining safety and health legislation in Queensland. Both decisions have important ramifications for the coal mining industry in Queensland.

Design of escapeways in underground mines

The decision of *Construction, Forestry, Mining & Energy Union v State of Queensland & Anor* [2004] QSC 181 concerned the application of regulation 296(1) of the *Coal Mining Safety and Health Regulation 2001*, which is a provision dealing with the design of escapeways. Regulation 296(1) says:

Escapeways

296(1) The site senior executive must ensure the mine has at least two trafficable entrances ("escapeways") from the surface that are separated in a way that prevents any reasonably foreseeable

event happening in one of the escapeways affecting the ability of persons to escape through the other escapeway.

The Court found that the escapeways at the relevant mine did not comply with regulation 296(1) because:

- a fire was a "reasonably foreseeable event" in one of the escapeways – an event will be reasonably foreseeable even though the risk of it occurring may be "infinitesimal" and one likely to occur "once in so many thousand years"; and
- the very act of using personal protective equipment in the other escapeway in the event of such a fire would have a substantial effect



on a person's ability to escape. That is, using goggles and mask would make breathing harder, would restrict vision and contribute to disorientation in the event of a fire.

This decision has ramifications for the coal mining industry in Queensland, particularly for the design of underground coal mines. It may mean, in a practical sense, that the obligation imposed by regulation 296(1) requires a minimum of 2 escapeways, both of which are intake or fresh air. The decision has been appealed.

Power to issue directive to suspend operations in all or part of a mine

This decision of *Construction, Forestry, Mining & Energy Union v Lyne & Anor* [2004] QSC 259 concerned the application of section 167(1) of the *Coal Mining Safety and Health Act 1999*, which deals with the

power to issue directives to suspend operations for unacceptable levels of risk. Section 167(1) states:

167 Directive to suspend operations for unacceptable levels of risk

(1) If an inspector, inspection officer or industry safety and health representative believes risk from coal mining operations is not at an acceptable level, the inspector, officer or representative may give a directive to any person to suspend operations in all or part of a mine.

The CFMEU sought a declaration that directives under section 167 can only be made in respect of all "coal mining operations", either at the whole mine or in a geographical part of the mine. The Court rejected that interpretation and found that directives under section 167 can be made to allow for the suspension of some but not all coal mining operations, either at the

whole mine or in a geographical part of the mine. In addition, the Court found that the exercise of power under section 167 should be targeted at stopping only that which made the level of risk unacceptable.

This decision is an important clarification of the power under section 167 of the Act. Among other things, a person who exercises power under section 167 may breach other provisions of the Act (for example, the obligation to not impede production unnecessarily) if a broad direction is issued in circumstances where a more narrow or targeted directive would have been appropriate to deal with the particular unacceptable level of risk.

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Prosecuting Unions For Breach of Industrial Instruments: New South Wales

In the decision of *BlueScope Steel (AIS) Pty Ltd v The Australian Workers Union, New South Wales (No 2)* [2004] NSWIRComm 145, BlueScope Steel successfully prosecuted the Australian Workers' Union for a breach of the "no dumping of hot metal" provisions of the enterprise agreement applicable at the Port Kembla Steelworks.

In what is the first successful prosecution of a union by an employer for a breach of an industrial instrument under the provisions of the *Industrial Relations Act 1996* (NSW), Justice Boland found that the AWU imposed a specific ban on the delivery of hot metal that resulted in the dumping of hot metal.

Justice Boland specifically held that the conduct of an AWU official and delegate amounted to a

"premeditated and deliberate" breach of an industrial instrument.

Justice Boland imposed a penalty of \$6,500 (of a maximum penalty of \$10,000) on the AWU for the contravention. An order for legal costs was also made in BlueScope Steel's favour.

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Lessons for employers

- Employers should consider the enforcement provisions of the *Industrial Relations Act 1996* when considering a strategy for managing the consequences of inappropriate conduct by unions and employees.

Employee Choice: Superannuation Funds

After many years, legislation to allow employees to choose their superannuation fund has passed into law. The *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004 (Cth)* will come into effect on 1 July 2005.

The Act essentially allows employees to choose the superannuation fund into which their superannuation contributions will be paid, although there are some limitations on the fund an employee may choose (eg the fund must be a "complying fund" and one to which the employer can make contributions). Employers are obliged to facilitate this choice by supplying employees with a standard choice form. Where employees elect not to make a choice, or where their choice is invalid, payment must be made into a default fund nominated by the employer.

Superannuation contributions will be made in compliance with the Act if the contributions are made to a superannuation fund in accordance with:

- a State industrial award;
- a certified agreement or AWA under the *Workplace Relations*

Act 1996 or a certified agreement under the *Industrial Relations Act 1988*; or

- an employment agreement that was in force under the Victorian *Employee Relations Act 1992*.

Although there is a long lead in time, employer compliance is quite onerous and will require significant planning. If payments are not made in compliance with the choice of fund legislation, then an employer will incur an individual superannuation guarantee shortfall.

As this shortfall applies on a per employee basis and accrues daily in respect of each instance of incorrectly applied payments, the total liability for an employer may be substantial.

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The Act essentially allows employees to choose the superannuation fund into which their superannuation contributions will be paid...

Lessons for employers

- To avoid incurring liability for any individual superannuation guarantee shortfall, it is important that employers begin planning for the changes introduced by the choice of superannuation fund legislation now.



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