

# IR Bulletin

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## End of 2005 – Focus on the WorkChoices Bill and Other Developments

As we approach the end of 2005, the focus remains very much on the federal Government’s *WorkChoices Bill*. The Bill has now been passed by the House of Representatives and the Senate. It is likely to become operative in or around March 2006. There is no doubt that 2006 will be an interesting year for all those working in the field of industrial relations and employment.

In the meantime, however, nothing stands still. There are some important developments to keep an eye on.

In this edition of the *IR Bulletin*, Yoram Finger and Jasmine Denkha write about the decision of Justice Merkel of the Federal Court of Australia in the *Commonwealth Bank of Australia v FSU*. The decision considered whether a certified agreement could provide for individual contracts of employment which if entered would be incorporated by reference into, and otherwise prevail over, the certified agreement. It is an important decision in several respects.

Karl Blake considers when an employer is entitled to dismiss an employee for breach of the employer’s policy. Karl and Bethany Sharman also summarise the key recommendations on independent contracting and labour

hire arrangements made by the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation. There will be important legislation introduced into this area before long.

Kiri Ross considers the Full Federal Court decision in *Arends* which has important implications for public sector employers.

Finally, Vanessa Swannie discusses the decision of the Full Bench of the Australian Industrial Relations Commission upholding the unfair dismissal claims of two seasonal employees.

This is the last edition of the *IR Bulletin* for 2005. We wish you all a Merry Christmas and a safe and happy holiday period.

Jane Harvey, Senior Associate, Melbourne  
[jane.harvey@bdw.com](mailto:jane.harvey@bdw.com)

Sonya Greaves, Senior Associate, Brisbane  
[sonya.greaves@bdw.com](mailto:sonya.greaves@bdw.com)

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# Federal Court Finds “Industrial Avoidance Scheme” Invalid

The Federal Court of Australia has ruled invalid the certified agreement of a subsidiary of the Commonwealth Bank of Australia, which attempted to allow individuals to contract out of the apparent provisions of agreement and then have the replacement contracts incorporated by reference: *Finance Sector Union of Australia v Commonwealth Bank of Australia* [2005] FCA 796.

## Background

In May 2002, the Bank decided that Commonwealth Securities Limited (CommSec), a wholly owned subsidiary, would act as the future employer of employees engaged in the Premium Financial Services business unit of Bank. The decision required that some existing employees of the Bank move to CommSec over time. CommSec had established industrial arrangements which facilitated employees moving from award/agreement coverage on to individual contracts of employment. An “opt out” provision of the CommSec certified agreement provided for CommSec to enter into individual contracts of employment which, once made, were deemed to be part of the relevant CommSec Agreement. The ultimate effect was that the individual contracts would prevail over the industrial instruments that otherwise applied to CommSec employees.

The Finance Sector Union pursued its claim against the Bank largely on freedom of association grounds relating to the movement of employees from the Bank to

CommSec and its allegedly inferior and less secure industrial arrangements. However, part of its case involved a challenge to the validity of the CommSec Agreement itself. In particular, the Union claimed that a certified agreement that includes an opt out provision is invalid having regard to the provisions of the *Workplace Relations Act 1996*.

## Decision

Justice Merkel of the Federal Court of Australia ruled that prior to certifying an agreement the Australian Industrial Relations Commission must be able to be satisfied that:

- (a) the terms of the agreement have been approved by a valid majority of employees;
- (b) the terms of the agreement relate only to matters pertaining to the employee-employer relationship;
- (c) the agreement does not include inconsistent, objectionable or discriminatory terms; and
- (d) the agreement passes the no-disadvantage test,

## Lessons for employers

- The decision casts doubt over some certified agreements that permit unrestrained opting out during the life of a certified agreement, especially where the matters individually agreed are to be incorporated by reference. Employers should review their certified agreements carefully and consider whether any such provisions may be invalid.
- An invalid certified agreement has wide reaching implications including exposing employers to penalties, claims for back-pay and, potentially, protected industrial action.



and that in order to satisfy itself about these matters, all the terms of an agreement must be in existence so that they can be reviewed prior to certification.

Justice Merkel then considered facilitative provisions. He thought them a probable exception to the general rule requiring certainty about the precise provisions to apply.

A facilitative provision normally allows the parties to agree about *how* a substantive clause is to be applied at the workplace during the life of an agreement, for example within a range of outcomes. This can be distinguished from a provision that leaves matters of substance to be agreed. Justice Merkel said that a facilitative provision is unlikely to affect the Commission's ability to be satisfied that the pre-conditions to certification have been met. Whether a facilitative provision is permissible depends upon the width of the provision and whether it facilitates the operation of the agreement

made between the parties, rather than overriding the award or certified agreement.

Justice Merkel also said that the opt out provision within the CommSec agreement, by excluding the terms of the CommSec Agreement, permitted a variation to the CommSec Agreement that is not permitted by the Act.

Justice Merkel found that the Commission did not have jurisdiction to certify the CommSec Agreement.

There were other bases upon which Justice Merkel was asked to rule that the CommSec Agreement was invalid. They turned on apparently misleading information given to the Commission about the extent of the business to which the Agreement would apply and which employees were involved in the approval process. The Court made some very critical remarks in this area but, in view of the invalidity finding made about the opt out clause, chose not to decide the other issues finally.

The invalidity of the CommSec Agreement resulted in the employees being governed by individual contracts of employment but without the protection of the *Workplace Relations Act*. Individual contracts operating in this way do not override the relevant award. Consequently, the Bank may potentially be liable for claims by employees for underpayment of benefits.

It is to be expected that the Bank may bring an appeal from Justice Merkel's decision.

**Jasmine Denkha, Lawyer, Perth**  
jasmine.denkha@bdw.com

**Yoram Finger, Senior Associate, Perth**  
yoram.finger@bdw.com

# When is an Employer Entitled to Dismiss an Employee for Breach of the Employer's Policy?

A Full Bench of the Australian Industrial Relations Commission recently summarised the principles relating to when an employer is entitled to dismiss an employee for breach of an employer's policy: *Woolworths Ltd t/as Safeway v Brown* (26 September 2005, PR963023).

## Facts

Safeway had an employee dress policy which provided that "No visible body piercing is permitted, which includes (visible) tongue piercing, eyebrow, nose, lip etc piercing". The policy was justified as being aimed at ensuring appropriate food hygiene standards. There were limited exceptions to the policy.

Mr Brown was employed by Safeway as a butcher. He wore an eyebrow ring. For two years, he worked at Safeway and covered the eyebrow ring with a bandaid. In November 2004, a new manager at the store in which Mr Brown worked formed the view that Mr Brown's wearing of the eyebrow ring was contrary to Safeway's dress policy.

Mr Brown was asked repeatedly to remove the eyebrow ring. He refused to do so, even after consultation with the union and the involvement of the Commission. Mr Brown was dismissed and commenced an unfair dismissal claim under the *Workplace Relations Act 1996*.

At first instance, Senior Deputy President Acton found Mr Brown's dismissal was harsh, unjust and unreasonable.

## Decision

The Full Bench overturned Senior Deputy President Acton's decision and found that Safeway was entitled to dismiss Mr Brown for breach of its dress policy.

## Lessons for employers

- Employment contracts should contain a term requiring employees to observe the employer's policies, though employers should consider carefully whether any policies ought to be incorporated into the contract of employment.
- Policies should be legal, rationally related to the business of the employer and the work of the employee, and reasonable in all the circumstances.
- Where an employer wishes to enforce a policy that has been applied inconsistently, it will be necessary to engage in a consultation and warning process with affected staff.
- Before terminating employment for breach of policy, consider whether there might be factors which mitigate the employee's conduct (for example, is dismissal disproportionate to the breach?).



The Full Bench stated that an obligation on an employee to observe a policy must be founded in the contract of employment. The requirement can be express and includes incorporating the policy by reference into the contract of employment. Alternatively, a requirement to observe a policy may be able to be implied on the basis that an employee is required to follow the lawful and reasonable directions of the employer.

The Full Bench stated that where a failure to observe a policy amounts to a refusal to follow the lawful and reasonable directions of the employer, and such refusal would justify dismissal at common law, then this will be a valid reason for termination of employment under the Act. A failure to comply with a direction will not provide a valid reason for termination where the policy or direction is illegal, or where the policy does not relate to the employment or matters affecting the work of the employee, or where the policy or direction is unreasonable.

The Full Bench stated that whether a policy is reasonable will depend on all the circumstances of the case. The Full Bench noted, however, that a policy will not be unreasonable merely because a member of the Commission considers a better or different policy may have been appropriate.

The Full Bench also noted that even where a breach of policy provides a valid reason for dismissal, termination of employment may nevertheless be

harsh, unjust or unreasonable. This will be the case where, for example:

- the employee is ignorant of the policy;
- the termination of the employee's employment is disproportionate to the breach of the policy;
- the policy has been applied or enforced inconsistently;
- the policy has been applied in a discriminatory fashion or used to disguise a real and impermissible reason for termination (for example, union membership).

In this case, Mr Brown's refusal to remove the eyebrow ring after repeated requests to do so was a failure to follow the lawful and reasonable directions of Safeway and thus provided a valid reason for the dismissal. Furthermore, although Mr Brown had been permitted by his first manager to wear the eyebrow ring, Safeway had followed a fair and protracted process to allow Mr Brown the opportunity to remove the eyebrow ring prior to his dismissal. The dismissal was therefore not harsh, unjust and unreasonable.

**Karl Blake, Senior Associate, Melbourne**  
karl.blake@bdw.com

# Federal Government Moves Towards Greater Regulation of Independent Contracting and Labour Hire

The House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation recently delivered its report and recommendations on independent contracting and labour hire arrangements.

The Committee acknowledged the growth of independent contracting and labour hire employment in the past 15 years, and the fact that these arrangements provide benefits to both employers and employees. The Committee recognised, however, some of the pitfalls facing independent contractors.

In response to the various submissions received, the Committee made a number of recommendations. The key recommendations made by the Committee are to:

1. Maintain the common law approach to distinguishing employees from independent contractors.
2. Pursue new legislation, or amend existing legislation to:
  - (a) adopt components of Australian income tax legislation to identify independent contractors;
  - (b) preserve the legal status of independent contractors as small businesses and provide a broad description of independent contractors to cover all forms of small business structures;
  - (c) broaden the definition of an independent contractor to extend it beyond natural persons; and
  - (d) provide alternative dispute resolution procedures for independent contractors.
3. Extend the jurisdiction of the Federal Magistrates Court to hear cases associated with the dispute resolution of unfair contracts for service.
4. Establish a voluntary code of practice for the labour hire industry by 2007.
5. Improve occupational health and safety (OHS) in the labour hire industry through, among other things:
  - (a) improving data collection on injury rates for labour hire employees;
  - (b) requiring labour hire agencies and host businesses to provide appropriate OHS training for independent contractors; and
  - (c) monitoring and enforcing compliance with OHS regulation.

**Karl Blake, Senior Associate, Melbourne**  
karl.blake@bdw.com

**Bethany Sharman, Articled Clerk, Melbourne**  
bethany.sharman@bdw.com



# Who is a Commonwealth Public Sector Employee?

In a recent decision, the Full Court of the Federal Court of Australia found that a person engaged under a series of contracts which described him as an independent contractor was not a Commonwealth public sector employee for the purposes of the *Workplace Relations Act 1996: Re Australian Industrial Relations Commission and Arends; ex parte Commonwealth of Australia* [2005] FCAFC 204.

## Background

The decision arose out of the Commonwealth's application to the High Court for judicial review of a decision of a Full Bench of the Australian Industrial Relations Commission. The Full Bench had held that Mr Arends, who worked for the Department of Defence as a radiographer from 1994 to 2002 under a series of contracts describing him as an independent contractor, was a "Commonwealth public sector employee" for the purposes of the *Workplace Relations Act 1996*. He was therefore able to seek a remedy for unfair dismissal in the Commission.

The term "Commonwealth public sector employee" is defined in section 170CD(1) of the Act and includes a person in employment by authority of a law of the Commonwealth. The Full Bench found that Mr Arends' contract was authorised by an administrative instruction, DIG 24.1, issued under the *Defence Act 1903*. In the Full Bench's view, the authorisation was no less effective because the purported contract for services turned out to be a contract of service. The Department had deliberately eschewed other sources of authority, namely the *Public*

*Service Act 1999*, in order to avoid creating an employment relationship. Mr Arends was a person in employment by authority of a law of the Commonwealth and therefore a "Commonwealth public sector employee" for the purposes of the Act.

## Federal Court Decision

The Full Court of the Federal Court held that Mr Arends was not a person in employment by authority of a law of the Commonwealth because he was not employed under the authority of the *Defence Act* or any other Act or instrument. The fact that the legal relationship between the Department and Mr Arends had, in operation, become a contract of service could not, as a matter of statutory interpretation, alter the nature of the authorisation of DIG 24.1, being an authorisation for a contract for services. The Federal Court considered that this was particularly so given that DIG 24.1 stated specifically that a contract authorised by it did not effect employment.

Kiri Ross, Lawyer, Canberra  
kiri.ross@bdw.com

## Lessons for employers

- This case is significant for public sector employers and shows that where the employment is authorised or effected by statute the contractual relationship between the Crown and the employee must be consistent with the statutory provisions that effect it.
- Independent contractors to the Commonwealth will generally not be able to access a remedy in respect of termination of employment, despite being employees at common law, unless they can demonstrate that the relevant authorisation was for a contract of service.

# Full Bench Upholds Decision on Seasonal Employees' Unfair Dismissal Claims

In the September 2005 edition of the *IR Bulletin*, we looked at a decision of the Full Bench of the Australian Industrial Relations Commission which found that two temporary, seasonal employees were able to bring claims for unfair dismissal. Commissioner Simmonds subsequently issued a decision which found that the terminations of both employees were harsh, unjust or unreasonable. A Full Bench of the Australian Industrial Relations Commission has now upheld the finding of Commissioner Simmonds that the terminations were harsh: *Esam & Anor v SPC Ardmona Operations Ltd* (22 November 2005, PR965476).

## Decision at first instance

Commissioner Simmonds' decision that the terminations were harsh was based on the following factors:

- although SPC Ardmona had operational reasons for terminating the employment of the employees, there was no valid reason for dismissing these employees as the terminations were based on their unwillingness to undertake tasks other than those for which they were employed; and
- the employees were not afforded a "fair go all round" as they were not notified of the reasons for the terminations or afforded an opportunity to respond.

Commissioner Simmonds awarded compensation equivalent to what the employees would have earned had they remained employed until the end of the season. Commissioner Simmonds declined to take into account the earnings of one of the

employees, Mr Esam, subsequent to the termination when awarding compensation.

SPC Ardmona appealed the decision, claiming that:

- the operational need to terminate the employees was a sufficiently valid reason;
- the rigorous due process requirement imposed by Commissioner Simmonds was unfair to SPC Ardmona given that it hires 7000 seasonal employees; and
- Commissioner Simmonds was bound to take into account the subsequent earnings of Mr Esam when awarding him compensation.

## Full Bench Decision

The Full Bench rejected SPC Ardmona's submissions. With respect to the "fair go all round" point, it considered that seasonal employees were entitled to the same due process as any other

## Lessons for employers

- It is critical that all employees, whether permanent or engaged on fixed-term or fixed-purpose contracts, are afforded procedural fairness during the termination process. This is so even where the termination is due to operational reasons.
- Compensation awarded for an unfair dismissal may not be reduced by the amount an employee earned subsequently if those earnings derive from work the employee was performing in addition to his or her principal position at the time of the termination.

employee. The total lack of due process was sufficient to render the termination harsh, unjust or unreasonable.

The Full Bench ruled that Commissioner Simmonds was correct in refusing to take into account the employment engaged in by Mr Esam subsequent to the termination when awarding compensation. That other employment was a continuation of a side-job. It was not alternative employment and no adjustment needed to be made for it.

**Vanessa Swannie, Lawyer, Melbourne**  
vanessa.swannie@bdw.com

### BDW Contact Details:

**Sydney** Adrian Morris, Helen McKenzie  
Stephen Nettleton, Jan Dransfield  
David Lloyd, Stephen Woodbury  
Lea Constantine, Ken Brotherson (02) 9258 6000

**Melbourne** Richard Bunting, Steven Amendola  
Vince Rogers (03) 9679 3000

**Brisbane** Ian Humphreys, Steve Bennett (07) 3259 7000  
**Perth** David Parker, Tony Davies (08) 9366 8000  
**Canberra** Paul Vane-Tempest (02) 6234 4000

This publication is authorised by Blake Dawson Waldron. The firm can be contacted by emailing [marketing@bdw.com](mailto:marketing@bdw.com)

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