

# IR Bulletin

April 2004

## Editorial

This edition of the *IR Bulletin* highlights the diverse and constantly changing range of issues that employers face in their day to day business.

The articles cover topics such as drug and alcohol testing in the workplace, employment issues arising from the increasing use of Australian Defence Force reservists and the extension of an employee's probationary period. We also consider the ability of employees to commence employment related claims against companies being wound up or in voluntary administration.

The use of labour hire arrangements is becoming increasingly common but employers need to be careful to ensure that such arrangements are legitimate and not designed merely to avoid award and statutory obligations. This was highlighted again by the Full Court of the Federal Court in *Damevski v Guidice* late last year and is discussed in an article by Tony Davies. Another issue that may arise where labour hire arrangements are

utilised is that the non-employer party may be made a party to an industrial dispute and have award provisions imposed upon it. Rebecca Taseff considers a recent case on this issue.

We also outline recent amendments to the *Workplace Relations Act 1996* in the areas of transmission of business and section 127 applications, and the decision of the Australian Industrial Relations Commission to increase the standard severance pay provisions in the Commission's safety net awards.

It is important for all employers to stay abreast of legal developments and changes in the area of employment and industrial relations.

Sonya Greaves, Senior Associate, Brisbane  
sonya.greaves@bdw.com

Jane Harvey, Lawyer, Melbourne  
jane.harvey.bdw.com

Drug and Alcohol Testing	2
Beware the Wolf in Sheep's Clothing	4
Industrial Dispute Found Between Union and Non-Employer	5
Is the AIRC a Court?	5
Extension of Probationary Period	6
Wearing 2 Hats: Employees Serving in the Defence Force Reserves	6
Further Changes to Right of Entry Laws – Are You Up to Date?	8
Full Bench of the NSW Commission Reaffirms Wide Jurisdictional Reach of Section 106	9
Increase of Maximum Severance Pay Standards in Federal Awards	10
Stop Press	11

in this issue



# Drug and Alcohol Testing

Drug and alcohol policies can be an important means of promoting health and safety in the workplace. Three recent decisions of State Industrial Relations Commissions highlight some important issues associated with the content of such policies and the dismissal of employees who refuse to undergo drug and alcohol testing.

## Commission’s recommendation on the Bluescope policy

### *AWU v BHP Steel (AIS) Pty Limited [2003] NSW IR Comm 461*

In December 2003, a Full Bench of the Industrial Relations Commission of New South Wales handed down a recommendation on the terms of the drug and alcohol policy in force at the Port Kembla Steelworks of Bluescope Steel (AIS) Pty Ltd. The Commission largely endorsed the structure and form of the Bluescope policy, subject to some minor adjustments.

The policy does not provide for random testing of all employees, but provides for testing to occur in particular circumstances, including:

- “for cause” where an employee has been involved in a significant incident;
- challenge testing;
- fitness to return to work testing; and
- employee self testing.

The Commission endorsed these circumstances, subject to recommending further definition around what constitutes a significant incident in respect of testing “for cause”.

In general, the Commission also endorsed the disciplinary aspects of the policy but recommended a graduated scale of probation for employees who continue to test positive. The Commission noted a general caution about the circumstances in which dismissal of employees may be seen as fair.

In summary, the Commission’s recommendations endorse the deterrence value of a drug and alcohol policy as a measure to

promote health and safety in the workplace. However, the policy must also be procedurally fair and appropriate to the needs of the individual workplace.

## Right to conduct urine testing

### *Pioneer Construction Materials Pty Ltd v TWU (2003) WAIRC 10049*

In another decision handed down late last year, the fitness for duty policy of Pioneer Construction Materials Pty Ltd was referred to the Industrial Relations Commission of Western Australia for consideration.

The Union objected to the introduction of several aspects of Pioneer’s fitness for duty policy and, in particular, Pioneer’s right to conduct urine testing, rather than saliva testing, to detect alcohol and other drugs.

Commissioner Beech found on the evidence before him that, at this point, urine testing is more reliable and accurate in assessing impairment than saliva testing. Central to this finding was the evidence of 2 toxicological experts, called by Pioneer, who attested that presently there is no Australian Standard governing saliva collection, drug analysis or drug level interpretation and that there are no on-site saliva testing devices that are reliable for all drug groups.

Urine testing, while criticised because it does not measure impairment, does reliably identify drug use which presents a risk of impairment. The Australian Standard outlines recommended practice for the collection, detection and quantification of drugs in urine and includes cut off levels for reporting

## Lessons for employers

- Drug and alcohol policies are an important measure to promote health and safety in the workplace. They must be procedurally fair and appropriate to the needs of the individual workplace and implemented appropriately if they are to be relied on.
- A drug and alcohol policy, whether part of a contract of employment or appearing in industrial instruments, must be clear and explained to all employees who are subject to it.

positive urine samples to minimise false positives and negatives.

Accordingly, the Commissioner made a declaration that Pioneer’s proposal to conduct urine testing as part of its fitness for duty policy was reasonable and that saliva testing be revisited in the future as part of Pioneer’s ongoing review of its fitness for duty policy.

## Dismissal for refusing to take a drug test was harsh, unjust and unreasonable

### *Perkins v Golden Plains Fodder Australia Pty Ltd; Macpri Pty Ltd [2004] SAIRComm 5*

The applicant, Mr Perkins, had been dismissed from his employment for refusing to comply with a management direction to provide a urine sample for a random drug test. It was accepted in evidence that the reason for the refusal was that Mr Perkins was concerned that he would return a positive test, given his recreational marijuana use the previous day. Mr Perkins was dismissed for failing to obey a lawful and reasonable direction.

When he started employment, Mr Perkins signed an occupational health and safety statement that obliged him to “obey any reasonable instruction that his or her employer may give in relation to health or safety at work...”

and “ensure that he...is not, by the consumption of alcohol or a drug...in such a state as to endanger his or her own safety at work”.

During subsequent occupational health and safety training, Mr Perkins was also handed an alcohol and other drugs policy which stated that employees at Golden Fodder had a responsibility to present for and remain at work unimpaired by drugs or alcohol.

Some months later, Mr Perkins signed an Australian workplace agreement (AWA) which contained a drug and alcohol policy which stated that “...coming to work under the influence of liquor or drugs is forbidden” and that management reserved the right to request such a test at any time. Further, the AWA stated that “instant dismissal will take place if the results of the Panel 5 drug test confirm that an employee was at work under the influence of an illegal drug”.

The AWAs were explained to the workforce when they were introduced. However, the South Australian Industrial Relations Commission did not accept that it was clear whether the AWA drug and alcohol policy superseded other similar documents. Also, although the policy was said to be one of zero tolerance, it was unclear what this meant exactly.

In holding that Mr Perkins had been unfairly dismissed, the Commission stated that:

- The job Mr Perkins performed (forklift driver and plant operator) in the industry in which he performed it (being the manufacture, processing and exporting of hay) was not so exceptional as to warrant a zero tolerance policy on drugs and alcohol.
- Whether the job is exceptional depends on specific safety considerations applying to that job and how it is performed.

- The policy may have been reasonable if it prohibited using drugs at work, possession of drugs at work or being impaired by drugs, but was unfair to most workers in prohibiting what a worker did away from the workplace.
- The AWA drug policy focused on the influence drugs had on a worker, not exposure to drugs. However, the test prescribed in the policy could not measure how the drugs actually influenced anyone. A dismissal pursuant to such a policy would always be unfair.
- The policy was poorly explained and the concept of zero tolerance was not articulated clearly to all the employees.

**Austin Dowling, Lawyer, Sydney**  
austin.dowling@bdw.com

**Julia Sutherland, Lawyer, Perth**  
julia.sutherland@bdw.com

**Michael Tamvakologos, Lawyer, Melbourne**  
michael.tamvakologos@bdw.com



# Beware the Wolf in Sheep's Clothing

In *Damevski v Guidice* [2003] FCAFC 252, the Full Court of the Federal Court held that despite purported "Odco" type contractual arrangements being implemented by Endoxos Pty Ltd, its worker, Mr Damevski, remained employed by Endoxos. The English Court of Appeal has also recently dealt with a similar issue in *Brook Street Bureau (UK) Ltd v Dacas* (5 March 2004).

## Odco style of independent contracting arrangements

The decision of *Building Workers Industrial Union of Australia v Odco Pty Ltd* had established that a particular system of labour hire arrangements was effective to establish independent contractor arrangements between a worker, a labour hire company and customers of the labour hire company.

Under the system, a labour hire company called Troubleshooters Available sourced workers wanting to be self employed and arranged work for them from time to time with customers of Troubleshooters as independent contractors. The Federal Court had held that the workers were not employees of Troubleshooters, and neither were they employees of the customers of Troubleshooters. This was despite the fact that they performed work for, and under the control of, those customers on a day to day basis.

## Damevski v Guidice

### Facts

Endoxos had employed Mr Damevski for 3 years. Mr Damevski performed cleaning duties for Endoxos and was supplied with all necessary clothing, equipment and transport. Due to a rise in public liability insurance and workers compensation premiums, Endoxos decided that it wished to restructure its working arrangements with employees, including Mr Damevski, by implementing the *Odco* style of independent contracting arrangements.

Endoxos procured Mr Damevski's resignation from employment with Endoxos so that he could contract his services to a company called MLC

Workplace Solutions which would in turn supply Mr Damevski's contract labour to Endoxos.

Following his resignation from Endoxos, Mr Damevski continued to work for Endoxos in much the same way as he had prior to his resignation. The only real change was that MLC received Mr Damevski's timesheets and organised his pay.

Ultimately Mr Damevski ceased work with Endoxos when Endoxos stopped offering work to him and removed the van and mobile phone which it had been providing for his work.

Mr Damevski commenced proceedings in the Australian Industrial Relations Commission for relief in respect of unfair dismissal. The Commission both at first instance and on appeal held that Mr Damevski was not an employee of Endoxos and therefore that it had no jurisdiction to hear his claim.

### Federal Court findings

A Full Court of the Federal Court held that the Commission was wrong to find that Mr Damevski was not an employee of Endoxos.

The Court held that there was no evidence at all of any contractual arrangements entered into or agreed between Mr Damevski and MLC (even though it may have been intended by the parties that such arrangements would be entered into). Indeed there was no evidence of any discussions or negotiations between Mr Damevski and MLC or any person on behalf of MLC concerning a contractual agreement.

The Court found Mr Damevski was not engaged in his own economic enterprise or business, had no right to delegate his shifts to others and

## Lessons for employers

- A Court will not consider as legitimate arrangements which are designed merely to avoid award and statutory obligations.
- A Court will look at all aspects of working arrangements in order to determine whether the relationship in question is an employment relationship or an independent contractor relationship.
- A person who wishes to implement contractor arrangements at its workplace will need to be properly advised about the contractual arrangements it will need to implement and ensure that it conducts its enterprise strictly in accordance with those planned arrangements.

worked only for Endoxos which provided him with all equipment and materials. The arrangement was not an *Odco* contractual arrangement. Rather, the Court found that although Mr Damevski had resigned from his employment with Endoxos in August 2001, he had recommenced employment with Endoxos immediately thereafter. The parties conduct implied a contract of employment between Mr Damevski and Endoxos.

## UK Case

Some similar issues have been discussed more recently in the *Brook Street Bureau* decision of the English Court of Appeal. The Court ruled that in cases of this kind (ie triangular *Odco* style independent contractor cases) a tribunal should at least consider the possibility of an implied contract of service between the worker and either or both of the supplier and the end-user.

Tony Davies, Partner, Perth  
tony.davies@bdw.com

Richard Bunting, Partner, Melbourne  
richard.bunting@bdw.com

# Industrial Dispute Found Between Union and Non-Employer

The Australian Industrial Relations Commission has found that an industrial dispute existed between ASC (Operations) Pty Ltd and the CEPU, notwithstanding that ASC was not the employer of the electrical workers represented by the CEPU at its Laverton sites: *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and IES Australia Pty Ltd and Others* (13 November 2003, PR940441). This decision reaffirms the general proposition that, in appropriate circumstances, non-employers can be a party to industrial disputes (see also *IR Bulletin*, November 2003, page 2, available on our website, [www.bdw.com](http://www.bdw.com))

## Background

ASC operates steel and wire mills at 2 Laverton sites in Victoria. It engages labour hire companies, IES and TAD, to supply labour (electrical workers) for the sites. On 25 February 2003 the employees of IES and TAD at the Laverton sites took industrial action to advance claims for new certified agreements. This industrial action lasted some 226 days until 9 October 2003 when the Commission terminated the bargaining periods. The employees returned to work at which time they were informed by their employers that ASC did not require all of the employees to return to work at the Laverton sites.

The CEPU then served a log of claims on IES and TAD as well as on ASC in relation to security of employment for the workers.

ASC opposed the making of a dispute finding between it and the CEPU on the basis that it was not the employer of the relevant employees. ASC also raised other issues with the form of the log of claims, arguing that its terms were uncertain and ambiguous.

## Decision – ASC could be made a party to the dispute

Senior Deputy President Williams found that “on the evidence ASC is in a position which enables it to assert a power to directly control or influence both IES and TAD in relation to the

relationship of each with its employees in respect to the security of employment of those employees”.

In particular, SDP Williams considered significant the fact that ASC “determines the numbers to be employed and the qualifications required. It controls who will be allowed on site to perform work. It provides day to day supervision of their work. It, in effect, holds the purse strings and can and does directly involve itself in the outcomes of negotiations over terms and conditions of employment”.

The Commission found that ASC’s interest and involvement were sufficient to affect directly the relationship between IES and TAD and their employees. Therefore, ASC could be made a party to the industrial dispute.

## Is the AIRC a Court?

A Full Bench of the Australian Industrial Relations Commission has found that the Commission is not a court for the purposes of the *Corporations Act 2001* (Cth): *G W Smith, R Ovcacic, D Hoste and J Farragher v Trollope Silverwood & Beck Pty Ltd* (17 November 2003, PR940508).

This means that an employee of a company being wound up or in voluntary administration may commence or continue proceedings in the Commission in respect of the termination of the employee’s employment or the employer’s failure to pay redundancy pay without first obtaining leave of a federal or State court.

The decision confirms the ability of unions to make an effective claim in the Commission where they expect that full redundancy entitlements will not be recovered in circumstances where a company is being wound up or is in voluntary administration.

## Lessons for employers

- Organisations which outsource their work arrangements but maintain high levels of control over the work may nevertheless be made a party to an industrial dispute and have award and other obligations imposed upon them.
- Whether this will be so, and whether other employment obligations might be imposed (eg vicarious liability for the acts of an employee) are matters needing careful attention and advice.

In reaching his decision, SDP Williams relied on the decision of the majority of the High Court in *Re The Amalgamated Metal Workers Union of Australia and Others: ex parte the Shell Company of Australia Limited* (1992) 174 CLR 345 which suggested that the definition of industrial dispute is wide enough to permit a non-employer to be a party to an industrial dispute.

SDP Williams rejected arguments that the log of claims was too vague or too broad to give rise to an industrial dispute, considering that the subject matter of the log was intelligible and capable of meaning.

Rebecca Taseff, Senior Associate, Perth  
rebecca.taseff@bdw.com

Sonia Harris, Lawyer, Sydney  
sonia.harris@bdw.com

# Extension of Probationary Period

As a general rule, an employer cannot extend an employee's probationary period in order to avoid the operation of unfair dismissal laws. However, the Australian Industrial Relations Commission recently found that a clause enabling a probation period to be extended by the period of an employee's absence due to illness operated to exclude the employee from commencing an unfair dismissal claim under the *Workplace Relations Act 1996: Justin Lightbody v Centrelink* (23 October 2003, PR939825).

## Background

Mr Lightbody commenced employment with Centrelink on 18 November 2002. Centrelink's offer of employment provided for a maximum of 6 months probation and went on to say:

If during this probationary period you are granted any continuous periods of leave of 1 month or more for maternity or personal injury/ illness purposes, the maximum probationary period will be 6 months plus an additional period which equates to the period of leave taken.

During his probation period, Mr Lightbody was hospitalised due to a serious illness for more than 1 month. He also had several single days absence. Following these absences, Centrelink advised Mr Lightbody in writing that his probation period would be extended by 32 days (the period of his absence) and would finish on 19 June 2003.

On 27 May 2003, Mr Lightbody's employment was terminated for performance related issues. Mr Lightbody commenced an unfair dismissal claim. Centrelink claimed that he was excluded from doing so because he was dismissed during a probation period.

## Dismissal during extended probation period not unfair

Senior Deputy President O'Callaghan concluded that Mr Lightbody was dismissed during a probation period and, accordingly, was excluded from commencing an unfair dismissal claim under the Act. In reaching his conclusion, SDP O'Callaghan held that the maximum period of probation had been agreed in advance and was in writing.

He then considered whether the period of probation was reasonable

## Lessons for employers

- It is generally not possible to extend an employee's probationary period to exclude the employee from accessing the unfair dismissal provisions of the *Workplace Relations Act*.
- An extension may be possible if a probation period clause dealing with the possibility of an extension is in writing, is agreed in advance and the period is reasonable in all the circumstances.

having regard to the nature and circumstances of Mr Lightbody's employment. He concluded that the probation period was reasonable. In particular, he considered that a probationary period of less than 6 months would have been likely to be highly prejudicial to Mr Lightbody given his absence from essential training and experience gathering opportunities together with the impact of his illness.

Damian Copeland, Lawyer, Brisbane  
damian.copeland@bdw.com

# Wearing 2 Hats: Employees Serving in the Defence Force Reserves

Many people will be familiar with the Australian Defence Force's (ADF's) reserve recruiting refrain of "one night a week, one weekend a month, two weeks a year ...". However, during the last few years, the ADF has been called upon to act in a variety of roles both domestically and internationally, and these commitments have stretched its full-time component capacity very significantly.

As a result, strategic planning for the future now involves significant utilisation of ADF Reserve strength, and has led to amendments to the *Defence Act 1903* (Cth) which allow for much more significant demands

on ADF Reserve members. In individual cases, ADF Reserve members may now be required to spend extended periods on duty – either in training or on deployment.

The legislative package which brought



about this change also recognised the significant impact that an extended period (or periods) of defence service can have on the civilian employer of an ADF Reserve member. Accordingly, the package includes measures to:

- compensate civilian employers for disruption caused by the increased potential for employees to render defence service; and
- enhance employment protection for ADF Reserve members.

### Employer Support Payments

The Employer Support Payment (ESP) Scheme was introduced in June 2001 to provide financial assistance to employers, in order to compensate for costs and any potential losses which are attributable to the absence of an employee who is performing defence service. It is governed by the terms of the *Defence Determination 2002 (Employer Support Payments)*.

Under the ESP Scheme, employers are able to claim for a payment (which is subject to taxation) equivalent to the average weekly full-time adult ordinary-time earnings (currently \$899.80 per week) for extended periods during which an employee is absent from their usual employment. Application may also be made for payments above the standard rate if particular substantial financial hardship or loss would result from the absence of the employee.

Payment is made for periods in excess of 5 continuous days of defence service, and is subject to the employee having previously completed 14 days defence service in the relevant financial year.

Claims are made through the unit to which the employee belongs, and the employee should provide a claim form for this purpose. Employers must certify, when making claims, that they are the employer of the ADF member, and that they have granted the employee leave for the purpose of the employee performing defence service. ESP claims can also (since June 2003)

be made by Australian Public Service departments and agencies.

### Employment discrimination on the basis of ADF Reserve member status

In conjunction with payments under the ESP Scheme to encourage employers to release employees for defence service, the legislative package includes measures to enhance the protection for employees who are required to perform defence service.

The *Defence Reserve Service (Protection) Act 2001* (Cth) provides a range of anti-discrimination and protective measures for ADF Reserve members who are performing various types of defence service. Those measures include a general requirement that an employer, or potential employer, must not discriminate against an employee or potential employee on the basis that the employee is an ADF Reserve member, or that the employee is or may be liable to render defence service.

Further measures are directly aimed at protecting ADF Reserve members in relation to partnership, contracting, higher-education, financial institutions and bankruptcy. The approach of the ADF to handling complaints under the legislation was formalised on 26 February 2004, and it can be expected that any complaints will be thoroughly examined.

Detailed advice should be sought where there is any potential for the *Defence Reserve Service (Protection) Act 2001* to apply, as employers who breach the legislation may be subject to penalties and injunctions.

### Designing workplace policies around legislative obligations and benefits

If your organisation has not reviewed policies and procedures surrounding service of employees in the ADF Reserve, the recent legislative package presents a good opportunity to ensure compliance with the new obligations,

## Lessons for employers

- Take the opportunity to review workplace policies and employment conditions to ensure they at least match the legislative obligations relating to ADF Reserve members.
- Consider how best to “track” Defence leave in order to allow accurate ESP Scheme claims to be made.
- Ensure particularly that managers are aware of the requirement not to discriminate against employees because of their status as ADF Reserve members.
- Consider ways in which positive Defence policies can be promoted so as to contribute to the profile of your organisation.

and to ensure that full advantage is taken of opportunities presented by the ESP Scheme. In addition, a new requirement has been placed on Australian Public Service departments and agencies to include specific provisions for Defence leave in future certified agreements.

Where a review of policies and conditions of service relating to Defence service is undertaken, care should be taken to examine introduction of measures such as periods of Defence leave on full pay or “top-up” pay, treating Defence leave as service for all purposes, requiring employees to supply claim forms for ESP Scheme payments on completion of any eligible defence service, and training managers in anti-discrimination obligations.

Timothy Lange, Senior Associate, Melbourne  
timothy.lange@bdw.com

# Further Changes to Right of Entry Laws – Are You Up to Date?

In the December 2003 edition of the *IR Bulletin* we looked at 3 decisions of the Australian Industrial Relations Commission which concerned the issue of when an award will apply to the employees performing work at the workplace (see pages 4 and 5, available on our website, [www.bdw.com](http://www.bdw.com)). Two of these decisions have since been appealed and on 23 February 2004, a Full Bench of the Australian Industrial Relations Commission handed down its decisions. These decisions clarify when unions will have a right of entry to hold discussions with employees under the *Workplace Relations Act 1996* (Cth).

## Aldi Foods – AWAs can exclude right of entry

In *National Union of Workers v Aldi Foods Limited*, 23 February 2004, Print PR943894, a Full Bench of the Commission ruled that Aldi was correct in refusing to allow the NUW access to its premises in Derrimut, Victoria.

Aldi refused the NUW entry on the basis that all its employees were parties to Australian workplace agreements (AWAs). By virtue of the provisions of the *Workplace Relations Act*, an **award** must **apply** at premises for a union to have right of entry to hold discussions at those premises. Aldi argued that because the *Workplace Relations Act* says AWAs displace awards during the

period of operation of the AWA, the NUW had no such right of entry.

The Full Bench accepted Aldi's submissions. Given that an award ceases to operate in respect of an employee covered by an AWA, it is not possible to say work is being carried on to which an award applies. As all the employees were covered by AWAs, the NUW had no right to enter the Derrimut premises.

## Ensham Resources – Certified agreements excluding awards cannot prevent entry

In *CFMEU v Ensham Resources Pty Ltd*, 23 February 2004, Print PR943725, the same Full Bench ruled that officers of the CFMEU were

## Lessons for employers

- The provisions of the *Workplace Relations Act* operate to nullify the application of an otherwise applicable award when all the employees covered by the award have AWAs.
- Employers wishing to exclude unions from entering their premises to hold discussions can consider offering employees the option of entering AWAs. However, all the employees at particular premises must be covered by AWAs if entry by unions to hold discussions is to be successfully resisted.
- A union which is party to an award with application to a workplace but not a party to a certified agreement at that workplace may still have right of entry even if the certified agreement purports to regulate all the terms and conditions of employment and displace all the terms of the relevant award.

illegally refused entry to a coal mine operated by Ensham.

Ensham refused the CFMEU entry on the basis that Ensham had entered into a section 170LK certified agreement with its employees that expressly excluded all other awards and agreements from applying to the employees at the mine. Ensham argued that therefore there were no awards that applied at the mine, so a key pre-requisite under the *Workplace Relations Act* to the CFMEU entering the premises to hold discussions was missing.

The Full Bench disagreed. It said that although under the Act a certified agreement overrides an award where there is an inconsistency between the two, the award will still apply.

Steven Amendola, Partner, Melbourne  
[steven.amendola@bdw.com](mailto:steven.amendola@bdw.com)



# Full Bench of the NSW Commission Reaffirms Wide Jurisdictional Reach of Section 106

In *Mitchforce Pty Limited v Starkey* (No 2) [2003] NSW IR Comm 458, the Full Bench of the Industrial Relations Commission of New South Wales reaffirmed the wide-ranging ambit of section 106 of the *Industrial Relations Act 1996* (NSW). If it can be shown that the contract or arrangement in question “leads directly” to the performance of work, either by one of the legal entities to the arrangement or by a collateral arrangement, then the relevant jurisdictional nexus will be established. According to the Full Bench, there is no requirement for that contract or arrangement to have “an industrial colour or flavour”. Therefore, the jurisdiction of the Commission to make an order varying or declaring void such a contract extends beyond the traditional realms of an “employee/employer” relationship.

This is the latest case in a legal controversy about the jurisdictional reach of section 106. Differing opinions have been expressed by members of the Commission and members of the NSW Court of Appeal. Accordingly, there is likely to be further judicial consideration of the issue in the future.

## Background

Mitchforce Pty Limited owned a property over which it held a liquor licence to allow a tavern to be operated on site. Mr and Mrs Starkey entered into a 10 year lease (with a 10 year option for renewal) to operate the tavern on the Mitchforce site. It was contemplated by both parties that the lessees would use the leased property for the purposes of operating a tavern. Subsequently, the lessees fell into arrears with their rental payments and Mitchforce Pty Limited refused to allow them to exercise their option to renew the lease. The lessees applied to the Commission for relief under section 106.

## Commercial arrangements and section 106

The Full Bench held that the lease agreement in question was not the type of contract which attracted the jurisdiction of the Commission under section 106. It said that it did not regard the generous scope of the unfair contracts provisions as granting it latitude to interfere with commercial transactions which do not directly envisage the performance of work.

In the course of its decision, the Full Bench made some useful observations about the application of section 106 in the context of commercial arrangements and the characteristics which a commercial contract should display in order to meet the jurisdictional threshold of “performance of work in an industry”. The Commission observed that:

- the requirement that a contract or arrangement involve “performance of work in an industry” is a “relatively undemanding one”;

## Lessons for employers

- The jurisdiction under section 106 is very generous. It is likely that commercial agreements will fall within its scope where, according to their terms, they lead directly to performance of work in an industry or their direct effect is to require the performance of work in an industry.
- It is not sufficient if the performance of work is merely a remote consequence or incident of the commercial contract or arrangement.
- Unfair contract claims can be commenced in relation to a wide range of commercial disputes (involving, for example, leases or licences) and are not confined to employment contracts or agreements relating to employment or industrial standards.

- if it can be shown that the contract or arrangement leads directly to the performance of work, either by one of the parties to the arrangement or someone else, then the relevant jurisdictional nexus will be found;
- it is not necessary to demonstrate that there exists an implied term in the contract requiring the performance of work. Instead, evidence may be provided as to the existence of an arrangement; and
- it is not a prerequisite that the contract have an “industrial colour or flavour”.

Sonia Harris, Lawyer, Sydney  
sonia.harris@bdw.com



# Increase of Maximum Severance Pay Standards in Federal Awards

On 26 March 2004, a Full Bench of the Australian Industrial Relations Commission handed down a decision varying the standard TCR severance pay formula.

The Full Bench extended the severance pay scale from 4 years of service to 10 years with increases in the amount of severance pay with each year of service between 5 and 9 years. The scale will not go beyond 10 years. The new scale will be as follows:

Period of continuous service	Severance pay
Less than 1 year	Nil
1 year and less than 2 years	4 weeks pay
2 years and less than 3 years	6 weeks pay
3 years and less than 4 years	7 weeks pay
4 years and less than 5 years	8 weeks pay
5 years and less than 6 years	10 weeks pay
6 years and less than 7 years	11 weeks pay
7 years and less than 8 years	13 weeks pay
8 years and less than 9 years	14 weeks pay
9 years and less than 10 years	16 weeks pay
10 years and over	12 weeks pay

The Full Bench fixed the amount of 12 weeks severance pay for 10 or more years of service having regard to the fact that an employee with 10 or more years of service whose employment is terminated on account of redundancy is entitled to pro rata payment of long service leave.

Importantly, the Full Bench also decided to extend some aspects of the standard award redundancy pay prescription to small businesses – those with less than 15 employees. Henceforth those employers will be required by award to meet the former TCR redundancy pay scale, a scale which caps at 8 weeks pay for 4 years or more continuous service.

Employers should anticipate that applications will now be made by unions to vary federal awards to insert the new severance pay standard.

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



# STOP PRESS

## **Workplace Relations Amendment (Transmission of Business) Act 2004**

Federal Parliament has now passed the long awaited *Workplace Relations Amendment (Transmission of Business) Act 2004*. This Amending Act principally amends section 170MB of the *Workplace Relations Act 1996* so that the Australian Industrial Relations Commission may, upon application, make an order that a certified agreement does not bind a new employer as a result of a transmission of business, or only binds that employer to a specified extent or for a limited period. A similar provision in relation to the transmission of awards is already contained in section 149 of the Act.

In making an order, the Commission must consider the length of time remaining on the original certified agreement, and weigh up the terms and conditions proposed by the new employer. If the relevant employees do not agree to the order, the Commission must not make the order unless it is satisfied that the order will not disadvantage the employees or is part of a reasonable strategy to deal with a short-term business crisis.

## **Workplace Relations Amendment (Improved Remedies for Unprotected Action) Act 2004**

Federal Parliament has also passed the *Workplace Relations Amendment (Improved Remedies for Unprotected Action) Act 2004*. This Amending Act amends the *Workplace Relations Act 1996* to empower expressly the Australian Industrial Relations Commission to issue interim section 127 orders to stop or prevent unlawful industrial action. Up until now, there has been some uncertainty as to the Commission's ability to grant such orders.

The Amending Act also amends section 127 to make it clear that the Commission may not make orders under this section in relation to protected industrial action. This restriction is not new, however, it was previously contained in section 170MT of the Act, which gave rise to some confusion.

## **Amcor and Gribbles – Off to the High Court**

In the May 2003 edition of the *IR Bulletin*, we reported on the decision of the Full Court of the Federal Court in *Amcor and Gribbles* (see pages 2-4, available on our website, [www.bdw.com](http://www.bdw.com)).

On 12 December 2003, both Amcor and Gribbles were granted leave to appeal to the High Court. It is expected that the High Court will hear and determine these matters in the second half of 2004.

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

Catherine Roberts, Lawyer, Melbourne  
[catherine.roberts@bdw.com](mailto:catherine.roberts@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  
Jonathan Sandler, Vince Rogers (03) 9679 3000

**Brisbane** Ian Humphreys, Anne Milner  
Steve Bennett (07) 3259 7000

**Perth** David Parker, Tony Davies (08) 9366 8000

**Canberra** Paul Vane-Tempest (02) 6234 4000

**London** Geoff Hone +44 20 7600 3030

This publication is authorised by Blake Dawson Waldron.

**Subscription Maintenance** – If you would like to unsubscribe or modify your subscription please go to our Publications Subscriptions page at <http://www.bdw.com/subscriptions/>

**Privacy Policy** – You can find our Privacy Policy on our website at <http://www.bdw.com/>

Where applicable, liability limited by the Solicitors' Scheme, approved under the Professional Standards Act 1994 (NSW). This publication is intended only to provide a summary of the subject matter covered. It does not purport to be comprehensive or to render legal advice. No reader should act on the basis of any matter contained in this publication without first obtaining specific professional advice.

© 2004 Blake Dawson Waldron

[www.bdw.com](http://www.bdw.com)