

IR Bulletin

September 2005

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Editorial

We are all waiting for the Federal Government's Bill containing its planned IR reforms. The latest expectation is that the Bill will be tabled in Parliament in October 2005 with a view to passage before the end of the year. One important Bill which was passed by Parliament on 7 September 2005 is the *Building and Construction Industry Improvement Bill 2005*. (For more details see the August 2005 *Industrial Relations and Employment Alert*, available on our website, www.bdw.com under publications.)

In the meantime, it is business as usual for courts and tribunals and there have been a variety of interesting decisions. This edition of the *IR Bulletin* deals with a selection.

Nereda Thomas and Vanessa Swannie consider whether seasonal employees can bring unfair dismissal claims, while Will Snow and Phoebe Emery write about the High Court's clarification of an employer's obligation to provide a reinstated employee with work.

There continue to be more decisions from the Australian Industrial Relations Commission as to what matters pertain to the employment relationship. Lucy Shanahan deals with a case about a certified

agreement overriding State long service leave legislation. Michael Tamvakologos considers a decision about labour hire and union notice board provisions.

Other articles look at the concept of joint employment, the Full Bench of the Australian Industrial Relations Commission's recent family provisions decision and the approach to interpretation of union eligibility for membership rules which turn on the connection with an employer's industry.

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in this issue



What is an Employer's Obligation to Provide a Reinstated Employee with Work?

In an important decision, the High Court has clarified the obligation of an employer to provide a reinstated employee with work: *Blackadder v Ramsey Butchering Services Pty Ltd* [2005] HCA 22.

Facts

Mr Blackadder was employed by Ramsey Butchering Services Pty Ltd as a boner at a meatworks, under an Australian workplace agreement (AWA). In September 1999, Mr Blackadder was instructed to perform hot neck boning, which involved removing the bones from the necks of animal carcasses shortly after slaughter. Mr Blackadder refused to perform the work as he had received no specific training and he considered it unsafe because it was more strenuous than his usual work and it would aggravate a pre-existing injury.

Mr Blackadder left work and obtained a medical certificate that he was unfit to perform hot neck boning. However, Ramsey still required Mr Blackadder to perform the work as directed or face dismissal. Mr Blackadder refused to return to work on these conditions and Ramsey terminated his employment.

Mr Blackadder then brought an unfair dismissal claim in the Australian Industrial Relations Commission. Commissioner Redmond found that Mr Blackadder had been constructively dismissed in a manner that was harsh, unjust or unreasonable, and ordered Ramsey to reinstate Mr Blackadder. Ramsey appealed to the Full Bench of the Commission but leave to appeal was refused.

Mr Blackadder was reinstated by Ramsey in April 2000. However, Ramsey told him that he was not required to perform work until he passed a medical examination. Mr Blackadder then applied to the Federal Court for injunctive relief,

arguing that Ramsey had not complied with the reinstatement order and had breached the terms of the AWA by ceasing to pay Mr Blackadder until he attended a medical examination.

Federal Court decision

Justice Madgwick of the Federal Court ordered Ramsey to reinstate Mr Blackadder to his previous position performing the same work he performed before being dismissed. Ramsey appealed this decision to the Full Court of the Federal Court, which held that an employer does not have an obligation to provide work to an employee unless specifically required to by the contract of employment. Mr Blackadder appealed this decision to the High Court.

High Court decision

The High Court held that reinstatement under the *Workplace Relations Act 1996* means reinstatement to the actual position the employee was employed in prior to termination, not re-employment or restoration of contractual entitlements only. The High Court also said that an employer cannot evade a reinstatement order by making it subject to the employer's satisfaction concerning the fitness of the employee or some other condition formulated by the employer.

A failure to reinstate Mr Blackadder to his former position had denied him the ability to increase his earnings, job satisfaction and vindication in relation to the dismissal. The High Court also commented that the

Lessons for employers

- If the Australian Industrial Relations Commission orders that an employee be reinstated, the employee must be reinstated to the position the employee held before dismissal and be provided with his or her usual work.
- Employees should receive adequate training for all tasks they are required or directed to perform.



reinstatement order did not stop Ramsey from lawfully altering Mr Blackadder's position after reinstatement provided that it was not capricious or unreasonable.

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Certified Agreements Can Specifically Exclude State Laws

A Full Bench of the Australian Industrial Relations Commission recently considered an appeal by the trustee of the Construction Industry Long Service Leave Fund against the certification of the Visionstream Certified Agreement 2004: *CoINVEST Limited v Visionstream Certified Agreement 2004* (6 May 2005, PR957811).

The Agreement contained a provision that excluded the operation of any State law in relation to long service leave. This included the *Construction Industry Long Service Leave Act 1997* (Vic) (the Act).

The Construction Industry Long Service Leave Fund is created by the Act and provides portable long service leave benefits to employees in respect of employment on construction work in the construction industry in Victoria. The scheme is funded by a levy on employers who engage employees on such work. Visionstream employs persons who perform work coming within the scope of the Act, although Visionstream did not concede that it was obliged to make contributions to the Fund.

The Full Bench decision

The certification of the Agreement was appealed by the trustee of the Fund on the basis that the Agreement limited the operation of the Act. There were three issues the Full Bench considered:

- whether the appellant was aggrieved by the certification and therefore had standing to appeal against the decision to certify;
- whether the certification was invalid because, by reason of the provision in question, the Agreement was not of the kind that could be certified as it contained a substantive matter which did not pertain to the employment relationship; and
- whether the certification was invalid because the long service leave provision was inconsistent with section 170LZ of the *Workplace Relations Act 1996*.

Whether the appellant was a person aggrieved depended on the legal effect of the provision complained of. The Full Bench assumed that the provision operated to exclude the operation of the Act, and on this basis agreed that the appellant was a person aggrieved by the decision to certify the agreement.

Section 170LI of the *Workplace Relations Act* requires an agreement to be about matters pertaining to the employment relationship between an employer and its employees whose employment is subject to the agreement.

In determining that the subject matter of the provision in question did pertain to the employment relationship, the Full Bench considered section 109 of the Australian Constitution, which provides that when a State law is inconsistent with a law of the Commonwealth, the latter shall prevail to the extent of any inconsistency. It also considered section 170LZ(1) of the *Workplace Relations Act*, which provides that a certified agreement prevails over terms and conditions of employment specified in State law, a State award or a State employment agreement, to the extent of any inconsistency.

The Full Bench held that the subject of the long service leave provision clearly pertained to the relationship between employers and employees. Further the effect of section 109 and section 170LZ(1) on the provision did not change the character of the provision. The character of the provision could only be gleaned from its legal effect and not the subjective intention of the parties.

Lesson for employers

- Employers can negotiate agreements that specifically exclude the operation of a State law that regulates a term or condition of employment.
- Employers should be careful to ensure that certified agreements only contain matters that pertain to the employment relationship between the employer and the employees whose employment is subject to the agreement.

Section 170LZ of the *Workplace Relations Act* specifies the circumstances in which the terms of a certified agreement will prevail over a State law, award or employment agreement. The Full Bench held that this section does not deal with the requirements for certification and there is no room for the implication of a requirement that agreements must comply with section 170LZ before they can be certified.

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Seasonal Employees Able to Make Unfair Dismissal Claims

A Full Bench of the Australian Industrial Relations Commission found that two temporary, seasonal employees of SPC Ardmona Operations Ltd were able to bring claims for unfair dismissal as they were not employed for specified periods of time or to perform specified tasks: *SPC Ardmona Operations Ltd v Esam & Anor* (20 April 2005, PR957497).

Background

In December 2003, SPC hired approximately 3,000 temporary fruit processors for the 2004 harvest season, including Mr Esam and Mr Organ. Their contracts of employment clearly stated that they were engaged temporarily for the duration of the season. Each contract also incorporated the terms of the Food Preservers' Award 2000, which specified that the employment of seasonal employees could be terminated on two days' notice. "Season" was defined in the Award as the period from a seasonal item being available for processing until the time when that item was no longer available.

Towards the end of the 2004 season, the amount of seasonally grown fruit delivered to the plant decreased significantly and there was a reduction in fruit processing. SPC

decided to stop operating some production lines and Mr Esam and Mr Organ were not selected to remain. They were dismissed on two days' notice in accordance with the Award and their contracts of employment.

Both Mr Esam and Mr Organ filed applications in the Commission claiming they had been unfairly dismissed. SPC objected to the Commission hearing the claims on the basis that Mr Esam and Mr Organ had been engaged under contracts of employment for specified periods of time or for specified tasks.

Commissioner Grainger at first instance, and then a Full Bench of the Commission on appeal, held that Mr Esam and Mr Organ could proceed with their unfair dismissal claims as they were not employed for specified periods of time or for specified tasks within the meaning of

Lessons for employers

- An employment contract that is expressed to terminate upon the occurrence of an event of uncertain date will not be for a fixed period and will not preclude an employee from bringing an unfair dismissal claim.
- An employment contract for a specified task which provides an unconditional right to terminate will not preclude an employee from bringing an unfair dismissal claim. However, if the ability to terminate the contract arises only in the event of misconduct or some other breach of contract, an employer may be able to object to an unfair dismissal claim being made against it.
- For seasonal employees, if the right to terminate on notice is specifically linked to decreased seasonal workload, this may provide the employer with protection from an unfair dismissal claim.



sections 170 CBA(1)(a) and (b) of the *Workplace Relations Act 1996*.

Why unfair dismissal claims were available

The contracts were not for specified periods because, at the time they were signed, their dates of termination (that is, when fruit would no longer be available) were unclear. As a result, there was no certainty regarding the termination dates of the contracts.

The contracts could have been for specified tasks as the employees were clearly engaged for the task of processing fruit during the 2004 season. The ranges of jobs Mr Esam and Mr Organ could perform on the main line were simply "part and parcel" of their specified tasks.

However, the two days notice periods incorporated into their employment contracts conferred on SPC a broad and unconditional ability to terminate "on a whim" prior to completion of the tasks. This meant the contracts

could not be considered contracts for specified tasks as they were in fact for indeterminate periods of time.

The Commission did note that if the right to terminate, rather than being unconditional, had been for a cause such as misconduct or other breach of contract, the contracts may well have been for a specified task.

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Notice to Strike can be Served by Fax

The Australian Industrial Relations Commission Amendment Rules 2005 (No 1), which came into operation on 1 July 2005, has ended the confusion over whether parties intending to take protected industrial action can validly serve notice by fax.

The *Workplace Relations Act 1996* does not specify how section 170MO notices should be served. In *Transfield Worley Joint Venture v AMWU, CEPU and AWU* (17 May 2004, PR946739) the Commission ruled that serving a notice of intention to strike by fax was not sufficient under the Act.

However, in *Bluescope Steel v CEPU* [2005] FCA 3 and *Cleary Bros (Bombo) Pty Ltd v CFMEU* (9 June 2004, PR947808), it was held that notices of proposed industrial action could be served by fax.

Rule 58A now clarifies the position. It states that notices sent under section 170MO may be given to the other party either personally, by post or by fax.

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Contractor and Notice Board Clauses in Certified Agreements – Are They Permissible?

A Full Bench of the Australian Industrial Relations Commission has considered whether an agreement between an employer and a union which contained a clause obliging the employer to ensure that labour hire workers are paid the same rates of pay as the employer's own employees could be certified under the *Workplace Relations Act 1996: Transport Workers Union of Australia v Australian Air Express and Another* (24 June 2005, PR959285). The Full Bench also considered whether a clause that obliged the employer to maintain a notice board for the purpose of posting notices in connection with union business was permissible for inclusion in a certified agreement.

Facts

Australian Air Express (AAE) and the Transport Workers Union (TWU) applied to the Commission to have an agreement made between them certified. At first instance, Senior Deputy President Lloyd held that because the labour hire clause dictated the rates of pay that labour hire agencies would pay their employees, it had no connection with the relationship between AAE and its own employees.

Senior Deputy President Lloyd did not consider whether the notice board provision was a matter pertaining to the relationship between AAE and its employees.

Appeal

Both AAE and the TWU appealed against Senior Deputy President Lloyd's decision to refuse to certify their agreement. The Minister for Employment and Workplace Relations intervened in the hearing to make submissions about the labour hire clause and the notice board clause.

On appeal, a majority of the Full Bench held that both the labour hire clause and the notice board clause could be included in the certified agreement. In their view, there were two routes to a conclusion that the agreement was certifiable.

Lessons for employers

- Whether a particular clause pertains to the employment relationship depends on both the specific wording of the clause and evidence about the operation of the particular workplace in question.
- There are differing views in the Commission about whether a clause obliging an employer to ensure that labour hire workers receive the same rates of pay as the employer's own employees is permissible for inclusion in a certified agreement. Given the consequences of taking industrial action in support of a clause which does not pertain, employers should consider carefully whether such a clause pertains to their relationship with their employees.
- A provision in an agreement allowing notices in connection with union business to be posted on a workplace noticeboard may be permissible for inclusion in a certified agreement where the fulfilment of the union's role under the agreement is assisted by the use of the notice board.



Decision

The short route was that a similar clause had been considered as pertaining to the employment relationship in *Re: Rural City of Murray Bridge Nursing Employees, ANF (Aged Care) – Enterprise Agreement 2004* (see May 2005 *IR Bulletin*, pages 4 and 5, available on www.bdw.com under publications) and there was no reason to decline to follow that decision.

The longer route involved an extensive analysis of the relevant cases and evidence about why the AAE employees wanted the labour hire clause in the agreement. Having conducted this analysis, the majority held that the reason the labour hire

clause was sought by the employees was that they wished to protect their job security by ensuring that the engagement of cheaper labour hire personnel would not undermine their own employment conditions. The majority ruled that given the concerns about job security, the labour hire clause had a direct connection to the relationship between AAE and its employees, and was therefore a matter pertaining to their relationship.

Senior Deputy President Hamberger disagreed with the majority. He considered that the specification in the clause of the actual rate of pay for labour hire personnel took the clause beyond the permissible range. He would have ruled against the appeal on this point.

The majority also held that the notice board clause was permissible for inclusion in the certified agreement on the basis that the union had various functions to perform under the agreement, and the ability of the union to post notices in connection with union business was ancillary, or incidental to, those functions. Senior Deputy President Hamberger's decision was silent on this point.

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Family Provisions Decision

On 8 August 2005, the Full Bench of the Australian Industrial Relations Commission handed down the Family Provisions Test Case Decision (PR082005).

In handing down its decision, the Full Bench identified some critical conclusions.

One conclusion was that awards should contain provisions which provide employees with a better opportunity than they now have to obtain their employer's agreement to a change in working arrangements. The Full Bench recognised that most employers are sensitive to the family responsibilities of their employees. Nevertheless, it considered there to be some employers who are unlikely to accommodate the family responsibilities of their employees, even when it is practicable to do so.

The Full Bench decided to create an employee's right to request a change in working conditions and to impose a duty upon the employer only to refuse the request on reasonable grounds.

The award provision determined by the Full Bench permits the employee to request:

- extension of the period of simultaneous unpaid parental leave to be taken by both parents up to a maximum of eight weeks;

- extension of the period of unpaid parental leave from 12 months to 24 months;
- a return to work from a period of parental leave on a part-time basis until the child reaches school age.

The provision places a duty on the employer to consider such a request having regard to the employee's circumstances. Provided the request is genuinely based on the employee's parental responsibilities, the employer may only refuse the request on reasonable grounds related to the effect on the workplace or business. Such grounds might include cost, lack of adequate replacement staff, loss of efficiency and the impact on customer service.

The Commission intends that the new provision should be allowed to operate for a reasonable period and then be subject to review. Unions will now seek to have awards varied to include this new provision. It will be difficult to resist the inclusion of this provision in awards unless there is a good reason for doing so in a particular award.

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Labour Hire Workers and the Concept of Joint Employment – Is it Part of Australian Law?

A Full Bench of the Western Australian Industrial Relations Commission recently considered whether a labour hire employee was also employed by the host entity: *CFMEU v BHP Billiton Iron Ore Pty Ltd and Integrated Group Ltd 2005 WAIRC 01797*. The decision raises the possibility that an industrial tribunal or a court may, in some circumstances, recognise the existence of two employers in relation to a single employee.

Facts

Mr Brandis was employed by BHP Billiton Iron Ore Pty Ltd as a train driver for over 20 years until he took a voluntary redundancy in 1999. After a break, he began working for Integrated Workforce in 2001 driving trains for BHP Billiton. He applied unsuccessfully for direct employment with BHP Billiton on a number of different occasions, including in January 2004 when he was interviewed for a position, provided referees and took part in some pre-employment testing.

The CFMEU sought a declaration from the Western Australian Commission that:

- Mr Brandis was in fact an employee of BHP Billiton on the basis that he had in all material respects been directed and supervised by BHP Billiton; and
- BHP Billiton had unreasonably refused to employ him in circumstances where he had unsuccessfully applied for employment with BHP Billiton in January 2004.

Commissioner Wood dismissed the CFMEU's application at first instance and the matter was appealed to the Full Bench.

Full Bench decision

The Full Bench majority found that Mr Brandis was *not an employee* of BHP Billiton, principally because there was no contractual relationship between him and BHP Billiton having regard to the essential requirement of mutuality of obligation under a contract of employment. A legally enforceable right against BHP Billiton for payment of wages was critical to establishing a contractual relationship. Such a right was absent in this case. The majority also noted that Mr Brandis' conduct in applying for employment with BHP Billiton, and BHP Billiton's conduct in refusing that application, were matters directly contrary to an implication that there was already a contract of employment between them.

President Sharkey, in the minority, would have ruled that Mr Brandis was *an employee* of BHP Billiton having regard to a range of facts and legal arguments. The President applied the traditional test of control used to distinguish between an employment relationship and other workplace relationships, and also some non-traditional approaches. He considered that Mr Brandis was jointly employed by BHP Billiton (the principal) and Integrated Workforce (the labour hire company) in a trilateral contract.

The decision raises the possibility that an industrial tribunal or a court may, in some circumstances, recognise the existence of two employers in relation to a single employee.

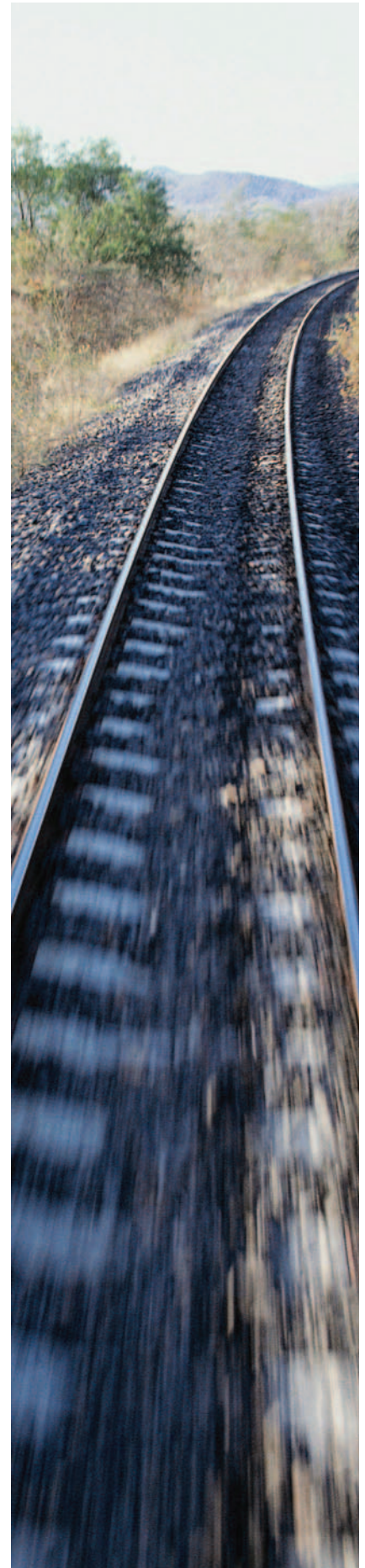
It is significant that the President was open to applying the notion of joint employment, a concept his Honour said could find support in tortious principles of vicarious liability, the English courts' recognition of joint contracts of employment of a triangular nature and the American doctrine of common employment. Chief Commissioner Beech, whilst not deciding the matter on this basis, could see no reason why there was not room for the principle of joint employment to operate in Australian law. Commissioner Kenner did not consider it was necessary to explore this issue.

The Full Bench unanimously ruled that the selection process had been so unfair that BHP Billiton had unfairly refused to employ Mr Brandis. BHP Billiton had unfairly relied upon

Mr Brandis' references which were found to be not credible or reliable and upon the results of a psychometric test, the conclusion of which was found to be entirely wrong.

The Full Bench therefore upheld the appeal and ordered BHP Billiton to employ Mr Brandis.

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Lessons for employers

- Where workers are provided under labour hire arrangements, care should be taken to ensure that the contractual arrangements, both in relevant contractual documents and also in practice, properly reflect the parties' obligations. For example, the labour hire agency ought to pay and be unconditionally liable for all payments to its employees.
- Employers should be aware of the possibility that decisions relating to unsuccessful applicants for employment may be challenged by a union on the basis that the selection process was not fair.
- There is a growing body of case law which has considered the concept of joint employment. Employers should be aware that there is a possibility, especially in labour hire or similar circumstances, that an employee of one entity may also be an employee of another entity engaged in the practical employment arrangements.

Interpreting Union Eligibility Rules

The recent decision of the Full Bench of the Australian Industrial Relations Commission in *CFMEU v Dyno Nobel Asia Pacific Limited* (14 July 2005, PR956868) provides a good analysis of the law relating to the interpretation of union eligibility rules.

Background

The case concerned whether or not employees of Dyno Nobel Asia Pacific Limited are eligible to become members of the CFMEU pursuant to rule 2D of the CFMEU's eligibility rules. Rule 2D says:

Without limiting the generality of the foregoing and without being limited thereby the Union shall also consist of an unlimited number of employees engaged in or in connection with the coal and shale industries together with such other person whether employees in industries or not as have been appointed officers and admitted as members.

Dyno's business involves the manufacture and supply of explosives and the provision of explosive related services to the coal mining industry.

At first instance, Senior Deputy President Drake found that employees of Dyno who work out of depots on or near coal mining leases were eligible to become members of the CFMEU because, in her view, drill and blast work and shot firing are essential to open cut coal mining.

The conclusion was that the work performed by Dyno on coal mining leases, or on the depots located either on site or nearby, was work performed within the coal industry. However, this did not include activities of Dyno's employees engaged at various manufacturing plants or off coal mining sites or depots in other industries.

Dyno appealed to the Full Bench. The appeal was allowed and resulted in Senior Deputy President Drake's finding being quashed.

Full Bench decision

Vice President Lawler and Senior Deputy President Hamberger found that shot firing and blast design services are, on the facts of the case, work that is incidental to Dyno's principal business activity, which is the manufacture and supply of explosives. This confers a "substantial character" that places the business of Dyno in the explosives industry or, more generically, the chemical industry. The fact that eight out of 160 employees were engaged in shotfiring was considered to be too minor and incidental to confer an additional substantial character on the business of Dyno.

Vice President Lawler and Senior Deputy President Hamberger also found that Dyno operates a single integrated business, and does not have an organisationally and functionally distinct enterprise for the supply of shot firing and blast design services to the coal industry.

No significant weight was placed on the fact that Dyno has certified agreements with the CFMEU to cover the work it performs in Queensland or that Dyno's competitor is a respondent to a coal industry award.

Commissioner Lewin gave separate reasons for the decision broadly in agreement with the other members of the Full Bench.



Interpreting union eligibility rules – A summary of the law

The Full Bench summarised the law relating to the interpretation of union eligibility rules as follows:

- An eligibility rule, or part of an eligibility rule, that simply refers to persons employed or engaged *in or in connection with* a specified industry or industries is properly characterised as a conventional industry rule and the *discremen* of eligibility under such a rule is the industry of the employer – that is, whether the trade or business of the employer is in or in connection with the specified industry or industries.
- Whether or not the trade or business of an employer is in or in connection with a particular industry is a question of fact.
- The answer to that question of fact is determined by the *substantial character* of the trade or business of the employer and all of its employees and requires a consideration of the business of the employer as a whole.
- The business of an employer can be *in or in connection with* more than one industry. This outcome can arise in different ways:
 1. The business of the single employer is a single integrated enterprise but nevertheless operates substantially in or in connection with two or more industries simultaneously. This may be because:
 - there is an overlap between industries and the business operates in the area of overlap (in such a case the same business can be described in different ways placing the business in either industry so that it has a substantial character that places it in each industry); or
 - the nature of the single integrated business is such that the business itself overlaps two or more distinct industries in such a way that it has a substantial character within each of those industries.
 2. The overall business of the single employer is properly seen as being constituted by two or more distinct businesses or enterprises each of which has a different substantial character.
- The mere supply of goods or services to a business in a particular industry is not, of itself, sufficient to render the business of the supplier one that is in connection with the industry of the business supplied, even if those goods are essential to the operation of that business.
- Where a conventional industry rule applies in relation to a distinct business or enterprise of an employer, *all* of the employees in that business or enterprise are eligible for membership of the union.

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