



Department of Consumer
and Employment Protection
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Labour Relations Newsletter

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The new department

The election of a new State Liberal/National Party Government in September will lead to the formation of a new Government Department of Commerce from 1 January 2009.

Industrial Relations (Labour Relations) will be part of this new Department which will replace the existing Department of Consumer and Employment Protection (DOCEP).

The Minister for Commerce, Science and Innovation is the MLA for Vasse, the Hon Troy Buswell, who also holds the Cabinet posts of Treasurer and Minister for Housing and Works.

Child employment and working in shops

The WA Industrial Magistrate's Court (IMC) has provided additional clarity of the employment of children under the *Children & Community Services Act 2004 (the CCS Act)*.

The case of *Department of Consumer and Employment Protection v Gold Mountain Enterprises*¹ trading as Video Ezy Dianella held that video stores fell within the definition of “shop” or “other retail outlet”

Section 191(4) of the *CCS Act* provides that children aged 13 and 14 years may perform “work in a shop, other retail outlet or restaurant”.

His Honour Magistrate Cicchini said “that the ordinary meaning of a “shop” would extend to include premises such as a “barber shop” (now more commonly referred to as a hairdresser) a “tailors shop” and a “fish and chip shop”. Such are primarily involved in the provision of services but are in the common view considered to be shops.”

Given the objective of the *CCS Act* (to promote the wellbeing of children) his Honour indicated that businesses no less dangerous than a retail shop, even where they are predominantly a service business, should be considered as appropriate.

This decision means that the *CCS Act* enables children to work in video stores, hairdressing salons, and similar establishments.

The *CCS Act* aims to protect children from exploitation by prohibiting the employment of children under the age of 15 with the following exceptions:

- a child of any age may be employed in a dramatic or musical performance, in the making of an advertisement or in a family business;
- a child aged 10 to 13 may be employed to carry out delivery of newspapers, pamphlets or advertising material between 6am and 7pm when accompanied by a parent or guardian; and
- a child aged 13 to 15 may be employed to carry out delivery work (as described above), work in a shop, other retail outlet or in a restaurant.

In addition, children of compulsory school age may only be engaged in employment during hours outside those they are required to attend school (see the *School Education Act 1999* for exceptions and further clarification).

There are further industrial limitations governing the employment of children or juniors in WA. For example, the *State Hairdressers Award 1989* only provides wage rates for Senior and Principal Hairdressers and Hairdressing Apprentices and Trainees (i.e no junior rates for employees outside of these wage classifications are provided). Employers or Parents should contact Wageline on 1300 655 266 for further clarification on these matters.

A full copy of the decision can be obtained from the Western Australian Industrial Relation Commission's website (www.wairc.wa.gov.au).

The *Children and Community Services Act 2004* and *School Education Act 1999* can be located on the State Law Publishers website (<http://www.slp.wa.gov.au/Index.html>).

¹ 2008 WAIRC 01420

The Constitution and industrial relations

The 'corporations power' of the Commonwealth Constitution s.51(xx) defines a constitutional corporation as "*foreign corporations and trading or financial corporations formed within the limits of the Commonwealth*".

In the significant case of *NSW v the Commonwealth (WorkChoices Case)* (2006) 231 ALR 1 the High Court of Australia endorsed a broad interpretation of the corporations power, empowering the Commonwealth to regulate the activities, functions, relationships and business of constitutional corporations. The Court also reaffirmed the 'activities test'² as the proper test for determining whether a corporation was either a financial or trading corporation and therefore a constitutional corporation.

Despite the expansion of the scope of the corporations power, the *WorkChoices Case* did not consider what kinds of corporations fall within the constitutional expression "trading or financial corporation formed within the limits of the Commonwealth". The High Court commented that any debate about such questions must await cases in which they properly arise.

The following cases demonstrate the possible limitations of the 'corporations power' in achieving a national industrial relations system as various legal decisions have found certain types of business not to be constitutional corporations and therefore continue to be covered by the State industrial relations jurisdiction.

Not-for-profit organisation found not to be a constitutional corporation

In *Hillman v Bankstown Handicapped Children's Centre Association Incorporated* [2008] NSWIRComm 64 (16 September 2008), the NSW Industrial Court found that a not-for-profit organisation, which provides disability services, was not a trading corporation as defined by the Commonwealth Constitution.

The matter involved a former employee of the organisation who sought to utilise the NSW unfair contracts jurisdiction. The organisation argued that the matter should be heard in the federal jurisdiction as it was a constitutional corporation under s.51(xx) of the Commonwealth Constitution. The Court found that the organisation's activities did not amount to trading nor financial activities and thus did not fall within the definition of a "constitutional corporation". The activities of the organisation included providing housing and services for those with disabilities, as well as child care and aged care which were found not to occur in a commercial market setting. The largest portion of the organisation's money was derived from Government funding in exchange for these social welfare services and prices were not a major factor in the acquisition of its services.

² Established in *R v Federal Court of Australia; Ex parte WA National Football League*.

Local Government - a fact sensitive area

In the case *Australian Workers' Union of Employees, Queensland v Etheridge Shire Council* [2008] FCA 1268 the Union sought declarations from the Federal Court that:

- the Etheridge Shire Council (the Council) was not an “employer” within the meaning of section 6(1) of the Workplace Relations Act 1996 (i.e. a constitutional corporation); and
- an employee collective agreement purportedly made by the Council was invalid.

The critical question of this case was whether the Council was a constitutional corporation.

After examining the activities and functions of the Council Spender J, at paragraph 151, went on to say that the activities of the Council entirely lacked the essential quality of trade. All of them ran at a loss and were directed to public benefit objectives within the shire. As a result he found the Council to fall outside of the definition of a trading or financial corporation.

Similarly, in the Western Australian case of *Jacqueline Anne Bysterveld v Shire of Cue* (2007) WAIRC 00941 Senior Commissioner Smith determined that the Shire of Cue was not a constitutional (trading) corporation as its trading activities were not considered to be carried out on a significant scale.

However, Senior Commissioner Smith in *Eric Bell v Shire of Dalwallinu* 2008 WAIRC 01269 held that the Shire of Dalwallinu was a trading corporation, and as such a constitutional corporation. Although the principal activities of the Shire were to provide statutory local government services which are not trading activities, the trading activities of the Shire formed a substantial element of what the Shire did even though these activities were not predominant.

Government super fund not a constitutional corporation

In the case *Mr Stephen David Mann v Government Employees Superannuation Board* [2008] AIRC 893 (18 November 2008) Commissioner Williams of the Australian Industrial Relations Commission (AIRC) held that even though the Government Employees Superannuation Board's (GESB's) activities included the collecting, investing, managing and paying out money to and from its members it could not be defined as a financial corporation within the meaning of s51(xx) of the Constitution.

The reason for this decision was based upon the fact that the *State Superannuation Act 2000* established GESB as a Crown Agency which meant that Mr Mann as an employee of GESB was legally defined as an employee of the Crown.

Commissioner Williams confirmed that the Crown and its agents could not be defined as constitutional corporation as this decision would be inconsistent with the separate roles and functions given to the states and the Commonwealth under the Constitution.

Employment arrangements, work life balance and retirement intentions

In November, the Australian Bureau of Statistics (ABS) released a new publication which focuses on the diversity of employment arrangements in Australia; people's use of working arrangements to balance work and caring responsibilities and their retirement plans and expectations. This publication provides an informative insight into the motivations and intentions of current employees and the varying issues they face in trying to balance their work and family responsibilities. The publication highlighted a number of interesting facts.

Employment Arrangements

Despite the high proportion of people working extra hours, almost two-thirds were satisfied with the amount of hours that they worked, while one in five employees would prefer to reduce their working hours. Even though the majority of employees were satisfied with the amount of hours they worked, a very high proportion also said that they always, often or sometimes felt rushed or pressed for time (76 per cent of men and 85 per cent of women). More than one-third of women felt they were rushed for time due to trying to balance work and family responsibilities.

Setting minimum wages to promote economic prosperity

On 30 to 31 October the Australian Fair Pay Commission (AFPC) held its inaugural Research Forum in Melbourne focusing on the theme "Setting Minimum Wages to Promote Economic Prosperity". The AFPC is the body responsible for adjusting the federal minimum wage in Australia. It makes an annual determination taking into account the views of the stakeholders including the Commonwealth government, state governments, unions, peak industry groups and individuals.

The keynote speakers at the Forum were Professor Stephen Machin from the United Kingdom (UK) Low Pay Commission and the London School of Economics and Professor Richard Burkhauser from Cornell University in the United States. Their presentations provided contrasting views on the effect of minimum wages on employment and the effectiveness of minimum wages in reducing poverty. Professor Machin argued that since the introduction of a National Minimum wage in the UK in 1999 there has been no resulting negative employment effect and that the welfare of low wage families had been improved. He noted that the current economic downturn may impact on these findings as the evidence is largely based on a period of economic prosperity. Professor Burkhauser argued that the evidence from the United States shows that minimum wage increases have had no effect on poverty rates and that these increases have increased unemployment amongst young, low skilled and poorly educated workers. Further he argues that welfare reforms and particularly low income tax credits have been far more effective in lowering poverty rates and increasing employment.

A number of Australian and New Zealand speakers dealt with related topics including junior employment, the employment effects of minimum wages, traineeships and the gender pay gap.

The Hon Julia Gillard Deputy Prime Minister; Minister for Employment and Workplace Relations; Education and Social Inclusion in her keynote address outlined the future role of Fair Work Australia (FWA) in setting minimum wages within a framework that reflects the principles of the Federal government's broader workplace relations reforms based on fairness, openness and transparency.

It is envisaged that the Minimum Wages panel of FWA will combine the best elements of wage-setting under the Australian Industrial Relations Commission and the Australian Fair Pay Commission. This body will annually review the safety net of fair minimum wages, taking account of:

- the performance and competitiveness of the national economy, including productivity, inflation and employment growth;
- promoting social inclusion through increased workforce participation;
- relative living standards and the needs of the low paid; and
- providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply, and employees with a disability.

The Minimum Wages Panel will have the power to commission research to help inform its decisions and will make this research publicly.

For additional information on the forum, including the papers presented at the forum visit www.fairpay.gov.au/researchforum2008 . Further information about the AFPC can be found at www.fairpay.gov.au

Women in leadership

The Equal Opportunity for Women in the Workforce Agency (EOWA) has released the bi-annual *Australian Women in Leadership Census* of ASX200 companies

According to EOWA, since the 2006 report, Australia's "glacial" advancement of women into business leadership roles has now gone into decline, with a reversal on the previous increases.

The census data considers women's representation on boards, in executive management and in line management (being an indicator of potential for women to advance into more senior positions). Women's representation in these leadership positions has declined in terms of CEOs (2%), Board Directors (8.3%) and executive managers (10.7%), while the percentage of chairs remains the same (2%). Australia has also fallen behind other countries considered in the data set – for example, only

50% of ASX200 companies have at least one female board member, compared to 85% with comparable companies in the United States.

The report highlights gender segregation in the workforce, and that women are generally not advancing in 'non-traditional' industries. It calls for Australian businesses to consider their workplace practices in terms of recruitment, talent development and promotion practices in all levels of business.

The full report is available at www.eowa.gov.au

Addressing pay equity

The CCI paper "Women in the Workforce" referred to in the last edition of the Labour Relations Newsletter highlights that the gender pay gap is one of the barriers to greater female participation in the workforce. The EOWA census data outlined in the article above demonstrates that the lack of female advancement is a barrier to addressing the gender pay gap.

As a resource for businesses to assess internal gender pay gaps, the Pay Equity Unit of DOCEP Labour Relations has developed the [Pay Equity Audit Toolkit](#), which is a suite of resources to assist organisations undertake a pay equity audit which include the WA Pay Equity Audit Tool - an automated spreadsheet that creates tables and charts based on payroll data, showing gender pay gaps (Indicators such as the prevalence of flexible working arrangements and other variables can be included).

In addition to this audit toolkit DOCEP Labour Relations has developed a range of fact sheets and solution sheets to help businesses identify and begin to address existing gender pay gaps. These can be used in isolation, or in conjunction with an audit toolkit.

These resources are available on the [Pay Equity Website](#), or by contacting Sarah Haynes at shaynes@docep.wa.gov.au.

Connecting with regional communities

Labour Relations' 'Connecting with Regional Communities' program enhances the dissemination of information on employment obligations and rights to communities in regional Western Australia. During October 2008 small businesses, the education sector and community organisations in Geraldton and Carnarvon had the opportunity to participate in various seminars and meetings.

Leanne Day, the Compliance and Education Officer for the Mid-West Region joined forces with Ruth Crow, Education Services Perth, to assist small business employers understand their employment obligations. Visits to the Midwest and Carnarvon Chambers of Commerce and Industry, Midwest and Gascoyne Development Commissions and Small Business Centres ensured wide coverage of small businesses operating in the State jurisdiction. Participants provided positive feedback on the presentations, enjoyed the personal approach and open forum for questions and

answers. Many follow-up employer consultations were delivered as a result of the program.

Considerable resources are devoted to regional fresh start programs and TAFE courses to encourage positive employment outcomes for regional communities. ***Your First Job***, a free online resource developed by Labour Relations for prospective and young workers, was introduced to job network providers, secondary schools and TAFEs in Geraldton and Carnarvon. Resources were left with these organisations to assist in developing programs to ensure that young people develop knowledge and skills about employment.

For more information about these programs contact Ruth Crow on ruth.crow@docep.wa.gov.au.

Strengthening the security industry

Mark Jenkin is new to Labour Relations Education Services and is becoming a well known employment rights adviser for the security industry. During the last three months employer and employee rights and obligations have been presented to prominent registered training organisations for the security industry, which is a major area of employment in Australia. During the last three months Mark has delivered more than 16 training sessions impacting on approximately 370 students.

Mr Peter Egge, Principal of Valiant Training commented that this program has been of tremendous value to students, staff and employers in the security industry. Students have gained a greater knowledge and understanding of their rights as employees and feel more confident in approaching employers with questions that are legitimate and important to ask.

For more information about the security industry program contact Mark Jenkin at mark.jenkin@docep.wa.gov.au.

Don't rule out mature age workers

Current labour and skills shortages mean many small businesses are finding it difficult to attract and retain workers. This trend is expected to worsen over the next decade as more people leave the workforce than enter it.

Employing mature age workers can reduce the impact of these shortages. Research shows that older workers bring many advantages to an employer, including life and work experience, a strong work ethic, above average commitment to their workplaces, reliability and stability, and lower absenteeism.

Many workers want to keep working beyond the traditional retirement age and it makes sense for employers to hold onto them. One way of doing this is to make workplaces more flexible to meet the preferences of mature age workers and at the same time continue to satisfy business needs. Flexible work includes variable start/finish times,

part time employment, job sharing, working from home, and flexible leave arrangements.

Many small businesses have already discovered the benefits of a mature workforce. One of these is Florescence, an Albany based flower farm with many long term older workers. Business owner Charles Reynolds believes that offering flexible hours and part-time work has been a big factor in retaining these highly skilled and experienced workers. Aside from reducing the costs of recruitment and training, their strong work ethic and commitment are major contributors to the success of the business.

'Don't rule out mature age workers' is a joint initiative of the Department of Commerce and the Small Business Development Corporation. For more information about mature age employment, including implementing flexible work options, case studies and publications please go to www.worklife.wa.gov.au.



Photo Caption: "Florescence proprietor Charles Reynolds, left, with employee Manuel Navalta who was celebrating his 60th birthday, and Irene Smith from the Albany office of the Labour Relations Division of the Department of Commerce."