**From:** Chambers - Hatcher VP [mailto:Chambers.Hatcher.VP@fwc.gov.au]
**Sent:** 10/05/2018 12:59 PM
**To:** 'Zoe Gannon'
**Cc:** Michal Roucek; Amanda Watt
**Subject:** RE: C2013/6333: Summons to Department of Education & Training of Victoria

Dear Ms Gannon,

**Re: C2013/6333 – Application by the IEU for an Equal Remuneration Order**

I refer to the above matter and your email below.

The Vice President advises that he will deal with the issue of permission to appear this afternoon at the hearing.

I confirm that I will print a copy of the cases provided.

Kind regards,

**Ammy Lewis**
Associate to Vice President Hatcher

**Fair Work Commission**
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**From:** Zoe Gannon [mailto:Zoe.Gannon@minterellison.com]
**Sent:** Thursday, 10 May 2018 11:59 AM
**To:** Chambers - Hatcher VP
**Cc:** michal.roucek@ablawyers.com.au; Amanda Watt
**Subject:** C2013/6333: Summons to Department of Education & Training of Victoria

Dear Associate

I refer to the above matter and the hearing listed for 4.30pm this afternoon. We confirm that we act for the Department of Education and Training, Victoria (**Department**).

At the hearing, counsel will be seeking permission to appear for the Department. In the event that such permission is granted, counsel will appear via video-link from Melbourne.

In this event, please find attached copies of three cases which counsel may seek to refer the Commission to during the hearing. We respectfully request that you arrange for copies of these cases to be made available to the Commission at the hearing.

Please contact me with any queries.

Kind regards

———

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[2015] FWCFB 2460

The attached document replaces the document previously issued with the above code on 10 April 2015.

The document has been edited to correct a typographical error in paragraph [24] by inserting the word "to" in the first sentence.

Katrine Huynh

Associate to Vice President Hatcher

Dated 25 May 2015

[2015] FWCFB 2460
**FAIR WORK COMMISSION**

# DECISION

*Fair Work Act 2009*
s.604 - Appeal of decisions

**Clermont Coal Pty Ltd; Clermont Coal Operations Pty Ltd; Collinsville Coal Operations Pty Ltd; and Glencore Coal Queensland Pty Ltd**
**v**
**Troy Brown; Campbell Dews; Damien Mason; Gregory Holmes; Jeffrey Mason; and Glynis Sabbo**
(C2015/2341)

VICE PRESIDENT HATCHER
SENIOR DEPUTY PRESIDENT HARRISON
COMMISSIONER BULL SYDNEY, 10 APRIL 2015

*Appeal against decisions [2015] FWC 1918 and [2015] FWC 2215 of Deputy President Gooley at Melbourne on 19 and 30 March 2015 in matter numbers U2014/13979, 13980, 13981, 13982, 13983 & 13984.*

**Introduction**

**[1]** Clermont Coal Pty Ltd, Clermont Coal Operations Pty Ltd, Collinsville Coal Operations Pty Ltd and Glencore Coal Queensland Pty Ltd (collectively the "appellants") have applied for permission to appeal the following decisions and orders:

(1) Paragraphs [10] and [24]-[29] of the decision issued by Deputy President Gooley on 19 March 2015 1 (First Decision).

(2) Orders 1-5 of an order for production of documents directed to Collinsville Coal Operations Pty Ltd issued on 20 March 2015 pursuant to the First Decision (First Order).

(3) Orders 1-5 of an order for production of documents directed to Glencore Coal Queensland Pty Ltd issued on 20 March 2015 pursuant to the First Decision (Second Order).

(4) Orders 3, 4, 6 and 7 of an order for production of documents directed to Clermont Coal Pty Ltd issued on 20 March 2015 pursuant to the First Decision (Third Order).

(5) Orders 3, 4, 6 and 7 of an order for production of documents directed to Clermont Coal Operations Pty Ltd issued on 20 March 2015 pursuant to the First Decision (Fourth Order).

(6) The whole of the further decision issued by the Deputy President on 30 March 2015 2 (Second Decision).

(7) The whole of an order for production of documents directed to Collinsville Coal Queensland Pty Ltd issued on 30 March 2015 pursuant to the Second Decision (Fifth Order).

(8) The whole of an order for production of documents directed to Glencore Coal Queensland Pty Ltd issued on 30 March 2015 pursuant to the Second Decision (Sixth Order).

**[2]** The decisions and orders the subject of the application for permission to appeal were made in connection with six applications for an unfair dismissal remedy filed under s.394 of the *Fair Work Act 2009* (FW Act). Each of the six applicants (applicants) was formerly employed by Clermont Coal Operations Pty Ltd, and was dismissed from that employment by reason of redundancy effective from about mid-November 2014. In each application, there is a dispute as to whether the dismissal was a genuine redundancy. What constitutes a genuine redundancy is defined in s.389. The dispute turns upon that part of the definition in s.389(2) - that is, whether it would have been reasonable in all the circumstances for the applicants to have been redeployed within the employer's enterprise or that of an associated entity. One aspect of the applicants' case is that s.389(2) requires consideration as to whether it would have been reasonable to redeploy them to perform work for Clermont Coal Operations Pty Ltd, or for an associated entity of Clermont Coal Operations Pty Ltd, that is currently performed by contractors or employees of contractors. Clermont Coal Pty Ltd, Collinsville Coal Operations Pty Ltd and Glencore Coal Queensland Pty Ltd are associated entities of Clermont Coal Operations Pty Ltd.

**[3]** In the First Decision, the Deputy President dealt with a number of objections advanced by the entities in relation to which the applicants sought orders for production (that is, the appellants). The first objection was that certain categories of documents sought in relation to work performed by contractors were not relevant because the test for genuine redundancy under s.389(2) did not require consideration of the reasonableness of an employer or an associated entity of the employer engaging contactors as opposed to employees. The Deputy President dealt with this objection as follows:

> "[8] I accept that this question has not been determined by a Full Bench of the Commission. In *Technical and Further Education Commission v Pykett* 3 the Full Bench said "the Commission must find, on the balance of probabilities, that there was a job or a position or other work within the employer's enterprise (or that of an associated entity) to which it would have been reasonable in all the circumstances to redeploy the dismissed employee."
>
> [9] In *Teterin and ors v Resource Pacific Pty Ltd* 4 the Full Bench did not question the approach of the member at first instance to consider work performed by contractors when he concluded that redeployment was not reasonable.
>
> [10] The proposition put by the respondents is absolute. It submits that the Commission could never consider the reasonableness of redeployment to a position filled or proposed

> to be filled by a contactor or an employee of a contractor. One only needs to consider the situation where an employer has a number of positions that it intended having done by labour hire workers but circumstances changed and before it engaged the labour hire workers it had to make employees who could do the job redundant. On the interpretation put by the respondents, the Commission could never consider if it would have been reasonable for the employer to redeploy the employees to those positions. The question of the reasonableness of the redeployment must be determined on the evidence before the Commission. I do not consider it appropriate to determine this matter at this stage of the proceedings. This issue is legitimately in dispute between the parties."

**[4]** The second objection advanced is not presently relevant. The third objection was that the period in relation to which documents were sought should be confined to 1 September 2014 to 30 November 2014, being the period encompassing from when the decision was made that the applicants' jobs were no longer required to be performed by anyone to when the dismissals had all taken effect. The Deputy President upheld this objection and restricted any orders to the period 1 September 2014 to 30 November 2014. 5

**[5]** The fourth objection was that, in relation to the orders seeking documents from Collinsville Coal Operations Pty Ltd and Glencore Coal Queensland Pty Ltd, the applicants were "fishing". The Deputy President rejected this as follows:

> "[24] I do not accept Mr Murdoch's submissions. It is clear that the reasonableness of the redeployment is a matter the Commission must consider. The evidence in relation to both the redeployment opportunities and the reasonableness of redeployment is generally in the possession of the employer and its associated entities. The respondents have submitted and called evidence that redeployment was not reasonable. The employees are not fishing when they seek the production of documents to challenge this contention."

**[6]** The final objection was that the orders sought would require the production of confidential documents, including commercially sensitive documents and documents which would reveal the internal deliberations as to the industrial strategy or policy of the relevant entities. In relation to the confidentiality aspect, the Deputy President determined that this could appropriately be dealt with once the documents were produced, including by the making of orders under ss.593 or 594. 6 In relation to orders which sought information about "the total number of employees required to attain optimum direct workforce level at Collinsville", the Deputy President did not accept that the documents sought would reveal the internal deliberations as to the industrial strategy or policy of the entities.7 Consideration of this objection in relation to some other categories of documents was deferred.8

**[7]** In the Second Decision the Deputy President dealt with this deferred issue. The production of the documents was ordered on the basis that, once the documents were produced, the applicants would be required to obtain an order from the Member of the Commission allocated the applications for hearing in order to inspect the documents. The Deputy President also confirmed that these further documents required to be produced would be confined to the period 1 September 2014 to 30 November 2014.

**Appellants' submissions**

**[8]** In its submissions in support of its application for permission to appeal, the appellants advanced five propositions:

> (1) The Deputy President erred in making orders 1-5 of the First Order and the Second Order, and orders 3 and 4 of the Third Order and the Fourth Order, because the documents sought could not be relevant because s.389(2), on its proper construction, did not require

> consideration of the reasonableness of an employee to be "redeployed" to a role performed by a labour hire contractor. This submission essentially repeated the first objection raised by the appellants at first instance and rejected by the Deputy President.
>
> (2) Order 1 of the First Order and the Second Order also sought documents that were not relevant insofar as it was not confined to the period 1 September 2014 to 30 November 2014. In this respect, the orders as issued were inconsistent with the First Decision.
>
> (3) Orders 6 and 7 of the Third Order and the Fourth Order were vague and uncertain as to the "policies" required to be produced. The Deputy President failed to deal with the appellants' submission to this effect made at first instance.
>
> (4) The First Order, Second Order, Fifth Order and Sixth Order were "fishing" in the sense that they were an attempt to discover whether there was any case at all that redeployment to the Collinsville mine would have been reasonable in circumstances where the applicants' case was currently based merely on suspicion and speculation. The Deputy President erred in rejecting this ground of objection to the orders.
>
> (5) Order 1 of the First Order and the Second Order sought documents which would reveal internal deliberations as to the industrial strategy or policy of Collinsville Coal Operations Pty Ltd and Glencore Coal Queensland Pty Ltd. The Deputy President did not give any reasons for her conclusion otherwise, and that conclusion was in error.

**Consideration**

**[9]** Under s.604(1), an appeal lies to a Full Bench only with permission. In relation to such permission, s.604(2) provides: "*Without limiting when the FWC may grant permission, the FWC must grant permission if the FWC is satisfied that it is in the public interest to do so*." The effect of this provision is that permission must be granted if it is in the public interest to do so, but may otherwise be granted on discretionary grounds.

**[10]** Section 400(1) modifies s.604(2) in relation to a certain category of decisions. It provides:

> (1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under this Part unless the FWC considers that it is in the public interest to do so.

**[11]** "*This Part*" refers to Part 3-2 of the FW Act, which is concerned with unfair dismissal. If section 400(1) applies, the public interest is the sole criterion for the grant or refusal of permission to appeal. If the Full Bench does not consider that it is in the public interest to grant permission to appeal, it must refuse such permission. It is not available to grant permission on discretionary grounds.

**[12]** In this case, the decisions and orders the subject of the appeal were made in relation to applications made under Part 3-2, but involved the exercise of general powers in s.590(2), which lies outside of Part 3-2. The parties were at odds in that circumstance as to whether s.400(1) applied to the appeal: the appellants submitted that it did not, but the respondents submitted that it did.

**[13]** In *Australian Postal Corporation v Gorman* 9 the Federal Court (Besanko J) gave consideration as to whether, in an appeal from an order dismissing an unfair dismissal application under s.587 of the FW Act, s.400(1) applied. The Court said:

> "[37] The question of whether there was or was not a binding settlement agreement is a question of fact, although no doubt informed by legal principles. In this case in considering whether permission to appeal should be granted and in considering the appeal itself the Full Bench was required to apply s 400 of the Act. I did not understand the first respondent to contend otherwise. It seems to me that the Senior Deputy President's decision was a decision made 'under this Part' within subsection 400(1) and a decision 'in relation to a matter arising under this Part' within subsection 400(2) despite the fact that s 587 is in Part 5-1 of the Act. The Senior Deputy President's decision was a decision to dismiss the first respondent's application made under s 394 for a remedy for unfair dismissal. That is a decision under Chapter 3 Part 3-2 in the same way as an order for re-instatement or compensation would be a decision under that Part. Even if FWA's general power to dismiss is contained in subsection 587(3), it is part of FWA's powers when it makes a decision under Chapter 3 Part 3-2. The same reasoning applies if regard is had not to the order but to the ground upon which the order was made, that is, that the continued pursuit of the application is frivolous or vexatious."

**[14]** Consistent with the Court's conclusion, we shall approach the appeal on the basis that s.400 (1) applies. However, for more abundant caution, we will alternatively state the conclusion we would reach if s.400(1) did not apply.

**[15]** In the Federal Court Full Court decision in *Coal & Allied Mining Services Pty Ltd v Lawler and others*, Buchanan J (with whom Marshall and Cowdroy JJ agreed) characterised the test under s.400 as "a stringent one". 10 The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment11. In *GlaxoSmithKline Australia Pty Ltd v Makin* a Full Bench of the Commission identified some of the considerations that may attract the public interest:

> "... the public interest might be attracted where a matter raises issue of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters." 12

**[16]** It will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated. This is so because an appeal cannot succeed in the absence of appealable error. 13 However, the fact that the Member at first instance made an error is not necessarily a sufficient basis for the grant of permission to appeal.14

**[17]** The appeal here is brought against interlocutory decisions and orders. Courts and tribunals have generally discouraged appeals against interlocutory decisions, and it will not usually be the case that permission would be granted to appeal against an interlocutory decision under s.604 of the FW Act, whether or not s.400(1) applies. 15

**[18]** The second and third propositions advanced by the appellants may be disposed of at the outset. In response to the second proposition, the respondents undertook that they would not call on the production of the documents referred to in order 1 of the First Order and the Second Order insofar as they did not pertain to the period 1 September 2014 to 30 November 2014. In response to the third proposition, the respondents accepted that the "policies" referred to in orders 6 and 7 of the Third Order and the Fourth Order were policies in the nature of documents generally available to employees for the purpose of providing guidance on decision-making, and undertook not to call on the production of "policies" under those orders which did not meet that description. We consider that those undertakings remove any utility in granting permission to

appeal on the basis of the appellants' second and third propositions, irrespective of the merits of those propositions. The public interest will not be attracted in respect of an appeal which has no practical utility. 16

**[19]** The first, and primary, proposition advanced by the appellants in support of its application for permission to appeal rests on a misconceived approach as to the assessment of the relevance of documents for which an interlocutory order for production is sought. The test is whether the documents sought have an apparent relevance to the issues in the proceedings. 17 Since, in the exercise of its discretion concerning the issuing of orders to produce documents, the Commission will generally be guided by what applies in courts of law18, the test of relevance applied by courts has usually also been applied by the Commission. The challenged orders clearly satisfy that test. The applicants in the unfair dismissal applications contend (among other things) that, for the purposes of s.389(2), it was reasonable for them to be redeployed to perform work currently done by contractors. Any documents which would be likely to demonstrate that, during the relevant period, there was work being performed by contractors which could be performed by the applicants would be of apparent relevance to that issue in the case.

**[20]** That Clermont Coal Operations Pty Ltd intends to argue at the hearing that s.389(2) does not permit the consideration of redeployment to work performed by contractors does not alter the position. The consideration of relevance in relation to an application for an order for the production of documents does not require the advance determination of a contested issue in the matter, with relevance then to be assessed on the basis of that determination. To adopt the approach advanced by the appellants would have the undesirable effect of making an interlocutory hearing concerning production of documents a forum for the resolution of the major issues in contest in the proceedings. The position might be different if a party seeks the production of documents to support a case which is not reasonably arguable. However, it was not suggested by the appellants that the applicants' case fell into this category. We were not taken to any decision in which the issue in contest has been determined. It remains an issue which will require resolution at the hearing.

**[21]** No issue of the Commission's power is involved here. The power of the Commission under s.590(1) to "*inform itself in relation to any matter before it in such manner as it considers appropriate*", which under s.590(2)(c) includes requiring the production of copies of documents and records to the Commission, is expressed in very broad terms. The Deputy President clearly had power to make the orders the subject of this appeal.

**[22]** As to the fourth proposition concerning "fishing", the Deputy President made an evaluative judgment about this issue. In the absence of any contention that compliance with the orders for production would be oppressive, we do not consider that the public interest would require any revisitation of this issue even if there was an arguable case of error.

**[23]** In relation to the fifth proposition, this Commission and its predecessors have traditionally been cautious in ordering any party to produce documents which would reveal internal deliberations as to its industrial strategy or policy. However, this has never been elevated to an absolute rule, akin to a privilege, that any such documents will never be ordered to be produced. 19 It is not clear to us why compliance with the relevant orders will require documents of that nature to be disclosed. If, after the orders are complied with, a view crystallises on the part of any of the appellants that any of the documents produced would disclose internal deliberations as to industrial strategy or policy, they may, consistent with what was stated by the Deputy President in her decisions, apply to the Member hearing the substantive proceedings for orders to be made to impose appropriate limitations on access to the documents (including, for example, the redaction of documents). If the documents ultimately find their way into evidence, a party may apply to the Member for confidentiality orders under

ss.593 or 594 of the FW Act. If any such application was made, we do not consider that the Member, who would have the capacity to inspect the particular documents in question, would be in any way bound by the view expressed by the Deputy President in paragraph [27] of the First Decision (or by any view we have expressed). In those circumstances, there does not appear to us to be any utility in granting permission to appeal in respect of this issue, taking into account that it was not suggested that the applicants sought the production of the relevant documents for any collateral or improper purpose.

**[24]** Having considered all of the matters raised by the appellants, we are not satisfied for the purposes of s.400(1) that it would be in the public interest to grant permission to appeal. Alternatively, even if s.400(1) is not applicable to this case, we are not satisfied that the appellants have advanced any discretionary ground which would justify the grant of permission to appeal.

**[25]** Permission to appeal is therefore refused.


VICE PRESIDENT

*Appearances*:

*C. Murdoch* of counsel with *K.Anderson* solicitor for the appellants.

*S. Crawshaw* SC with *A.Bukarica* for the respondents.

*Hearing details:*

2015.

Sydney:

8 April.

<Price code C, PR562928>

1 [2015] FWC 1918

2 [2015] FWC 2215

3 [2014] FWCFB 714

4 [2014] FWCFB 4125

5 First Decision at [19]-[21]

6 First Decision at [26]

7 First Decision at [27]

8 First Decision at [29]

9 [2011] FCA 975

10 (2011) 192 FCR 78 at [43]

11 *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* (2011) 85 ALJR 398 at [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78 at [44] -[46]

12 (2010) 197 IR 266 at [27]

13 *Wan v AIRC* (2001) 116 FCR 481 at [30]

14 *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 at [26]-[27], (2010) 197 IR 266; *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089 at [28], (2010) 202 IR 388, affirmed on judicial review in *Coal & Allied Mining Services Pty Ltd v Lawler*; (2011) 192 FCR 78; *NSW Bar Association v Brett McAuliffe* [2014] FWCFB 1663 at [28]

15 See *Hutton v Sykes Australia Pty Ltd* [2014] FWCFB 3384 at [3] and the decisions cited there.

16 *Ferrymen Pty Ltd v The Maritime Union of Australia* [2013] FWCFB 8025 at [48]

17 *Trade Practices Commission v Arnotts Limited* (1989) 88 ALR 90 at 103; *Re Clerks' (Alcoa of Australia - Mining and Refining) Consolidated Award 1985* Print H2892, 2 June 1988

18 *Re Clerks (Alcoa) Case* Print H2892 at p 2: "In its exercise of a broad discretion and judgement over use of the power, the Commission will have regard to practice followed in courts of law where a judicial discretion has been applied to regulate use of a subpoena to produce documents".

19 *Comalco Aluminium (Bell Bay) Limited v AWU-FIME* Print L5800, 13 October 1994; *Finance Sector Union of Australia v Comsec Trading Limited* PR946862 [2004] AIRC 708 at [27]. As a general proposition, confidentiality or commercial sensitivity alone is not taken to be a proper ground for objection to the production of relevant documents to a court or tribunal: *Santos Ltd v Pipeline Authority of SA* [1996] SASC 5628 per Perry J at [76]-[77].

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[2014] FWC 5134
**FAIR WORK COMMISSION**

# DECISION

*Fair Work Act 2009*
s.394 - Application for unfair dismissal remedy

**Mr Luke Faulkner**
**v**
**BHP Coal Pty Ltd**
(U2014/4966)

**Mr Shannon Boal**
**v**
**BHP Coal Pty Ltd**
(U2014/5272)

COMMISSIONER SPENCER BRISBANE, 29 JULY 2014

*Objection to Orders requiring production of documents to Fair Work Commission*

**Introduction**

**[1]** This decision relates to an objection by the CFMEU on behalf of Mr Luke Faulkner and Mr Shannon Boal (the Applicants) in relation to Orders requiring the production of documents issued under s.590(2) of the *Fair Work Act 2009* (the Act) at the request of the Respondent, BHP Coal Pty Ltd.

**[2]** On 22 July 2014, three Orders requiring the production of documents in relation to matter number U2014/4966 and one Order requiring the production of documents in relation to matter U2014/5272 were initially confirmed, as is regular practice. The Respondent also made a request for the issue of an additional Order on Wednesday 23 July 2014. All relevant Orders will be dealt with in this Decision.

**[3]** An objection was received from the CFMEU, and the matter was listed with Directions for hearing. The Applicants made an application to have the Orders revoked, and in the alternative to have the orders varied. The application was made pursuant to s.603 of the Act.

**[4]** The Orders for production are sought in the context of substantive proceedings in respect of applications for unfair dismissal proceedings under s.394 of the Act.

**[5]** The Orders for production are for telephone records of the Applicants, broadly for a period from the implementation of a new policy restricting the use of mobile phones on site The Orders are directed to Telstra, Singtel, Vodafone and Optus.

**Summary of the Applicants' Submissions**

**[6]** The Applicant submitted that the Respondent has failed to demonstrate the relevance of the documents sought in terms of the relevant tests. The Applicants oppose the orders on a number of grounds including on the basis of harshness and alleged breach of privacy to the Applicants and other persons named in the Orders.

**[7]** The Applicant argued that the Orders are not drafted with reasonable particularity. Further, that the Orders are entirely speculative and amount to a 'fishing expedition'. It is submitted that the documents and time period that fall within the scope of the Orders are so wide as to be oppressive or seriously and unfairly burdensome to the recipients, for example, the documents relate to significant periods were the Applicants were not even at work. The Commission noted the documents would have to be redacted against relevant rostered hours, to be reasonably founded and relevant.

**[8]** The Applicant relied on the decision of Commissioner Williams in *G4S Custodial Services Pty Ltd v Trevor Abbott & Ors* [2011] FWA 7771. The Applicant submitted that the principles endorsed in *G4S Custodial Services* were of significance to the issue of burden. In that case, Commissioner Williams considered whether the documents sought were for a legitimate forensic purpose and did not amount to a fishing expedition, had been sufficiently particularised, were materially relevant to the substantive application, were oppressive on the third party recipient and were sought from the other party before a third party.

**[9]** The Union emphasised that the employees were not requested in relation to the specific documents prior to the seeking of the Orders. Furthermore they emphasised the broad scope of the documents and the burden this may place on the third party telecommunication companies and the Commission in redacting the documents to the relevant specificity of dates and hours.

**[10]** Further, the Applicant submitted that the Orders raise issues in relation to the public interest and the due administration of justice. The Applicant submitted the issuing of the Orders at this late stage after filing of their material will disrupt the conduct of the trial and that Orders could have been obtained at an earlier stage.

**[11]** The Applicant does acknowledge the balance that has to be considered by the Commission to have all relevant information before it, but other considerations in terms of privacy, confidentiality and fairness that attached to the documents sought, must also be weighed.

**Summary of the Respondent's Submissions**

**[12]** The Respondents submitted that the documents returnable pursuant to the Orders to produce go directly to issues in dispute between the parties. In particular, it was submitted that the documents will resolve factual issues in dispute and may be relevant to the Commission's determination of valid reason, harshness, reinstatement and compensation.

**[13]** The Respondent does not accept that the issues raised by the Applicant justify the

revocation of the Orders.

**[14]** The Respondents submit that the Applicant has brought into issue the use of the mobile phones by the Applicant on days other than those that led to the dismissal. To the extent that the produced documents show other instances of breach of the Policy, the Respondent may rely on that evidence as justification in support of the dismissal, whether or not those instances were a reason for the termination.

**[15]** The Respondent submitted that they had given such a broad scope to the material to be produced so as to save the recipients of the order from having to provide multiple records, each

pertaining to a particular set of dates and times. The Applicants emphasised that the broad scope of information, much of which may not be relevant or admissible, was a fishing expedition, burdensome and in breach of the Applicants' privacy.

**[16]** The Respondent conceded that any records of the Applicant's phone usage outside his rosters were irrelevant to the substantive matter. The Respondent indicated it would be prepared to provide the dates and times of the Applicant's rosters so that any irrelevant records of phone usage may be redacted via a process overseen by the Commission.

**Considerations**

**[17]** The Commission is not strictly bound by the rules of evidence. However, in exercising its discretion to issue an order to produce, the Commission will generally be guided by the rules of evidence and the relevant case law, in which broad principles have emerged in considering Orders to produce. In *Coates Hire Operations Pty Ltd v AMWU* [2013] FWC 1585, Commissioner Bull referred to Justice Munro's decision in *Clerks (Alcoa) Case* 1:

> *In its exercise of a broad discretion and judgement over use of the power, the Commission will have regard to practice followed in courts of law where a judicial discretion has been applied to regulate use of a subpoena to produce documents. Any such subpoena must specify with reasonable particularity documents which are required to be produced. It may be sufficiently specific to identify documents to be produced by reference to the subject matter to which they relate.*
>
> ...
>
> *The documents sought must be of a nature capable of being relevant to an issue which might legitimately arise on the hearing of the matters in dispute.*
>
> ...
>
> *A party will not be required to produce documents where to do so would be oppressive; or where the demand for production is a `fishing expedition', in the sense that it is an endeavour not to obtain evidence to support a case, but to discover whether there is a case at all. Where the proper use of legal compulsion to produce documents is in issue, the tribunal will need to carry out an exercise of judgement upon the particular facts in each case. That judgement requires a balance on the one hand of the reasonableness of the burden imposed upon the recipient, and of the invasion of private rights, with on the other hand, the public interest in the due administration of justice and in ensuring that all material relevant to the issues be available to the parties to enable them to advance their respective cases.*

**[18]** Further, the tests were relevantly set out in *Tamawood Ltd v Habitare Developments Pty Ltd* [2009] FCA 364, in which Collier J cited with approval a list of principles which Greenwood J had earlier stated to be relevant in deciding whether to issue a subpoena in *McIlwain v Ramsey Food Packaging Pty Ltd* [2005] FCA 1233. The following principles are relevant:

1. the documents for production must be identified with reasonable particularity 2;

2. the category of documents must not be so wide as to be oppressive;

3. the material sought must have an adjectival relevance, that is, an apparent relevance to the issues in the principal proceedings. The adjectival relevance looks towards the

possibility whether the material sought could reasonably be expected to throw light on some of the issues in the principal proceedings (cf *Trade Practices Commission v Arnotts Ltd* (1989) 88 ALR 90);

4. the documents must be relevant to an issue raised on the pleadings and be used to elicit documents to support the Applicant's existing case. It cannot be used for the purposes of "fishing" or for the purpose of determining a preliminary question as to whether a party has a supportable case 3, or to investigate the character of the opposing party's evidence4;

5. the test for relevance does not require that a party demonstrate direct relevance to the contest between the parties. Rather, the documents must have some apparent potential relevance to the pleadings as they stand 5;

6. there must be a legitimate forensic purpose for the production of documents 6;

7. a subpoena should not be issued in circumstances where it would unduly disrupt the conduct of the trial by requiring the Court to read documents which could have been obtained at an earlier stage in the proceedings 7;

8. a wide-ranging subpoena seeking documents of doubtful relevance at great inconvenience to, or that risk compromising the commercial privacy of, a third party, may not readily attract the grant of leave;

9. the issue of the subpoena must not, in all the circumstances, be oppressive in terms of its impact on the recipient.

**[19]** The Commission has a broad discretion to inform itself under s590(2) of the Act:

***590 Powers of the FWC to inform itself***

*(1) The FWC may, except as provided by this Act, inform itself in relation to any matter before it in such manner as it considers appropriate.*

*(2) Without limiting subsection (1), the FWC may inform itself in the following ways:*

*(a) by requiring a person to attend before the FWC;*

*(b) by inviting, subject to any terms and conditions determined by the FWC, oral or written submissions;*

*(c) by requiring a person to provide copies of documents or records, or to provide any other information to the FWC;*

*(d) by taking evidence under oath or affirmation in accordance with the regulations (if any);*

*(e) by requiring an FWC Member, a Full Bench or an Expert Panel to prepare a report;*

*(f) by conducting inquiries;*

*(g) by undertaking or commissioning research;*

*(h) by conducting a conference (see section 592);*

*(i) by holding a hearing (see section 593).*

**[20]** The Applicant raised that the requests for Orders by the Respondent were not provided to the Applicant. The Respondent submitted that they complied with the obligations under the Fair Work Commission Rules 2013. Rule 54 provides:

***54 Order for production of documents***

*(1) A party in a matter before the Commission may, by lodging a draft order, request that the Commission inform itself in relation to the matter by requiring a person to provide copies of documents or records, or provide any other information, under subsection 590 (2) of the Act.*

*Note: The request must be in the approved form—see subrule 8(2).*

*(2) If the order is made, the party who requested the order must, as soon as practicable after the order is made, serve a signed copy of the order upon the person who is required to produce the documents, records or other information.*

*(3) The order may be satisfied by producing the documents, records or other information specified in the order to the General Manager or other employee of the Commission at the place specified in the order no later than 4 pm on the day before the day specified in the order for the provision of the documents, records or other information.*

**[21]** The Respondent complied with their obligations under the rules. The initial Orders have lapsed in time and, based on correspondence, required additional information for the third parties to comply with the Orders.

**[22]** The Commission has a wide discretion to pursue matters relevant to the consideration of the issues before it. Issues of fairness and procedure must also be balanced.

**[23]** In order to grant an order to produce, the records sought by the Respondent must be of a nature capable of being relevant to an issue which might legitimately arise on the hearing of the matter in dispute. The Orders to produce relate to phone records of the Applicants and another. The substantive matters involve the alleged use of a mobile phone in contravention of the company policy limiting such use on site. I am satisfied that the phone records of the Applicant may well be capable of being relevant to the issues in contention. However, I am mindful of the need to balance the Applicant's privacy and the public interest with this. The Orders to produce in their current form were of a broad scope, relating to all telephone usage of the Applicants and Ms Bessie-Lee Emblen between 19 November 2013 and for Mr Faulkner, 4 February 2014 and for Mr Boal and Ms Emblen, 12 February 2014. This broad scope relating also to non-work hours clearly is wider than the required relevance of phone use during work hours and has the ability to compromise the Applicants' privacy.

**[24]** Orders for production of documents should not be used as a tool to substantiate a valid reason after the fact. However post dismissal conduct that becomes apparent may be relevant considerations in termination proceedings 8.

**[25]** It was open to the Respondent to seek the records from the Applicant in the first instance and also to seek the orders earlier in the proceedings. Such material, however, was not sought at an early stage and one additional consideration is that to allow for its production now would require for the Directions to be set aside or amended.

**[26]** Having considered the relevant principles from the case authorities and the competing interests in this matter it is appropriate to allow the current Directions to run on the evidence, without the need for the orders for the production of further material.

**[27]** I do not rule out the opportunity for the Respondents to reserve their rights to argue after the hearing of such evidence that specific records be produced for particular periods in relation to a specific argument. Relevant argument would be heard from the Applicant if an application was received.

**[28]** Accordingly the current Orders that have lapsed in time will be set aside and the recipients so advised. The Directions already issued remain in place to be complied with. The hearing of the evidence will proceed. If, as a result of the hearing, specific records are sought on reasonable grounds in relation to a particularised matter in contention, related to the reasons for dismissal, such will be considered against the tests.

**[29]** The orders are revoked pursuant to s.603(2)(b)(i) of the Act. The application for the additional Order is dismissed.

**[30]** I Order accordingly.


COMMISSIONER

1 [1988] AIRC 391 Print H2892 at p 2

2 *Commissioner for Railways v Small* (1938) SR (NSW) 564, 574-575 per Jordan CJ

3 *Hennessy v Wright* (1988) 21 QBD 509

4 *Griebart v Morris* [1920] 1 KB 659,666

5 *Australian Gas Light Company v Australian Competition & Consumer Commission* [2003] FCA 1101

6 *Dorajay Pty Ltd v Aristocratic Leisure Limited* [2005] FCA 588 at [34]

7 *Diddams v Commonwealth Bank of Australia* [1998] FCA 497

8 *Metricon Homes Pty Ltd v Bradley* (2009) 181 IR 115

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# Industrial Relations Commission Decision 463/1988;

IN THE AUSTRALIAN CONCILIATION AND ARBITRATION COMMISSION

Conciliation and Arbitration Act 1904

In the matter of an application by The Federated Clerks' Union of Australia to vary the

Clerks' (Alcoa of Australia - Other Than Mining and Refining) Consolidated Award 1985(1)

(C No. 4674 of 1987)

Clerks' (Alcoa of Australia - Mining and Refining) Consolidated Award 1985(2)

(C No. 4675 of 1987)

in relation to incidence of award, preference to unionists and wage rates

JUSTICE MUNRO Sydney, 2 June 1988

Practice and procedure - summons - union made application for summons to

produce documents - privilege from production of internal industrial relations deliberations to be balanced against what may be relevant to important issues of fact - Commission found issues not relevant to determination of matter in dispute - application dismissed.

RULING ON APPLICATION FOR SUMMONS TO PRODUCE DOCUMENTS

Applications to vary the above awards are before the Commission as constituted for investigation and report to the Full Bench established to deal with the respective matters.
On 19 May 1988 a ruling on an application for the issue of a summons to produce documents was given in abbreviated form on transcript

of proceedings. I now furnish, with some elaboration and corrections, my reasons for the ruling.

The Federated Clerks' Union of Australia (FCU) has applied in the course of the hearing before me for a summons to issue addressed to the "Proper Officer" of Alcoa Australia Limited (the company). The proposed summons seeks the production of:

"All documents, notes, memoranda and reports raised between 30 November 1986 and 30 June 1987, both dates inclusive, relative to the offers made by Alcoa of Australia Limited to clerical employees to go to monthly staff."

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(1) Print F9387 (2) Print F9441



In accordance with my request, the

application for a summons has been made in public hearing and I have had the advantage of submissions by counsel for the parties on the question. The company opposes the issue of a summons, and by inference, although the point was not specifically addressed, the production of documents, if any exist, which may answer the description of those sought in the proposed summons.

I have been referred to a number of decisions and judgments on the issue of summons and subpoenas to produce documents. Those authorities outline the principles followed as a matter of law in judicial proceedings and as a matter of discretion in proceedings before this Commission. It appears from the cases referred to that the principles to be followed are well defined.

The Commission's power to issue a summons for production of documents or information is to be found in section 41(1)(n) of the Conciliation and Arbitration Act 1904 and Regulation 21 of the Conciliation and Arbitration Act Regulations. Sections 186 and 187 of the Act are relevant, allowing the direction of evidence in certain cases, and prescribing for the inspection of documents produced pursuant to summons under section 41. The power to compel production is discretionary and not mandatory in the sense of giving any person, intervenor or party a legal right to require, as it sees fit, production of documents or attendance of witnesses.(3)

In its exercise of a broad discretion and judgement over use of the power, the Commission will have regard to practice followed in courts of law where a judicial discretion has been applied to regulate use of a subpoena to produce documents. Any such subpoena must specify with reasonable particularity documents which are required to be produced. It may be

(3) National Wage Case (1975) 167 CAR 18 at 22

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sufficiently specific to identify documents to be produced by reference to the subject matter to which they relate. In the case of a corporation, it is usually appropriate, where the custodianship of documents is not clear, to direct the subpoena to the "Proper Officer". It is not legitimate to use a subpoena for what, in effect, would be discovery of documents against a person not liable to make discovery, or as a substitute for discovery which should be

applied for at the proper time. The documents sought must be of a nature capable of being relevant to an issue which might legitimately arise on the hearing of the matters in dispute. In the first instance the documents are produced to the tribunal upon whom it falls to examine the documents, assess their relevance and determine what access by the parties to the documents may be appropriate; (section 187 of the Act appears to be the statutory counterpart of this principle of practice). A party will not be required to

produce documents where to do so would be oppressive; or where the demand for production is a "fishing expedition", in the sense that it is an endeavour not to obtain evidence to support a case, but to discover whether there is a case at all. Where the proper use of legal compulsion to produce documents is in issue, the tribunal will need to carry out an exercise of judgment upon the particular facts in each case. That judgment requires a balance on the one hand of the reasonableness of the burden imposed upon the recipient, and of the invasion of private rights, with on the other hand, the public interest in the due administration of justice and in ensuring that all material relevant to the issues be available to the parties to enable them to advance their respective cases(4).

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(4) See Clarke J: Southern Pacific Hotels Services Incorporated v. Southern Pacific Hotel Corporation Limited (1984) 1 NSW LR 711 at 717-721; Commissioner for Railways v. Small [1938] NSWStRp 29; (1938) 38 SR(NSW) 564 at 573; Purnell Brothers Pty. Limited v. Transport Engineers Pty. Limited (1984) 73 FLR 160 at 174; National Employers Mutual General Association Limited v. Waind and Hill (1978) 1 NSW LR 372; Rochfort v. D.P.C. [1982] HCA 66; (1982) 43 ALR 659 at 667.

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I am not persuaded by Mr. Giudice, who appears for the company, that the material sought to be produced is without relevance to issues in the proceedings before me relating to matters in dispute. Certainly in the ordinary run of proceedings before the Commission, the intention or motives of the parties will be of no relevance. However, in this case the company itself has responded to the union's case and has led evidence of its purpose in making offers to its fortnightly employees for appointment to monthly staff. I accept that the extent to which the conversion of fortnightly staff to monthly staff may have been influenced by attitudes towards the FCU or observation of award requirements could be one of many considerations relevant to determination of the claims made by the FCU.

I have some reservation as to whether the demand for production is made with sufficient particularity to avoid imposing an excessive burden on the company and upon this tribunal. Mr. Gallagher sought to justify the demand for production by reference to evidence given by a senior officer of the company, Mr. Opie, who testified that he made an oral request on 11 November 1986 for the raising of a plan for conversion of fortnightly staff to monthly staff. However, the demand for production is expressed with such width that it would embrace not only the broad policy plan but the documentary trail

leading to offers made to individual employees. A very substantial body of documents may be involved, of which, on the basis of rulings I have already given in proceedings in this case, only a fraction could be likely to be relevant. This consideration would lead me to confine the wording of the summons but not to deny the issue of any summons at all.

The summons is not directed to specified documents, and it is clear that the applicant seeking production is not aware of the content, or indeed of the

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necessary existence of written documents conforming to the description given in the summons. However, I do not consider that a summons to produce documents relating to implementation of the request made by Mr. Opie on or about 11 November 1986 for the development of a plan for conversion of fortnightly staff to monthly staff would properly be categorised as a fishing expedition and therefore, for that reason alone, an abuse of process. If such documents exist, they may be the best evidence on some of the aspects of the company's intention covered within the oral testimony lead by the company.

There are in Commission proceedings no formal mechanisms for discovery. I consider that an absence of effort by a party to seek directions akin to discovery at an appropriate stage of proceedings may be a reason for not exercising the discretion to issue a summons. In the circumstances of this case, and having regard to rulings I have made at earlier stages of proceedings directing what information should be made available by the company, I would not refuse to issue a summons at this stage of proceedings because of any delay in the application or because of the stage at which it is made.

The determination of whether a party should be compelled to produce information which may be within its possession must in my view be primarily guided by the considerations referred to by the 1975 National Wage Case Bench when it said:

"This wide-ranging discretion conferred on the Commission is statutory recognition of the complex exigencies which permeate industrial relations. What procedures are fair and reasonable in the handling of a dispute must depend upon the particular mix of factors involved and inevitably calls for the exercise of broad discretion and judgment."(5)

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(5) (1975) 167 CAR 18 at 22



The exercise of such a discretion in this case depends upon a finer balance than may often be the case. There are many instances in Australian practice recognising that participants in industrial relations will be sheltered from compulsory production of information categorised as internal to their deliberations in industrial relations matters. The decision of the 1975 National Wage Bench, and a more recent decision of Commissioner Brack, are such instances and others are able to be found(6). However, the variety of expression in which privilege from production has been couched raises a question as to how far any principle influencing the exercise of discretion can be identified with sufficient clarity to afford a definitive guide in cases involving different facts.

Against the application of the practice of sheltering the company's internal industrial relations deliberations in this instance must be balanced

the consideration that production is sought to be compelled of what may be evidence relevant to important issues of fact. Findings on the particular facts in issue undoubtedly have relevance to the overall determinations to be made in this case. This circumstance leads me to a question whether this is a case where production of such documents as may be relevant ought be compelled. I have concluded that production should not be compelled. Resolution of the issues of fact as to the company's attitude toward the FCU and toward the maintenance of award coverage is not essential to the determination of the matters in dispute. Such facts as may be established must be weighed along

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(6) Amalgamated Metal Workers' Union v. ETSA Brack C (1980) 241 CAR 570 at 576; National Wage Case 1975 167 CAR 18 at 22; Re Queensland Electricity Commission and others (Print H2852); Conciliation and Arbitration Act 1904 section 30(4); Freedom of Information Act 1982 section 40(1)(e); Administrative Decisions (Judicial Review) Act 1977 section 13 Schedule 2(u); Professional Engineers Case 1961 97 CAR 233 at 260; but see also R v. Marks; Ex Parte Australian Building Construction Employees and Builders Labourers' Federation [1981] HCA 33; (1981) 147 CLR 471 at 483 (per Mason J), at 500 (per Brennan J)

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with a range of considerations which may be taken into account in what must be a determination based on a broad discretion. In the circumstances, I do not consider that the requirements of fairness demand that I should put aside from the company the shield from production of details of internal deliberations and intentions on industrial relations matters to which industrial protagonists are normally entitled. In reaching this conclusion I am influenced by the consideration that should the circumstances of the case warrant it, the axiom of Mansfield LJ in Blatch v. Archer(7) can

be applied to
the evaluation of evidence finally before the tribunal:

"It is certainly a maxim that all evidence is to
be weighed according to
the proof which it was in the power of one side to produce, and in the
power of the other to
have contradicted."

The application is refused.

BY THE COMMISSION:

DEPUTY PRESIDENT

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(7) [1774] EngR 2; 1774 1 Cowp. 63; Cross on Evidence: (1970) Butterworths Australian Edition at 100