

## IN THE FAIR WORK COMMISSION

**Matter No: C2016/35**

**Title: 4 YEARLY REVIEW OF MODERN AWARDS –  
ABANDONMENT OF EMPLOYMENT COMMON ISSUE**

### **AUTHORITIES AND OTHER MATERIALS REFERRED TO IN Ai GROUP'S FINAL SUBMISSION**

1. [Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd \(2007\) 233 CLR 115](#)
2. [Visscher v The Honourable President Justice Giudice \[2009\] HCA 34](#)
3. Extracts from *Macken's Law of Employment*, Seventh Edition, pp.336-337  
(**Attachment A**)
4. [Purcell v Tullett Prebon \(Aust\) Pty Ltd \[2010\] NSWCA 150](#)
5. [Tullett Trebon \(Australia\) Pty Ltd v Purcell \(2008\) 175 IR 414](#)
6. [Moir M, Recent Case - Purcell v Tullett Prebon \(Aust\) Pty Ltd \[2010\] NSWCA 15, \(2011\) 24 Australian Journal of Labour Law 173.](#)
7. [Erbacher v Golden Cockerel \[2007\] AIRC 491](#)
8. [Sharam v Blue Tier Logging, T10436 of 2002 – Full Bench Decision](#)
9. [Sharam v Blue Tier Logging, T10228 of 2002 – Commissioner Abey](#)
10. [Byrne v Australian Airlines \[1995\] HCA 24](#)
11. [Automatic Fire Sprinklers v Watson \(1946\) 72 CLR 435](#)
12. [Mohazab v Dick Smith Electronics Pty Ltd \(No 2\) \(1995\) 62 IR 200](#)
13. [Ishan D'Souza v Henry Schien Halas \[2014\] FWC 5864](#)
14. Extracts from *Industrial Information Digest* (updated to 18 July 1967)  
(**Attachment B**)

15. *Metal Industry Award 1971* – Clause 6 – Contract of Employment  
**(Attachment C)**
16. *Metal Industry Award 1984 – Part I* – Clause 6 – Contract of Employment  
**(Attachment D)**
17. [Metal Industry Award Simplification Decision, Print P9311](#)
18. [Bienias v Iplex Pipelines Australia Pty Limited \[2017\] FWCFB 38](#)
19. [4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues \[2014\] FWCFB 1788](#)
20. [Shop, Distributive and Allied Employees Association v National Retail Association \(No.2\) \(2012\) 205 FCR 227](#)
21. [4 yearly review of modern awards – Annual leave common issues \[2016\] FWCFB 3177](#)
22. [4 Yearly review of modern awards – Payment of wages common issues \[2016\] FWCFB 8463](#)
23. [Re Shop, Distributive and Allied Employees' Association \(2003\) 135 IR 1, PR941526](#)
24. [Joint draft Manufacturing Award dated 1 August 2008 that was submitted to the AIRC during Stage 1 of the Award Modernisation process.](#)

**ATTACHMENT A**

**EXTRACTS FROM *MACKEN'S LAW OF EMPLOYMENT*, SEVENTH EDITION, PP.336-337**

# MACKEN'S LAW OF EMPLOYMENT

SAPPIDEEN, O'GRADY, RILEY, WARBURTON

MACKEN'S LAW OF EMPLOYMENT  
SAPPIDEEN, O'GRADY, RILEY, WARBURTON • SEVENTH EDITION

SEVENTH EDITION

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employer's rights to dismiss.<sup>371</sup> The mere lapse of time between the misconduct and discovery of the wrongdoing by the employer does not amount to condonation or waiver.<sup>372</sup>

## Repudiation

### Definition

[8.430] As to what constitutes repudiation, the High Court has said:

The term repudiation is used in different senses. First, it may refer to conduct which evinces an unwillingness or an inability to render substantial performance of the contract. This is sometimes described as conduct of a party which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations. It may be termed renunciation. The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it ... Secondly, it may refer to any breach of contract which justifies termination by the other party ... There may be cases where a failure to perform, even if not a breach of an essential term ... manifests unwillingness or inability to perform in such circumstances that the other party is entitled to conclude that the contract will not be performed substantially according to its requirements. This overlapping between renunciation and failure of performance may appear conceptually untidy, but unwillingness or inability to perform a contract often is manifested most clearly by the conduct of a party when the time for performance arises. In contractual renunciation, actions may speak louder than words.

In the past, some judges have used the word 'repudiation' to mean termination, applying it not to the conduct of the party in default, but to the conduct of the party relying upon such default. It would be better if this were avoided.

...

For present purposes, there are two relevant circumstances in which a breach of contract by one party may entitle the other to terminate. The first is where the obligation with which there has been failure to comply has been agreed by the contracting parties to be essential. Such an obligation is sometimes described as a condition.

...

It is the common intention of the parties expressed in the language of their contract, understood in the context of the relationship established by that contract and (in a case such as the present) the commercial purpose it served, that determines whether a term is 'essential', so that any breach will justify termination.

The second relevant circumstance is where there has been a sufficiently serious breach of a non essential term.<sup>373</sup>

The test is objective. It is not necessary to prove a subjective intention to repudiate.<sup>374</sup> Whether there has been a repudiation of the contract in the individual

371 *Haddow v Inner London Education Authority* [1979] ICR 202 at 207, 208. Note, however, the statutory protection available to employees participating in protected industrial action: see below, n 424.

372 *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 39 Ch D 339.

373 *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at [44]-[49] (Gleeson CJ, Gummow, Hayden and Crennan JJ); *State of South Australia v McDonald* (2009) 185 IR 45 at [284].

374 See the useful summary of principles in *Whittaker v Unisys Australia Pty Ltd* (2010) 192 IR 311 at [32]-[41], adopted in *Earney v Australian Property Investment Strategic Pty Ltd* [2010] VSC 621 (22 December 2010, Hargrave J) at [77].

case is not a question of law but a question of fact.<sup>375</sup> It is not to be inferred lightly. A refusal to perform contractual obligations if sufficiently serious will suffice.<sup>376</sup> Similarly, misconduct of a serious nature inconsistent with the fulfilment of express or implied conditions of service will constitute repudiation.<sup>377</sup> Repudiation will exist, for example, where there has been a wrongful dismissal of an employee<sup>378</sup> or an employee leaves the job without notice or with insufficient notice,<sup>379</sup> or where an employee has accepted an offer of employment which is then withdrawn by the employer before commencement of the employment,<sup>380</sup> or where an employer reduces the wages of an employee without that person's consent,<sup>381</sup> or a serious non-consensual intrusion on the nature of the employee's status and responsibilities in a way which is not permitted by the contract.<sup>382</sup>

The Australian courts have been prepared to recognise an implied term in the contract of employment to the effect that an employer must be good and considerate to its employees, or that the employer should not, without reasonable cause, do anything calculated or likely to destroy the relationship of trust and confidence between the employer and the employee.<sup>383</sup> There is United Kingdom authority for the view that any breach of the implied term as to trust and confidence will amount to a repudiation of the contract because the very essence of the breach is that the conduct is calculated or likely to destroy or seriously damage the relationship.<sup>384</sup> In Australia, the law relating to the implied term as to trust and confidence is less developed. In order to establish a

- 375 *Woods v W M Car Services (Peterborough) Ltd* [1982] ICR 693 at 698, 699-700, 701-702.
- 376 *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698. Note, however, the confusion in many cases between discharge for breach of condition and discharge resulting from repudiation: see Freedland, *The Contract of Employment* (OUP, 1976), pp 212-219. See discussion of implied terms above, [4.500]. In *Bruce v AWB Ltd* (2000) 100 IR 129, an express refusal to comply with a proposed change in reporting structures was found not to be sufficiently serious as to amount to a repudiation because there was a respectable, though erroneous, view on the part of the employee that the proposed change was outside the scope of the contract.
- 377 *North v Television Corp Ltd* (1976) 11 ALR 599 at 608-609.
- 378 *Turner v Australasian Coal and Shale Employees Federation* (1984) 6 FCR 177; 55 ALR 635 (withdrawal of offer of employment after acceptance); *Courtaulds Northern Spinning Ltd v Sibson* [1987] ICR 329 (employee required to retain union membership in face of threatened industrial action; on employee's refusal employer proposed to transfer employee; proposed transfer held to be a breach of contract and repudiation of contract, but reversed on appeal [1988] ICR 451).
- 379 *Thomas Marshall (Exports) Ltd v Guinle* [1979] 1 Ch 227; *Evening Standard Co Ltd v Henderson* [1987] ICR 588 (Court of Appeal); *Tullett Prebon (Australia) Pty Ltd v Purcell* (2008) 175 IR 414 at [24].
- 380 *Hochster v De la Tour* (1853) 2 El & Bl 678; 118 ER 922; *Turner v Australasian Coal and Shale Employees Federation* (1984) 55 ALR 635.
- 381 *Rigby v Ferodo Ltd* [1988] ICR 29; *Brookton Holdings No V Pty Ltd v Kara Kar Holdings Pty Ltd* (1994) 57 IR 288. Consent is not to be assumed merely because the worker continues to work at the reduced rate for a time. *Metropolitan Health Service Board v Australian Nursing Federation* (2000) 99 FCR 95. See also *Cartier Fitzgerald International v Callaghan* [1999] 2 All ER 411; *Tokyo Network Computing Pty Ltd v Tanaka* [2004] NSWCA 263 (2 August 2004, Mason P, Handley and Tobias JJA).
- 382 The assessment of whether there has been such an intrusion as to amount to a repudiation will turn on an objective comparison of the two roles against the background of changes permitted by the express terms of the contract: *Whittaker v Unisys Australia Pty Ltd* (2010) 192 IR 311 at [41]-[46], [68]; *Earney v Australian Property Investment Strategic Pty Ltd* [2010] VSC 621 (22 December 2010, Hargrave J) at [77].
- 383 See above, [5.140]; although the issue still awaits judicial confirmation at the highest level.
- 384 *Post Office v Roberts* [1980] IRLR 347; *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84; *Omilaju v Waltham Forest London Borough Council* [2005] ICR 481 at 487 (leave to appeal to the House of Lords refused [2005] ICR 749) citing *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666 at 672. However, on appeal in *Woods v WM Car Services (Peterborough) Ltd* [1982] ICR 693 at 698, Lord Denning MR put the principle in terms of the employer being guilty of misconduct justifying the employee in leaving without notice, citing his own judgment in *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221. The Master of the Rolls said that in each case it depends on whether the misconduct amounted to a repudiatory breach.

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8. Note, however, the  
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CLR 115 at [44]-[49]  
cDonald (2009) 185 IR

f (2010) 192 IR 311 at  
y Ltd [2010] VSC 621

**ATTACHMENT B**

**EXTRACTS FROM *INDUSTRIAL INFORMATION DIGEST* (UPDATED  
TO 18 JULY 1967)**

**TERMINATION OF EMPLOYMENT—Absence of Employee Through Illness or Incapacity—Continued.**

illness may so go to the root of the contract as to justify the master in treating the contract as terminated. So long as the contract is subsisting, the question whether or not the servant is entitled to his wages or his salary during temporary absence from work through illness is a question of fact in each case and the answer depends entirely upon the terms of the individual contract of service, express or implied."

In any case in which it is desired to terminate the services of an employee who is absent, it is usually considered advisable to forward a definite intimation to such effect whatever the circumstances of the absence. The notification should be sent preferably by registered letter to the employee's last stated address if it is not possible to arrange personal service of such notice (see **Termination of Employment—Absent Employees**; and **Termination of Employment—Absenteeism—For**; and see also **Sickness—Absence Through**).

— **Absent Employees.** The services of an employee who is absent for any reason (including absence on workers' compensation) may be terminated by either party in the same manner as in the case of any other employee, and there is no obligation to postpone the giving of notice until the employee returns to work. (See *Carmichael v. Colonial Sugar Refining Co. Ltd.*, 44 S.R. 233).

It is necessary, of course, to take reasonable efforts to ensure that the requisite notice of termination actually reaches the party concerned, and it is usually considered advisable for the employer to forward a registered letter to the employee's last-known address if personal service of such notice cannot be effected.

In the case of a weekly hired employee, the date specified in the letter as that on which the employment is to be terminated, should be at least one week later than the date on which the letter will be received.

The fact that no work is performed by an employee during the period of notice does not affect the currency of the notice, nor does the giving of notice confer on the employee any right to wages which he would ordinarily not have possessed had notice not been given. In other words, if the employee desires to work during the period of notice he must be allowed to do so, or paid; if he does not attend for duty he forfeits his pay if he normally loses his pay for non-attendance. In either case, however, the employment terminates in accordance with the notice given (see *Storemen and Packers Case re Harris Scarfe Ltd.* (1928), 26 C.A.R. 392 and *Re Liquor and Allied Trades, Hotels (A.C.T.) Award* 96 C.A.R. 810 and *Re Journalists (Metropolitan Daily Newspapers) Award*, 4 F.L.R. 164.)

See also **Termination of Employment—Absenteeism for**.

— **Absenteeism—For.** It has been held that deliberate absenteeism is a ground for summary dismissal (i.e., dismissal without notice) of a weekly hired employee (see *Metal Trades Case* 46 C.A.R. 332 at p. 333; see also **Absence of Employee—Dismissal for**).

When dealing with a case in which an employee fails to attend for work without communicating any reason for his absence to his employer, it is generally considered advisable for the latter to allow a reasonable time to elapse (e.g., one week) and then to communicate personally or by post with the employee inquiring as to the reason for his absence. If the reason is not forthcoming within a reasonable time, or if, when tendered, it is found to be unsatisfactory, it is customary for a further communication to be forwarded terminating the employment forthwith. (See also **Termination of Employment—Absent Employees**.)

Where an employer omits to terminate the services of an



**TERMINATION OF EMPLOYMENT—Absenteeism—For—Continued.**

employee, who is unlawfully absent, he leaves himself liable, in many cases, to claims for such benefits as paid public holidays, and, in the case of employees under N.S.W. State awards, in some instances, to annual leave rights, which have accrued during the period of the absence (see *Metal Trades Case re James Mullan Pty. Ltd.* 47 C.A.R. 676; and *In re Wharf Labourers (Port Jackson, Newcastle and Morpeth) Award* (1945) A.R. (N.S.W.) 387). (See also **Holidays and Annual Holidays Act**.)

An employee who has been absent without having tendered any reason for such absence, and who reports again for duty (assuming that his services have not been terminated in the meantime), may be requested to explain the reason for his absence before being allowed to re-commence work. If the reason given is unsatisfactory, and there is reasonable ground for suspecting that the absence was unlawful, the employer would be justified in terminating the employee's service without notice. It is necessary, however, in such cases, to dismiss the employee at the earliest moment possible after the offence has been established, otherwise the employer will be held to have condoned the offence. (See **Misconduct**.)

Where there is reason to believe that an absent employee has no intention of returning to work, many employers adopt the practice of forwarding a communication to the employee advising that unless he reports for duty or furnishes a reason for his absence, together with advice as to the estimated duration thereof, within a specified time, he will be regarded as having terminated his services on the date that he last attended for duty (i.e., without notice.) Where the award provides for forfeiture of a week's wages in lieu of notice, any moneys in hand, to the value of a week's wages, are then forfeited if the employee fails to comply with this requirement. (See **Termination of Employment—Failure to Give Notice**.) Where the employee does report as requested, however, and is apparently ready to resume work, he can then only be regarded as an ordinary absentee, subject to the considerations referred to above in relation to absentees generally.

*Abandoned  
&  
forfeiture  
of wages*

- **Added Tradesmen.** See **Added Tradesmen**.
- **Annual Leave—During.** See **Annual Leave—Termination of Employment During or Immediately Prior to Leave**.
- **Annual Leave Rights on Termination.** See **Annual Leave—Termination of Employment; Pro Rata Leave Pay**.
- **Apprentices.** See **Apprenticeship—Termination of Apprenticeship**.
- **Award-free Employees.** The period of notice required to be given to award-free employees depends on the terms of the contract between the parties.

In employment contracts, in which there is no mention of the time during which the contract is to continue, the hiring is said to be a "general hiring," and in the absence of any indication to the contrary there is a presumption that the engagement is on a year-to-year basis. In most cases it would appear that the interval, at which wages are paid, serves to indicate the nature of the hiring. Thus, where wages are paid weekly or monthly, and there is no other determining feature to the contrary, the hiring may be taken to be weekly or monthly as the case may be. The nature of the hiring, however, does not of itself necessarily determine the period of notice to be given on termination of the engagement. Thus, a contract may be indefinite as to the time, during which it is to continue in force, and yet provide specifically for termination by either party on the giving of a short period of notice. Where no provision at all is made as to the notice to be given, however, "reasonable notice"

**TERMINATION OF EMPLOYMENT—Award-free Employees—Contd.**

must be given when it is desired to terminate the contract. (*Crew v. Municipality of Prospect* 11 L.R. (N.S.W.) 72.)

"Reasonable notice" has been held, in a number of cases, to depend on the nature of the occupation of the employee concerned.

For a list of periods held to be reasonable in a variety of occupations see *Halsbury*, Third Edition, Vol. 25, p. 490.

In one English case involving the discharge of the chief engineer of an ocean liner, 12 months' notice was held to be "reasonable" (*Savage v. British India S.N. Co. Ltd.* (1930) 46 T.L.R. 234), while a specialist salesman was held to be entitled to not more than 3 months' (see *Fisher v. Dick & Co. Ltd.* (1938) 4 All E.R. 467).

In the case of what are known in law as "menial servants" (e.g., gardeners, domestic usefuls, etc.) not more than a month's notice has been held to be reasonable where there is no indication as to the period of the hiring or the period of notice to be given. (*Johnson v. Blenkinsopp* (1841) 5 Jur. 870). In many of these cases, of course, provision is implied in the contract for termination by the giving of a week's notice.

— **By Group of Employees, to Enforce Demands.** See **Termination of Employment—Mass Terminations Held to be Strikes.**

— **Casuals.** The employment of casuals may generally be terminated without notice at any time. Under some awards, however, provision is made for the payment of a minimum amount on any day on which such an employee is required to attend for duty. (See **Casuals.**)

— **Commencement of Notice—Weekly Hiring.** See **Termination of Employment—Week's Notice—Meaning of.**

— **Continuing Notice.** Notice given by an employer or employee must relate to a specific period; it cannot be continuous in effect. (*Bullock v. Wimmera Fellmongery & Wool Scouring Co. Ltd.* 5 V.L.R. 362.) Where a weekly hired employee, for example, continues in employment after the expiration of a period of notice, the employment may only be terminated by the giving of another week's notice or the payment or forfeiture of the requisite sum in lieu of notice (see **Termination of Employment—Failure to give Notice—Weekly Hiring.**)

— **Dismissal (Summary) After Notice Given.** The fact that notice of termination of employment has been given by either party does not prevent the employer from summarily dismissing an employee if the latter is guilty of misconduct during the period covered by the notice.

The actual giving of notice does not affect the rights of either party under the employment contract or the award while such contract continues in operation (see *Storemen and Packers Case re Harris Scarfe Ltd.* (1928) 26 C.A.R. 392).

— **Dispensing with Notice by Agreement.** The requirement in most weekly hiring awards that a week's notice of termination shall be given on either side or payment or forfeiture made, as the case may be, of a week's wages, would not appear to prevent the parties agreeing between themselves **at the instance of the employee** to terminate the contract at any time with payment for time worked only.

Where, for instance, an employer gives notice of termination to an employee and the latter himself desires to terminate his employment as soon as possible, the employer would not be prevented from agreeing to allow the employee to quit immediately if the latter desires to do so, with payment up to the time of leaving only.

In taking such action, however, the employer should ensure that he obtains clear evidence of the willingness of the employee

**TERMINATION OF EMPLOYMENT—Dispensing with Notice by Agreement—Continued.**

to accept such an arrangement in order to protect himself from a possible claim for payment in lieu of notice.

In the case of award-free employees the parties may agree to dispense with notice.

- **Divulging of Reasons for Termination.** When giving an employee notice of termination of his services, as required by the relevant award, or the contract of employment, an employer is not obliged to divulge the reason for such action. (See *Transport Workers Case* 64 C.A.R., 103 at p. 104 and *Western Suburbs District Ambulance Committee v. Tipping* (1957) A.R. (N.S.W.) 273.)

A coal-mining award provided that "14 days' notice shall be given by either side to terminate the contract of service." The manager of a colliery gave 14 days' notice to two employees without stating any reason for their dismissal. It was held by Scholes, J., that the manager in giving the notice was exercising a legal right, and that the Court had no power to enquire into his reasons for giving the notice, it being admitted that the notice was not a breach of s. 52 (unlawful dismissal) of the Act. (*In re Corrimal—Balgownie Collieries* (1912) A.R. (N.S.W.) 97.) See also **Victimization**.

- **During Absence of Employee.** See **Termination of Employment—Absent Employees.**
- **During Stand-down Period.** See **Termination of Employment—Stand-down Period—During; Termination of Employment—Absent Employees.**
- **Employer's Right to Select Employees for Discharge.** See **Management of Shop or Business.**

- **Failure to Give Notice—Weekly Hiring.** Under many weekly hiring provisions of awards, failure by either party to give a week's notice of termination of employment necessitates the payment or forfeiture of a week's wages, as the case may be.

The application of this provision, in cases where the employee fails to give notice, has given rise to much uncertainty and difficulty. Apart from the fact that in many cases insufficient moneys are held in hand to enable the employer to take advantage of the provision, in appropriate cases, to impose forfeiture of a week's wages, it is often difficult to establish that an employee who "walks off the job" has actually terminated his employment (but see **Termination of Employment—Absenteeism** for). If he is treated as an absentee and summarily dismissed, however, payment must be made for all time worked up to the time of dismissal, and no question of forfeiture of wages arises.

*Meaning of "Forfeiture of a Week's Pay".*

Another point of uncertainty is the question of what is actually meant by "a week's wages" for this purpose; as there does not appear to have been any judicial pronouncement on this point.

It would appear, however, that the specific reference to forfeiture of a week's wages in the award provisions referred to, means more than forfeiture of the wage which would normally be payable for the days worked in the current week, as the word "forfeiture" in such case appears to connote the loss of a full week's wages in the same way as the employer is obliged to pay a full week's wages if he terminates the employment without the requisite notice. If the employee leaves during the week he has no right at common law to wages for such week (see *Halsbury's Laws of England*, 3rd Ed., Vol. 25, pp. 479-480), but he cannot be said to forfeit a week's pay when, for example, he works only 2 days in a week in which he gives notice, and is paid for

**ATTACHMENT C**

***METAL INDUSTRY AWARD 1971 – CLAUSE 6 – CONTRACT OF  
EMPLOYMENT***

25L  
for Casual  
at 434

IN THE COMMONWEALTH CONCILIATION AND ARBITRATION COMMISSION

In the matter of the Conciliation and Arbitration Act 1904-1970

and of

THE METAL INDUSTRY AWARD, 1971

(C Nos 1128 and 1853 of 1971)

On 24 November 1971 the Commonwealth Conciliation and Arbitration Commission (Commissioner Hood) issued the following statement and made the award hereinafter appearing:

1971.  
Sydney,  
Nov. 24,  
Commr  
Hood.

The Commission having made an interim award known as the Metal Industry Interim Award 1971 on 2 July 1971 and since that date having made several separate orders concerning matters dealt with progressively, it is now in a position to embody all such orders in one award which shall be known as the Metal Industry Award 1971.

Certain other clauses which form part of the Metal Trades Award 1952, as varied were not directly written into the said interim award, but were made applicable by virtue of an overall prescription written into the interim award. Such clauses as are relevant are now expressly written into the award now handed down.

In the process of bringing all the foregoing provisions into the one award the opportunity has been taken to bring together all related matters and to insert sub-headings which will simplify reference to the document.

The award will come into operation on and from this day 24 November 1971 and remain in force until 30 June 1972.

The one remaining decision not yet incorporated in the award relates to the trigger classifications and definition thereof which is currently the subject of discussions between the parties. In due course a formal order will be issued.

*Award, order and prescribe:*

METAL INDUSTRY AWARD, 1971 (Part 1)

PART 1—WAGES EMPLOYEES

1—TITLE

This award shall be referred to as the 'Metal Industry Award, 1971'.

2—ARRANGEMENT

Subject Matter	Clause Number	Page Number
Abandonment of employment	6	6
Absence from duty	6	6
Accommodation and conveniences	39	60
Aged and infirm workers	34	53
Annual close down	25	49
Annual leave	25	47
Apprenticeship	14	27
Apprenticeship to metal polishing	15	31
Apprenticeship—additional provisions for specified trades	16	33
Parental leave	26	50



## AWARD—METAL INDUSTRY

[Commr Hood

ERY

and repair of fluorescent lighting,  
conducting of electricity,  
insuring and controlling devices for  
sure, time, etc.  
industrial gases (other than coal gas),  
metallic containers.

bonderising.  
varnish.  
synthetic resins, or similar materials  
in pastes, powders, tablets, etc., as used

repairing.

cleaning and repair of ventilating and

cleaning and repair of vehicles (except where  
provided in a special award).  
cleaning washers and similar articles.  
cleaning, etc.  
cleaning and repair of scales and weighing

cleaning and repair of watches and clocks.

cleaning and repair of motor engines, and/or  
electrical parts including the trans-  
missions and other motor driven vehicles.

metallic articles.

chemical engraving.  
metal wire.  
wiring equipment and plant, and

metal trades industries.  
maintenance, repair and recon-  
struction of metal and/or other material

transport in connection with any

operation, maintenance, repair and recon-  
struction services (including power supply) in  
any of the occupations and callings described herein and

carried on or performed in or in  
connection with any of the foregoing industries.

in any clause wherever expressed may  
be taken to include any other work of a  
similar nature whatsoever.

in Schedule 'A' and the members

(ii) all employees whether members of an organisation of employees mentioned in  
Schedule 'A' to this award or not, engaged in any of the occupations, industries or  
callings specified herein;

(iii) Metal Trades Industry Association of Australia, Metal Industries Association, South  
Australia, Metal Industries Association Tasmania and The Victorian Chamber of  
Manufacturers and members of such organisations of employers; and

(iv) the employers specified in Schedule 'B'.

(b) In Queensland—

(i) Metal Trades Industry Association of Australia and the members thereof as to  
all employees whether members of an organisation of employees or not, engaged  
in any of the occupations, industries or callings specified herein; and

(ii) the organisations of employees mentioned in Schedule 'A' hereto and the members  
of such organisations of employees.

## 5—DATE AND PERIOD OF OPERATION

This award shall come into operation on and from the beginning of the first pay period to  
commence on or after 24 November 1971 and shall remain in force until 30 June 1972.

## 6—CONTRACT OF EMPLOYMENT

*Weekly Employment*

(a) Except as provided in sub-clause (c) hereof employment shall be by the week. Any  
employee not specifically engaged as a casual employee shall be deemed to be employed by  
the week.

*Part Time Employment of Females*

(b) (i) A female employee may be engaged by the week to work on a part-time basis  
for a constant number of hours less than forty each week. A female so engaged shall be paid  
per hour one-fortieth of the weekly rate prescribed by this award for the work she performs.

(ii) A female engaged on a part-time basis shall be entitled to payments in respect of  
annual leave, public holidays and sick leave arising under this award on a proportionate basis  
calculated as follows:

(1) Annual Leave

Where the female has completed twelve months' service—three weeks' leave at the  
number of fixed hours normally worked each week.

Where the female is entitled to *pro rata* leave on termination or at a close down  
in accordance with this award for each completed week of service she shall receive  
an entitlement in accordance with the following formula—

$$\frac{\text{Number of fixed hours worked each week} \times 3}{52}$$

(2) Public Holidays

Where the normal paid hours fall on a public holiday and work is not performed  
by the female she shall not lose pay for the day.

Where the female works on the holiday she shall be paid in accordance with  
clause 22 of the award.

(3) Sick Leave

During the first year of any period of service with an employer she shall not be  
entitled to leave in excess of the fixed number of hours worked each week. Provided  
that during the first six months of any period of service with an employer, sick  
leave shall accrue at the rate of one-sixth of the fixed number of hours worked each  
week for every completed month of service.

Provided further that on application by the employee during the seventh month  
of employment and subject to the availability of an unclaimed balance of sick leave  
the employee shall be paid for any sick leave taken during the first six months  
and in respect of which payment was not made.

During the second and subsequent years of any period of service with an employer  
she shall not be entitled to leave in excess of an amount calculated as follows—

$$\frac{\text{Number of fixed hours worked each week} \times 8}{5}$$

(iii) A part-time female who works in excess of the hours fixed under her weekly contract  
of employment shall be paid overtime in accordance with clause 21 of this award.

## AWARD—METAL INDUSTRY

*Commr Hood]*

(iv) The unions respondent to this award are at liberty to apply to vary the provisions of this clause at any time should the circumstances relating to the employment of females on a part-time basis so require.

*Casual Employment*

(c) A casual employee is one engaged and paid as such. A casual employee for working ordinary time shall be paid per hour one-fortieth of the weekly rate prescribed by this award for the work which he or she performs, plus 15 per cent.

*Termination of Employment*

(d) (i) Employment except in the case of casual employees, shall be terminated by a week's notice on either side given at any time during the week or by the payment or forfeiture of a week's wages as the case may be.

(ii) Notwithstanding the provisions of paragraph (i) hereof the employer shall have the right to dismiss any employee without notice for malingering, inefficiency, neglect of duty or misconduct and in such cases the wages shall be paid up to the time of dismissal only.

(iii) Where an employee has given or been given notice as aforesaid he shall continue in his employment until the date of the expiration of such notice. Any employee who having given or been given notice as aforesaid without reasonable cause (proof of which shall lie on him) absents himself from work during such period shall be deemed to have abandoned his employment and shall not be entitled to payment for work done by him within that period. Provided that where an employer has given notice as aforesaid, an employee other than a casual employee, on request, shall be granted leave of absence without pay for one day in order to look for alternative employment.

*Standing Down of Employees*

(c) Notwithstanding anything elsewhere contained in this clause:

(i) The employer shall have the right to deduct payment for any day the employee cannot be usefully employed because of any strike or through any breakdown in machinery or any stoppage of work by any cause for which the employer cannot reasonably be held responsible.

(ii) An employer in the State of New South Wales who by reason of the failure or shortage of electric power is unable to carry on his undertaking during the working hours of the day may deduct from the wages of an employee payment for any part of a day in excess of 20 minutes such employee cannot be usefully employed. Provided that any employee who is required to attend for work on any day but for whom for the reason abovementioned no work is provided shall be entitled to two hours' pay and provided further that where any employee commences work he shall be entitled to be provided with four hours' employment or failing which be entitled to be paid as for four hours' work.

*Babcock and Wilcox Australia Ltd*

(iii) Babcock and Wilcox Australia Limited, Park Road, Regents Park in the State of New South Wales shall be entitled to deduct from the wages of any employee payment for any part of a day such employee cannot be usefully employed because of any strike or stoppage of work within the company's works by any of the company's employees. Leave is reserved to any of the parties to apply at any time for the deletion of this provision from the award.

*Absence from Duty*

(f) An employee (other than an employee who has given or received notice in accordance with sub-clause (d) of this clause) not attending for duty shall except as provided by clause 24 of this award, lose his pay for the actual time of such non-attendance.

*Abandonment of Employment*

(g) (i) The absence of an employee from work for a continuous period exceeding three working days without the consent of the employer and without notification to the employer shall be *prima facie* evidence that the employee has abandoned his employment.

(ii) Provided that if within a period of fourteen days from his last attendance at work or the date of his last absence in respect of which notification has been given or consent has been granted an employee has not established to the satisfaction of his employer that he was absent for reasonable cause, he shall be deemed to have abandoned his employment.

(iii) Termination of employment by abandonment in accordance with this sub-clause shall operate as from the date of the last attendance at work or the last day's absence in respect of which consent was granted, or the date of the last absence in respect of which notification was given to the employer, whichever is the later.

## AWARD—METAL INDUSTRY

[Commr Hood

*Prohibition of Bans, Limitations or Restrictions*

(h) (i) Where—

- (a) A Commissioner or the Registrar has been notified that a ban, limitation or restriction upon the performance of work in accordance with this award has occurred or is likely to occur, and
- (b) such ban, limitation or restriction or likely ban, limitation or restriction has been the subject of a conference convened by, or a hearing before, the Commission (whether or not all parties concerned appear or are represented at such conference or hearing), and
- (c) the Commission has determined a period within which such ban, limitation or restriction or likely ban, limitation or restriction shall terminate, and
- (d) such period has elapsed,

no organisation (whether of employers or employees) party to this award shall in any way, whether directly or indirectly, be a party to or concerned in such ban, limitation or restriction.

(ii) An organisation shall be deemed to commit a new and separate breach of this sub-clause on each and every day in which it is directly or indirectly a party to such ban, limitation or restriction.

*Time Keeping—Late Comers*

(i) Notwithstanding anything elsewhere contained in this award an employer may select and utilise for time keeping purposes any fractional or decimal proportion of an hour (not exceeding quarter of an hour) and may apply such proportion in the calculation of the working time of employees who without reasonable cause promptly communicated to the employer, report for duty after their appointed starting times or cease duty before their appointed finishing times.

An employer who adopts a proportion for the aforesaid purpose shall apply the same proportion for the calculation of overtime.

## 7—PAYMENT OF WAGES

(a) Wages shall be paid weekly or fortnightly. Where an employer and an employee agree, the employee may be paid his wages by cheque.

(b) On the first pay day occurring during his employment, an employee shall be paid whatever wages are due to him up to the completion of his work on the previous day. Provided that this sub-clause shall not apply to employers who make a practice of allowing advances to employees approximating wages due.

(c) Upon determination of the employment wages due to an employee shall be paid to him on the day of such determination or forwarded to him by post on the next working day.

(d) An employee kept waiting for his wages on pay day for more than six minutes after the usual time for ceasing work shall be paid at overtime rates after that six minutes.

(e) On or prior to pay day, the employer shall state to each employee in writing the amount of wages to which he is entitled, the amount of deductions made therefrom, and the net amount being paid to him.

## 8—WEEKLY WAGE RATES

*Adult Males and Females*

(a) (i) An adult female employee (other than apprentices or employees for whom a certificate under Section 48 of the Act is in force) employed in a classification appearing in sub-clause (b) hereof shall be paid per week in accordance with the following prescriptions:

Date of Operation	Amount of Female Rate
Up to 1st January, 1972	95 per cent of the appropriate male rate at the date of operation.
From 1st January, 1972	100 per cent of the appropriate male rate.

The total wage shall be calculated to the nearest 5 cents, any broken part of 5 cents in the result not exceeding 2 cents to be disregarded.

(ii) The rates prescribed for adult males in sub-clauses (c), (d) and (e) of this clause shall apply to adult females.

(b) Subject to clause 9, the weekly wage rates to be paid to adult male employees and from 1 January, 1972, to adult female employees (other than apprentices or employees for whom a certificate under Section 48 of the Act is in force) shall be as follows:



**ATTACHMENT D**

***METAL INDUSTRY AWARD 1984 – PART I – CLAUSE 6 –  
CONTRACT OF EMPLOYMENT***

*Conciliation and Arbitration Act 1904*

# **Metal Industry Award, 1984 — Part I**

[REPRINT ISSUED PURSUANT TO s.195 OF THE ACT  
INCORPORATING ALL VARIATIONS TO 19 JULY 1985 (V014)]

DATE OF ISSUE: 14 FEBRUARY 1986

26 FEB 1986

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4 - Parties bound (a) - contd

- (iii) Metal Trades Industry Association of Australia, Metal Industries Association, South Australia, Metal Industries Association Tasmania and The Victorian Chamber of Manufactures and members of such organizations of employers; and
- (iv) Subject to Appendix B - Steel Industry Establishments - BHP Group, the employers specified in Schedule "A".

In Queensland

- (b) (i) Metal Trades Industry Association of Australia and the members thereof as to all employees whether members of an organization of employees or not, engaged in any of the occupations, industries or callings specified herein; and
- (ii) The organizations of employees mentioned in subclause (a)(ii) of this clause and the members of such organizations of employees.

## 5 - DATE AND PERIOD OF OPERATION

This award shall come into operation on and from the beginning of the first pay period to commence on or after 19 March 1984\* and shall remain in force for a period of 3 months.

## 6 - CONTRACT OF EMPLOYMENT

Weekly employment

(a) Except as provided in subclause (c) hereof employment shall be by the week. Any employee not specifically engaged as a casual employee shall be deemed to be employed by the week.

Part-time employment of females

- (b) (i) A female employee may be engaged by the week to work on a part-time basis for a constant number of hours which having regard to the various ways of arranging ordinary hours shall average less than 38 hours per week.
- (ii) A female employee so engaged shall be paid per hour one thirty-eighth of the weekly rate prescribed by clause 8 for the classification in which she is engaged.
- (iii) A female employee engaged on a part-time basis shall be entitled to payments in respect of annual leave, public holidays and sick leave arising under this award on a proportionate basis calculated as follows:

- (1) Annual Leave

Subject to the provisions of clause 25:

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\* The award came into force on this date and continues in force pursuant to section 58 of the Conciliation and Arbitration Act 1904. The several variations included herein came into operation on various dates - for particulars thereof see the variation list appended to this award.

6 - Contract of employment (b)(iii)(1) - contd

\* Where the female employee has completed twelve months' continuous service - four weeks' leave at the number of ordinary hours which would otherwise have been worked during the period of leave.

\* Where the female employee is entitled to pro rata leave on termination or at a close down in accordance with this award she shall receive 2.923 hours paid at the appropriate rate of wage for each 38 ordinary hours worked.

## (2) Public holidays

Where the normal paid hours fall on a public holiday and work is not performed by the female employee, such employee shall not lose pay for the day.

Where the female employee works on the holiday, such employee shall be paid in accordance with clause 22 of this award.

## (3) Sick leave

First year of employment

During the first year of any period of service with an employer the female employee shall be entitled to sick leave equivalent to the average number of hours worked each week in accordance with subclause (b)(i) of this clause.

During the first five months of any period of service with an employer, sick leave shall accrue at the rate of one fifth of the average number of hours worked each week for every completed month of service. Provided further that on application by the employee during the sixth month of employment and subject to the availability of an unclaimed balance of sick leave the female employee shall be paid for any sick leave taken during the first five months and in respect of which payment was not made.

Second or subsequent years of employment

During the second or subsequent years of any period of service with an employer the female employee shall not be entitled to leave in excess of an amount calculated as follows:

$$\frac{\text{Average number of hours worked in each week} \times 8}{5}$$

## (4) Bereavement leave

Where a part-time female employee would normally work on either or both of the two working days following the death of a close relative which would entitle an

6 - Contract of employment (b)(iii)(4) - contd

employee on weekly hiring to bereavement leave in accordance with clause 26 of this award, the female employee shall be entitled to be absent on bereavement leave on either or both of those two working days without loss of pay for the day or days concerned.

Overtime

- (iv) A part-time female employee who works in excess of the hours fixed under the contract of employment, shall be paid overtime in accordance with clause 21 of this award.

Casual employment

(c) A casual employee is one engaged and paid as such. A casual employee for working ordinary time shall be paid per hour one thirty-eighth of the weekly award wage prescribed herein for the work which he or she performs, plus 20 per cent.

Termination of employment

## Notice of termination by employer

[6(d) substituted by V009 from 01Feb85]

- (d) (i) (1) In order to terminate the employment of an employee the employer shall give to the employee the following notice:

<u>Period of continuous service</u>	<u>Period of notice</u>
1 year or less	1 week
1 year and up to the completion of 3 years	2 weeks
3 years and up to the completion of 5 years	3 weeks
5 years and over	4 weeks

- (2) In addition to the notice in subparagraph 6(d)(i)(1) hereof, employees over 45 years of age at the time of the giving of the notice with not less than two years continuous service, shall be entitled to an additional week's notice.
- (3) Payment in lieu of the notice prescribed in subparagraphs 6(d)(i)(1) and/or 6(d)(i)(2) hereof shall be made if the appropriate notice period is not given. Provided that employment may be terminated by part of the period of notice specified and part payment in lieu thereof.
- (4) In calculating any payment in lieu of notice the wages an employee would have received in respect of the ordinary time he or she would have worked during the period of notice and his or her employment not been terminated shall be used.

6 - Contract of employment (d)(i) - contd

(5) The period of notice in this clause shall not apply in the case of dismissal for conduct that justifies instant dismissal, including malingering, inefficiency or neglect of duty, or in the case of casual employees, apprentices, or employees engaged for a specific period of time or for a specific task or tasks.

(6) For the purposes of this clause, continuity of service shall be calculated in the manner prescribed by subclause 25(e) - Calculation of continuous service of this Award.

## Notice of termination by employee

(ii) The notice of termination required to be given by an employee shall be the same as that required of an employer, save and except that there shall be no additional notice based on the age of the employee concerned.

If an employee fails to give notice the employer shall have the right to withhold moneys due to the employee with a maximum amount equal to the ordinary time rate of pay for the period of notice.

## Time off during notice period

(iii) Where an employer has given notice of termination to an employee, an employee shall be allowed up to one day's time off without loss of pay for the purpose of seeking other employment. The time off shall be taken at times that are convenient to the employee after consultation with the employer.

## Statement of employment

(iv) The employer shall, upon receipt of a request from an employee whose employment has been terminated, provide to the employee a written statement specifying the period of his or her employment and the classification of or the type of work performed by the employee.

## Summary dismissal

(v) Notwithstanding the provisions of subparagraph 6(d)(i)(1) hereof the employer shall have the right to dismiss any employee without notice for conduct that justifies instant dismissal, including malingering, inefficiency or neglect of duty and in such cases the wages shall be paid up to the time of dismissal only.

## Unfair dismissals

(vi) Termination of employment by an employer shall not be harsh, unjust or unreasonable.

For the purposes of this clause, termination of employment shall include terminations with or without notice.

6 - Contract of employment (d)(vi) - contd

Without limiting the above, except where a distinction, exclusion or preference is based on the inherent requirements of a particular position, termination on the ground of race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction and social origin shall constitute a harsh, unjust or unreasonable termination of employment.

Disputes settlement procedures - Unfair dismissals

(vii) Subject to the provisions of sections 5, 119, 122 and 123 of the Conciliation and Arbitration Act 1904, any dispute or claim arising under paragraph 6(d)(vi) should be dealt with in the following manner.

- (1) As soon as is practicable after the dispute or claim has arisen, the employee concerned will take the matter up with his or her immediate supervisor affording him or her the opportunity to remedy the cause of the dispute or claim.
- (2) Where any such attempt at settlement has failed, or where the dispute or claim is of such a nature that a direct discussion between the employee and his or her immediate supervisor would be inappropriate, the employee shall notify a duly authorised representative of his or her union who, if he or she considers that there is some substance in the dispute or claim, shall forthwith take the matter up with the employer or his or her representative.
- (3) If the matter is not settled it shall be submitted to the Australian Conciliation and Arbitration Commission which shall endeavour to resolve the issue between the parties by conciliation.
- (4) Without prejudice to either party, work should continue in accordance with the award while the matters in dispute are being dealt with in accordance with this paragraph.

Standing down of employees

(e) Notwithstanding anything elsewhere contained in this clause:

- (i) The employer shall have the right to deduct payment for any day the employee cannot be usefully employed because of any strike or through any breakdown in machinery or any stoppage of work by any cause for which the employer cannot reasonably be held responsible.
- (ii) An employer in the State of New South Wales who by reason of the failure or shortage of electric power is unable to carry on his undertaking during the working hours of the day may deduct from the wages of an employee payment for any part of a day in excess of 20 minutes such employee cannot be usefully employed. Provided that any employee who is required to attend for work on any day but for whom for the

6 - Contract of employment (e)(ii) - contd

reason abovementioned no work is provided shall be entitled to two hours' pay and provided further that where any employee commences work he shall be entitled to be provided with four hours' employment or failing which be entitled to be paid as for four hours' work.

Absence from duty

(f) Subject to subclause (c) of clause 7 of this award an employee (other than an employee who has given or received notice in accordance with subclause (d) of this clause) not attending for duty shall, except as provided by clause 24 of this award, lose his pay for the actual time of such non-attendance.

Abandonment of employment

- (g) (i) The absence of an employee from work for a continuous period exceeding three working days without the consent of the employer and without notification to the employer shall be prima facie evidence that the employee has abandoned his employment.
- (ii) Provided that if within a period of fourteen days from his last attendance at work or the date of his last absence in respect of which notification has been given or consent has been granted an employee has not established to the satisfaction of his employer that he was absent for reasonable cause, he shall be deemed to have abandoned his employment.
- (iii) Termination of employment by abandonment in accordance with this subclause shall operate as from the date of the last attendance at work or the last day's absence in respect of which consent was granted, or the date of the last absence in respect of which notification was given to the employer, whichever is the later.

Prohibition of bans, limitations or restrictions

- (h) (i) Where:
- (1) a Commissioner or the Registrar has been notified that a ban, limitation or restriction upon the performance of work in accordance with this award has occurred or is likely to occur; and
  - (2) such ban, limitation or restriction or likely ban, limitation or restriction has been the subject of a conference convened by, or a hearing before, the Commission (whether or not all parties concerned appear or are represented at such conference or hearing); and
  - (3) the Commission has determined a period within which such ban, limitation or restriction or likely ban, limitation or restriction shall terminate; and
  - (4) such period has elapsed;



6 - Contract of employment (h)(i)(4) - contd

no organization (whether of employers or employees) party to this award shall in any way, whether directly or indirectly, be a party to or concerned in such ban, limitation or restriction.

- (ii) An organization shall be deemed to commit a new and separate breach of this subclause on each and every day in which it is directly or indirectly a party to such ban, limitation or restriction.

Time keeping - late comers

(i) Notwithstanding anything elsewhere contained in this award an employer may select and utilise for time keeping purposes any fractional or decimal proportion of an hour (not exceeding quarter of an hour) and may apply such proportion in the calculation of the working time of employees who, without reasonable cause promptly communicated to the employer, report for duty after their appointed starting times or cease duty before their appointed finishing times. An employer who adopts a proportion for the aforesaid purpose shall apply the same proportion for the calculation of overtime.

## 6A - NO EXTRA CLAIMS

It is a term of this award (arising from the decision of the Australian Conciliation and Arbitration Commission in the National Wage Case 1983 (C Nos 3071, 3087 and 3088 of 1983), the terms of which are set out in Print F2900) that the unions undertake that for a period of two years they will not pursue any extra claims, award or overaward, except where consistent with the Principles.

## 7 - PAYMENT OF WAGES

(a) Deleted.

(b) Wages shall be paid as follows:

- (i) Employee who actually works 38 ordinary hours each week

In the case of an employee whose ordinary hours of work are arranged in accordance with clause 18A(b)(i) or (ii) of this award so that he works 38 ordinary hours each week, wages shall be paid weekly or fortnightly according to the actual ordinary hours worked each week or fortnight.

- (ii) Employee who works an average of 38 ordinary hours each week

Subject to subclauses (c) and (d) hereof, in the case of an employee whose ordinary hours of work are arranged in accordance with clause 18A(b)(iii) of (iv) of this award, so that he works an average of 38 ordinary hours each week during a particular work cycle, wages shall be paid weekly or fortnightly according to a weekly average of ordinary hours worked even though more or less than 38 ordinary hours may be worked in any particular week of the work cycle.