From: Katie-Maree O'Brien [mailto:Katie-Maree.OBrien@aigroup.com.au]
Sent: Wednesday, 7 February 2018 3:36 PM
To: AMOD
Cc: Chambers - Lee C; Katie Biddlestone; Julia Fox; Matthew Galbraith (matt@sda.org.au); Michael Mead
Subject: Four Yearly Review of Modern Award: Fast Food Industry Award 2010: Proceeding No. AM2017/4

Good afternoon

We refer to the above matter, the Conference before Commissioner Lee on 8 February 2018, and attach the following documents:

1. Submissions of The Australian Industry Group dated 7 February 2018; and
2. *Remington Products Australia Pty Ltd v Energizer Australia Pty Ltd* [2008] FCAFC 47.

Kind regards
Katie-Maree

Email from Ai Group Workplace Lawyers – Confidential & Privileged

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Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Fast Food Industry Award 2010
(AM2017/49)

7 February 2018

4 YEARLY REVIEW OF MODERN AWARDS –

FAST FOOD INDUSTRY AWARD 2010

(AM2017/49)

Ai GROUP SUBSTANTIVE CLAIMS

1. The Australian Industry Group (**Ai Group**) refers to the letter from the SDA dated 1 February 2018.

2. This submission responds to the objection raised by the SDA in the letter dated 1 February 2018.

3. Ai Group submits that the objection ignores the relevant history relating to the *Part-time and Casual Employment Decision* [2017] FWCFB 3541 (**Part-time and Casual Employment Decision**).

4. Ai Group notes the relevant history is:

    a. On 2 March 2015 and 7 October 2016, Ai Group filed its proposed variations to the *Fast Food Industry Award 2010* (**Fast Food Award**).

    b. At the time of the filing of the proposed variations, Ai Group could not predict the outcome in the Part-time and Casual Employment Decision or the variations to the modern awards as a result of the Part-time and Casual Employment Decision.

    c. On 5 July 2017, a Full Bench of this Commission published the Part-Time and Casual Employment Decision.

    d. On 24 November 2017, the Full Bench made its determinations to give effect to the Part-time and Casual Employment Decision in relation to the part-time provisions in the *Hospitality Industry*

(General) Award 2010, the *Registered and Licensed Clubs Award 2010* and the *Restaurant Industry Award 2010*.

e. By the Part-time and Casual Employment Decision and the determinations, the Full Bench established (in effect) a new standard for a part-time and casual employment clause for inclusion in modern awards (especially hospitality and hospitality-related awards).

f. On 8 November 2017, at a directions hearing in these proceedings before Ross J, Ai Group foreshadowed to the Commission an intention to apply to vary the Fast Food Award so as to insert a new part-time employment clause but subject to modifications suited to the fast food industry.

g. On 30 November 2017, Ai Group filed a submission proposing a variation to the part-time provision in the Fast Food Award based on the standard part-time and casual employment clause inserted into the hospitality and hospitality-related awards.

h. On 1 December 2017, the Commission directed Ai Group to file a submission identifying the claims it was pressing concerning the Fast Food Award.

i. On 21 December 2017, Ai Group filed a submission identifying (as its fourth claim) its new part-time employment clause based on the standard part-time and casual employment clause inserted into the hospitality and hospitality-related award.

5. Ai Group notes that the four yearly review is not *inter partes* proceedings but comprises the Commission undertaking (independently of the parties) its own examination of modern awards (such as the Fast Food Award) as required by section 156 of the *Fair Work Act* 2009 (Cth) (**FW Act**) (see

Penalty Rates Decision [2017] FWCFB 1001 at [110], [837], [995], [1156]; *Penalty Rates Transitional Arrangements* [2017] FWCFB 3001 at [50]).

6. Ai Group notes that the Commission has not yet commenced (or formally commenced) its four yearly review of the Fast Food Award and the parties have not yet filed the evidence upon which they intend to rely.

7. Ai Group notes that its proposed variation to the part-time employment clause will ensure that the Fast Food Award is consistent with the standard part-time and casual employment clause (subject to industry differences).

8. Ai Group submits that it is an important consideration in conducting a four yearly review (flowing from section 138(g) of the FW Act) for modern awards to contain (where appropriate) standard clauses (subject to industry differences) so as to meet the objective of ensuring a simple and easy to understand award system.

9. Ai Group submits that, insofar as the SDA cites the Statement of Ross J of 1 December 2014 at [19] (which identifies that inefficiency and the risk of inconsistent decisions was at the centre of the decision to convene a Casual and Part-time Employment Full Bench), the hearing of its proposed variation to the part-time employment clause will not create any inefficiency in the proceedings nor is there any risk of inconsistency of decisions (but only will enable the Commission in these proceedings to benefit from the decision of the Full Bench in the Part-time and Casual Employment Decision and provide the opportunity to make a determination having regard to the specific circumstances of the fast food industry).

10. Ai Group further notes that the SDA has not identified prejudice from the proposed variation to the part-time employment clause.

11. Ai Group submits that the Commission should reject the SDA objection and proceed to determine its proposed variation to part-time employment clause.

Remington Products Aust Pty Ltd v Energizer Australia Pty Ltd

Jump to:

Court:	Federal Court of Australia Full Court
Judges:	Tamberlin J, Jacobson J, Edmonds J
Judgment Date:	27/3/2008
Jurisdiction:	Australia (Commonwealth)
Court File Number:	NSD378 OF 2008
Citations:	[2008] FCAFC 47, (2008) 246 ALR 113, (2008) ATPR 42-228, [2009] ALMD 363
Party Names:	Remington Products Australia Pty Ltd, Energizer Australia Pty Ltd
Legal Representatives:	Counsel for the Appellant: R B S Macfarlan QC with J Baird; Solicitor for the Appellant: Deacons; Counsel for the Respondent: A Bannon SC with D T Kell; Solicitor for the Respondent: Gilbert + Tobin
Classification:	» High Court and Federal Court > Federal Court > Original jurisdiction > Remedies and orders > Other matters

Judgment

Remington Products Aust Pty Ltd v Energizer Australia Pty Ltd

Procedure — primary judge made supplemental orders subsequent to making final orders in an application under the Trade Practices Act — power to make supplemental orders — circumstances where supplemental orders appropriate — decision of primary judge upheld

Legislation Considered
Federal Court of Australia Act 1976 (Cth), ss 22, 23

Cases Cited
Australian Competition & Consumer Commission v The Shell Company of Australia Limited (1997) 72 FCR 386 referred to
Caboolture Park Shopping Centre Pty Ltd (In Liquidation) v White Industries (Qld) Pty Ltd (1993) 45 FCR 224 discussed
Jackson v Sterling Industries Limited (1987) 162 CLR 612 referred to
Pelechowski v Registrar, Court of Appeal (NSW) (1999) 198 CLR 435 referred to
Preston Banking Co v William Allsup & Sons [1895] 1 Ch 141 cited
Re Scowby; Scowby v Scowby [1897] 1 Ch 741 at 754 referred to
VTAG v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 141 FCR 291 referred to

1. The appeal is dismissed, with costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the *Federal Court Rules.*

Tamberlin, Jacobson and Edmonds JJ

1 The appellant, Remington Products Australia Pty Ltd, appeals from the judgment of Moore J delivered on 11 March 2008 in which his Honour made orders additional to the final orders of the court made on 14 December 2007.

2 Although the notice of appeal raises a substantial number of grounds, the essence of the appeal is that Remington submits the primary judge did not have power to make the March orders. Remington submits in the alternative that if his Honour did have power, the primary judge did not exercise it within established authority, as the circumstances existing did not render necessary the making of the March orders. There was also argument about the form of the March orders, but these were subsidiary matters to the essential questions to which we have referred.

3 Orders 2, 5 and 6 of the final orders made in December 2007 are in the following terms.

> "2. Order that on and from 23 January 2008 the Respondent whether by its servants or agents or otherwise be permanently restrained from supplying or distributing Current Varta High Energy AA or AAA Batteries in Current Varta High Energy Packaging.
>
> 5. Order that on and from 23 January 2008 the Respondent whether by its servants or agents or otherwise be permanently restrained from making any representation in trade or commerce that or to the effect that Current Varta High Energy AA or AAA Batteries last as long as Energizer or Duracell.
>
> 6. Note that it shall not be a breach of the previous order to make a representation in trade or commerce that or to the effect that Current Varta High Energy AA or AAA Batteries last as long as Energizer Max or Duracell CT."

4 The orders which the primary judge made in March 2008 are in the following terms:

> "2. The respondent forthwith take all available steps:
>
> (a) to have removed from public display, by 11 April 2008, all Current Varta High Energy AA or AAA Batteries in Current Varta High Energy Packaging in retail stores to which it has supplied Current Varta High Energy AA or AAA Batteries in Current Varta High Energy Packaging;
>
> (b) alternatively to sub-paragraph (a), to oversticker (or otherwise obliterate or conceal from view) before 11 April 2008 the sticker on any and all Current Varta High Energy Packaging in so far as it contains the words 'Lasts as Long as Energizer & Duracell'."

5 There was no dispute between parties that the December orders were final.

6 The history of the litigation between the parties is set out in [2] to [12] of the reasons of the primary judge in his judgment of 11 March 2008. We do not need to repeat what was set out by his Honour in narrating the history of the proceedings.

7 The disposition of this appeal turns upon whether his Honour correctly applied the principles stated by a Full Court in *Caboolture Park Shopping Centre Pty Ltd (In Liquidation) v White Industries (Qld) Pty Ltd* (1993) 45 FCR 224 at 234-236.

8 In *Caboolture*, the Full Court accepted that the true principle which governs the Court's power to make supplemental orders was stated by Lord Lindley in *Preston Banking Co v William Allsup & Sons* [1895] 1 Ch 141 at 143-144. Lord Lindley there stated that the power may be exercised where circumstances have " … since occurred which [have] rendered a supplemental order necessary." The Full Court observed at 235 that critical to the jurisdiction of the Court is first that the application not be one in any way to vary or alter the initial order.

9 Their Honours went on to say that assistance may be obtained from the decision of the Court of Appeal in *Re Scowby; Scowby v Scowby* [1897] 1 Ch 741 at 754. In that case the language used by Smith LJ was that the supplemental order " … did not touch the previous orders … "

10 The Full Court in *Caboolture* went on to say at 235 that there are many cases where supplemental orders will be made and the jurisdiction, while no doubt requiring caution, is not limited to the making of orders in aid of the enforcement and working out of original orders, although the making of supplemental orders may be "appropriate" in such cases.

11 In light of what was stated by the Court in *Caboolture*, there are three principal issues which arise on the appeal. These are, first, whether the March orders were a variation or alteration of the December orders. The second is whether the March orders were "supplemental" orders. The third question is whether they were "necessary" within the test stated in the authorities.

12 Senior Counsel for Remington, Mr Macfarlan QC, submitted that the orders which his Honour made on 14 December 2008 constituted a "package" or "suite" of orders which effectively precluded the Court from making the orders for removal or over-stickering contained in Order 2 of the March orders. Mr Macfarlan also submitted that, having declined to make the proposed Order 11 on 14 December 2007, it was not open to the primary judge as a matter of power to make the order for removal and over-stickering, which is contained in the March orders. The effect of Mr Macfarlan's submissions was that, as a matter of substance, these two considerations gave rise to an inconsistency with the December orders. Thus, on his submission, the first and critical condition for the exercise of the power identified in *Caboolture* was not satisfied.

13 However, Mr Macfarlan fairly conceded that Order 5 of the December orders and Order 2 of the March orders (ie, the order for removal or over-stickering) could stand side by side. That concession having been made, it seems to us that the first condition for the exercise of the power was satisfied.

14 We do not consider that the fact that his Honour considered but declined to make the over-stickering order in December gives rise to an inconsistency with the earlier orders or an alteration or variation of them in the sense stated in *Caboolture*. It does not affect the question of power, but it may go to the question of whether the discretion ought to be exercised. The March orders were, in our view, supplemental orders because they were related to the December orders and were incidental to or in aid of the enforcement and working out of those orders.

15 The effect of Remington's submission on the third issue is that *Caboolture* is authority for the proposition that the power to make a supplemental order only arises where the circumstances render it necessary to do so. Mr Macfarlan also submitted that the power is limited by the requirement that the circumstances must be those which have occurred subsequent to the making of the initial order.

16 We do not consider that the word “necessary” is used in *Caboolture* in this limited sense. The expression used in that case was that the supplemental order is to be appropriate to the circumstances of the case.

17 This was effectively recognised by Drummond J in *Australian Competition & Consumer Commission v The Shell Company of Australia Limited* (1997) 72 FCR 386 at 395. His Honour there observed that common law superior courts of record do not become functus officio merely upon the making and entry of the judgment or order that determines the rights of the parties: they retain power in the same suit to make supplemental orders not limited to orders in aid of the enforcement and working out of the orders determining the rights of the parties.

18 His Honour observed that this Court's ancillary powers flow from authority under ss 22 and 23 of the *Federal Court of Australia Act 1976* (Cth) (‘FCA Act’) to resolve the whole of the controversy between the parties. The power of the Court referred to in s 23 of the FCA Act is, in relation to matters, to make such orders including interlocutory orders as the Court thinks appropriate. Clearly enough, the exercise of the power is not confined to interlocutory orders and extends to the making of final orders.

19 Moreover, in *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at [51], the High Court (Gaudron, Gummow and Callinan JJ) observed that the term “necessary” is to be understood as identifying the power to make orders which are reasonably required or legally ancillary to the accomplishment of the specific remedies for enforcement provided in the legislation to which their Honours referred. Their Honours observed that in this setting, the term “necessary” does not have the meaning of “essential”; rather, it is to be subject to the touchstone of reasonableness.

20 It is well-established that the Federal Court has all the powers expressly or by implication conferred by the FCA Act and such powers are as incidental and necessary to the exercise of the power so conferred. The implied powers conferred on the Court are no less than the inherent power of a court of unlimited or general jurisdiction. The implied power carries with it all that is necessary for the proper function of the Court: see *Jackson v Sterling Industries Limited* (1987) 162 CLR 612 at 619; see also *VTAG v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 141 FCR 291 at [30].

21 It is unnecessary for us to determine the question of whether the power is constrained by the requirement that the circumstances relied upon for its exercise must have arisen since the date of the original orders. We say this because the primary judge found at [19] that circumstances had arisen since the date of the making of the December orders.

22 His Honour observed that Remington had embarked on a program of over-stickering, but without the objective of ensuring that this course be undertaken as soon as possible. Second, his Honour found that Remington had communicated with retailers in a way which misrepresented (at least by failing to fully explain) the reason the orders were made on 14 December 2007 and that Remington endeavoured to create “an unjustified measure of comfort” for the retailers if they continued to display and sell batteries in packaging that his Honour had found to be misleading.

23 In our view it was open to the primary judge to take this view. This is sufficient to dispose of the submission that the circumstances which his Honour relied upon to ground the making of the March orders had not occurred after the making of the December orders.

24 Furthermore, there was evidence to which we were taken in argument that established that other new facts had occurred since the December orders which justified the exercise of the power. First, there was evidence that the old stock, which had not been over-stickered, was juxtaposed with new stock in the retail outlets so as to give rise to inconsistent representations as to the effective life of the batteries. This stock was displayed side by side with Energizer's batteries.

25 Second, the steps to over-sticker the stock undertaken by Remington prior to Energizer's application for a supplemental order had been limited to Coles stores, but they excluded Coles Metro stores and had not extended to other retailers, including Kmart, Harvey Norman, BiLo, Bunnings and Office Works. The over-stickering did not commence until approximately 11 January 2008 notwithstanding the Court's orders made on 14 December 2008, which were premised upon the product packaging being misleading and deceptive.

26 In addition, there was evidence to the effect that the over-stickering was being conducted in an unsatisfactory and incomplete fashion. This evidence may be found in the affidavit of R Hollitt sworn 31 January 2008, in particular at [9] to [11]. The evidence disclosed that Remington's representatives over-stickered some of the batteries in a Coles store leaving quantities of batteries continuing to display the impugned sticker.

27 Mr Macfarlan took us to [14] of the reasons of the primary judge. He submitted that the reference in that paragraph to hundreds of thousands of packets in retail stores with misleading stickers was of importance to the decision. He

submitted that this finding was unsustainable in light of the matter to which his Honour next referred in [14], namely, that there was a probably unquantifiable circulation to and within retail organisations of batteries packaged with the old sticker, over-stickered packages and packages with the new sticker.

28 We do not consider that this submission can be sustained. Senior counsel for Energizer, Mr Bannon SC took us to evidence that there were substantial quantities of stock and although this evidence may not have disclosed with precision the quantity it seems to us that the evidence was sufficient to support the finding which the primary judge made.

29 We turn then to the submission as to the form of the orders. It was submitted on behalf of Remington that on one view of the March order it required Remington to both over-sticker and remove the stock from the retail outlets. On this view of the orders, it was submitted that Remington could not choose between the course of over-stickering and removal of the stock and persist with that choice.

30 We do not consider that there is any substance in this submission. In our view the March orders are sufficiently clear in their terms.

31 It was also submitted on behalf of Remington, the March orders required Remington to “take all available steps” and that this order should have been couched in terms of reasonableness. We do not consider that this submission can be sustained. In particular, we were taken to evidence which set out steps that established that Remington has sufficient access to the retail outlets to enable it to give effect to the orders. We do not, therefore, consider that any variation ought to be made to the terms of the existing orders.

32 For these reasons, as we said earlier today, the appeal must be dismissed with costs.