

*Workplace Relations Act 1996*

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Applications for an order for a protected action ballot to be conducted

ASU - BP2008/3401

**OUTLINE OF SUBMISSIONS  
FOR IBM AUSTRALIA LIMITED**

1. The purported application seeks an order for the conduct of a protected action ballot pursuant to Part 9, Division 4 of the *Workplace Relations Act 1996* (the Act).
2. Section 451(1) of the Act permits an organisation of employees that has initiated a bargaining period to apply to the Commission, during a bargaining period, for an order for a ballot to be held to determine whether proposed industrial action has the support of relevant employees.
3. An application pursuant to section 451(1) of the Act may not be made unless a valid bargaining period exists.
4. Division 2 of Part 9 of the Act deals with the initiation of a bargaining period. Section 423 of the Act relevantly applies in relation to a collective agreement that, if made, will be made under section 327 or 328. Subsection 423(2), when read with section 423(1), has the effect that if an organisation of employees wants to try to make a collective agreement under section 327 or 328 of the Act, in relation to employees who are employed in a single business or part of a single business, the organisation may initiate a bargaining period for negotiating the agreement.
5. Section 328 deals with collective agreements between an employer and organisations of employees. It provides that:

*“An employer may make an agreement (**a union collective agreement**) in writing with one or more organisations of employees if, when the agreement is made, each organisation:*

- (a) *has at least one member whose employment in a single business (or part of a single business) of the employer will be subject to the agreement; and*
  - (b) *is entitled to represent the industrial interests of the member in relation to work that will be subject to the agreement.”*
- 6. In the present case, the ASU purported to initiate a bargaining period by notice dated 1 May 2008. The ‘Notice to Initiate a Bargaining Period’ identified the types of employees whose employment would be subject to the proposed collective agreement as “all employees of IBM Australia at the IBM Flightdeck, National Operations Centre, New South Wales.
- 7. No valid bargaining period exists unless on 1 May 2008, the ASU had at least one member employed by IBM Australia at the “Flightdeck” whose industrial interests it was entitled to represent.
- 8. The ASU is only entitled to represent the industrial interests of IBM Australia employees who are eligible to become ASU members in accordance with its Rules.
- 9. It is apparent from the terms of the ASU’s ‘Notice to Initiate a Bargaining Period’ that it relies upon those parts of its Eligibility Rules that define its industry coverage as follows (see 5(a) – Part V, and Part(b) Part V):
  - (i) All employees engaged wholly or partly in the servicing, repairing, maintaining, structurally altering and/or assembling business equipment including cash registers, accounting machines, adding machines, calculators, computers and peripheral equipment.
  - (ii) all persons engaged in any clerical capacity, and/or engaged in the occupation of shorthand writers and typists and/or on calculating, billing, or other machines designed to perform or assist in performing any clerical work whatsoever.

10. Union eligibility rules are to be interpreted liberally and according to their ordinary and popular meaning; see for example *Reg. v. Isaac; Ex parte Transport Workers' Union* [1985] HCA 80; (1985) 159 CLR 323, per Gibbs C.J. at p 335 and Wilson J. at p 340.
11. It cannot be said that the work performed by IBM Australia employees at the “Flightdeck” at the National Operations Centre at Baulkham Hills meets the description in the ASU Rules relied upon when those Rules are properly construed according to their ordinary and popular meaning.
12. On 1 May 2008 the ASU did not have capacity under its Rules governing eligibility for membership to enrol such IBM Australia employees as members.
13. Accordingly, the ASU was not able to validly initiate a bargaining period under the Act in respect of the proposed collective agreement for IBM Australia employees at the “Flightdeck” at IBM Australia’s National Operations Centre.
14. It follows that the present application by the ASU is not competent to invoke the power of the Commission to grant an order for the holding of a secret ballot pursuant to Part 9, Division 4 of the Act.

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