Holman Webb
Lawyers

Workplace Relations

December 2014

Contents

Introduction

Welcome to the Holman Webb Workplace Bulletin inaugural edition.

The Australian workplace environment is one of the most exciting and dynamic areas within the legal industry and indeed the national economy. This year has seen important legislative reform across a wide range of issues affecting rights to request flexible workplace arrangements, return to a safe job during pregnancy, concurrent parental leave, workplace entry for employee organisations and the advent of a new anti-bullying regime. We have also seen some Court decisions which will have serious implications and may change the way we approach our businesses and how we advise our clients.

Our inaugural bulletin discusses one of the most important decisions on workplace law, the recent decision of the High Court on the duty of good faith in Australia. There is also analysis of recent caselaw on awarding damages in discrimination and harassment cases, an interesting defamation case in relation to workplace health and safety decided in South Australia, interpretation of post employment covenants and restraints of trade and developments in relation to enterprise agreement making.

Our team of experts has picked off some hot topics which you will find interesting and relevant in your industry and the day to day operation and management of your staff and the systems which regulate workforce interaction and ensure legal compliance.

The edition also coincides with the festive season which brings to many of us its own set of unique challenges. Accordingly, we have provided you with an overview of what you can do to ensure that your business and all of those within the workplace will be safe and that it will be a memorable season for all. We ask that you give this article your closest attention, as years of experience have showed us that it is a time during which things happen which result in the need for legal assistance. Also for a bit of a change from most legal bulletins we have included a great Christmas cake recipe. Give it a try and let us know what you think.

We hope that you enjoy reading our bulletin and if you have any enquiries, please do not hesitate to contact me or any of the members of our team to assist you, or if someone you know would like to be added to our distribution list.

We wish you the complements of the season and a very safe and productive 2015.

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Deck the Halls with Bows of Holly, Beware the Leftovers of Employee Folly

By Rachael Sutton, Partner and Jacqueline Snell, Special Counsel

Christmas is a wonderful time of the year and office parties and customer and supplier events provide us with an opportunity to celebrate the festive season and our achievements over the year.

Employers can take numerous steps to ensure their workers are safe and act appropriately at end-of-year celebrations such as:

Choice of Venue

Choosing a restaurant is a much safer option than having it at an adult themed venue. Choose a place that's safe, work appropriate and easy to access for all your employees. If you choose a relatively public space, reserve a dedicated area that will remain within your control throughout the event. Organise travel arrangements from the venue such as taxis or public transport, for employees to get home safely.

Start and finish times

Ensure employees know when your party officially starts and ends and remind workers that celebrations that continue after the designated finish time aren't endorsed by the company. In other words, make the distinction between the end of your company-sanctioned Christmas party and the start of unrelated partying as clear as possible. Physically close down the venue at the scheduled end time to make it clear that the party has ended.

Choice of Entertainment

Consider whether the entertainment you have chosen is appropriate. You may think this goes without saying, but you'd be surprised just how many employers set the wrong tone for their event by selecting the wrong type of entertainment. It is a good idea to have actually seen a sample of the entertainment before letting it loose on your employees who may well be offended by it.

Make someone responsible

You need put someone responsible in charge to minimise the chances of something going awry during the event. This should be someone who is sensible and a senior member of your team who is happy either not to drink or to keep their drinking to a minimum. They should monitor any bar tab, ensure that there is food available and that anyone who may have overdone it has a means to travel home safely.

Set clear expectations

The Christmas party is an employment related event and this means employees should be reminded that the function is actually a work event and ensure they know relevant workplace policies – such as WHS, anti-discrimination, sexual harassment and social media policies – apply at the event; You need to inform employees that failure to follow policies and procedures, or any reasonable or lawful direction, could result in disciplinary action, including dismissal. Remind employees about appropriate dress (if it is a themed party) and that presents (eg for Kris Kringle) should not be offensive or inappropriate, to refrain from posting inappropriate messages and photos on social media or online generally or anything that they would not want to see on the front page of the Sydney Morning Herald!

If there are post-party complaints, make sure each issue is dealt with according to your policies.

Celebrations are much more enjoyable for everyone when acceptable standards of behaviour are maintained and much more memorable when there are no disasters to deal with afterwards.

To Imply or Not to Imply - Mutual Trust and Confidence in Employment Contracts

By Robin Young, Partner

The High Court has unanimously held that there is no implied term of mutual trust and confidence in Australian employment contracts.

In August 2013, a majority of a full court of the Federal Court found that all Australian employment contracts had an implied term of mutual trust and confidence. Specifically, the Court held that an employer had breached the implied term of mutual trust and confidence, when it made an executive manager redundant for failure to consider redeployment opportunities in accordance with its policies. This represented a fundamental shift in Australia's workplace relations law as such an implied term had not been so convincingly recognised, as it has been in England.

The High Court of Australia has now unanimously overruled the Federal Court and confirmed that there is no implied term of mutual trust and confidence in Australian employment contracts. The High Court held there was no need to imply such a term into employment contracts finding that to do so would require the Court to assume a regulatory, as opposed to judicial function. The majority Judgement states that the declaration of such an implied term was "a matter more appropriate for the legislature than for courts to determine".

Along with the standard factors to be considered in determining whether a term should be implied or not, the High Court also discussed the mutuality of the implied term. Specifically that the obligations would not only be imposed upon all employers, but also on all employees; employees whose voices had not been heard in this matter. Moreover, the High Court found that the "mutual obligations [are] wider than those which are necessary even allowing for the broad considerations which may inform implications in law".

Additionally, and to avoid any doubt, the High Court held that English authorities which implied the term of mutual trust and confidence into employment contracts are not applicable in Australia. In this regard, we note that the leading English authority deals with the relationship between employer and employee, rather than performance of the employment contract which this case focused upon.

The majority Judgement concluded that the absence of such an implied term should not be taken as reflecting upon the question whether there is a general obligation to act in good faith in the performance of contracts.

Whilst, it is now abundantly clear, that there is no implied term of mutual trust and confidence in Australian employment contracts; you should not assume that the mutual obligations of trust and confidence are wholly banished from Australian employment law. Rather, this case should be seen as a warning to all employers on the importance of understanding the extent of their obligation to maintain trust and confidence in an employment relationship; especially when carrying out any termination and/or disciplinary matter.

Should you have any queries regarding the High Court's decision or need assistance in managing your staff please contact one of our specialised workplace relations team members.

Employment Update – Significant Increases in Damages Awarded by Courts in Sexual Harassment, Discrimination and Adverse Action Claims - *Richardson v Oracle Corporation Australia Pty Ltd*; *Sagona v R & C Piccoli*

By Robin Young, Partner, Alicia Mataere, Senior Associate and Kristen Hammond, Solicitor

Two recent judgments of the Full Federal Court and Federal Circuit Court have resulted in awards of significant damages to employees in cases involving claims of sexual harassment, discrimination and adverse action.

The prevailing trend in recent times has been for courts to adopt a cautious approach when fixing damages in such cases, typically awarding between $12,000 and $20,000. However, a full Federal Court has awarded an employee $130,000 in damages and the Federal Circuit Court awarded an employee over $235,000 in damages and penalties, marking a significant shift away from low awards of damages.

***Richardson v Oracle Corporation Australia Pty Ltd*[1]**

In Richardson the Full Fed eral Court increased Ms. Richardson's original award of damages from $18,000 to $130,000.

Ms Richardson alleged that between April 2008 and December 2008 she was subjected to multiple incidents of unlawful sexual harassment by her colleague while working at Oracle. Ms Richardson's case was that her colleague had subjected her to "a humiliating series of slurs, alternating with sexual advances, from [the colleague] which built into a more or less constant barrage of sexual harassment." The alleged incidents of sexual harassment included:

- making comments regarding he and Ms Richardson having a sexual relationship and "being married" in their past lives, such as stating "so, how do you think our marriage was? I bet the sex was hot" and telling a colleague he and Ms Richardson had a "really hot love/hate thing going on";
- repeatedly propositioning Ms Richardson to begin a sexual relationship with him, including inviting her to "go away for a dirty weekend"; texting and calling her outside of work hours to invite her to meet him at social events; and asking Ms Richardson to "sneak off to a corner" with him;
- making sexually suggestive comments regarding Ms Richardson's appearance, such as "I love your legs in that skirt. I'm going to be thinking about them wrapped around me all day long"; and
- behaving in a sexualised manner towards Ms Richardson in front of their colleagues, such as imputing sexual connotations to comments made to Ms Richardson – for example, when a colleague commented "I'll give it to her", the colleague would say "you will give it to her" in a suggestive manner.

Ms Richardson complained to her direct manager in November 2008, and the matter was escalated to Oracle's Australia and New Zealand Director of Human Resources shortly after. Ms Richardson eventually resigned.

Initially, his Honour Justice Buchanan held that Ms. Richardson had been sexually harassed, that Oracle had contravened section 28B of the Sex Discrimination Act 1984 (Cth)(SD Act) and that Oracle was vicariously liable for the conduct of the colleague who sexual harassed Ms. Richardson. Consequently, Justice Buchanan awarded Ms Richardson general damages of $18,000 in compensation of the distress and embarrassment she had suffered as a result of the sexual harassment.

Ms. Richardson appealed Justice Buchanan's judgment arguing, among other things, that the award of damages was manifestly inadequate.

A full Federal Court agreed that the order of $18,000 was manifestly inadequate and should be replaced with an award of $130,000, comprising of $100,000 in general damages and $30,000 in economic loss. Significantly, the Court relied on prevailing community standards and the beneficial nature of discrimination legislation to substantially increase the damages award, noting that the previously

[1] [2014] FCAFC 82

accepted range of damages in sexual harassment cases would not be determinative.

***Sagona v R & C* Piccoli**[2]

Similarly, in the Federal Circuit Court judgment of Sagona, a breach of the Fair Work Act 2009 (Cth) (FW Act) adverse action provisions led to the award of $174,097 in compensation and a further $61,000 in penalties.

Ms Sagona successfully claimed that Piccoli Photography took adverse action against her because of her pregnancy, gender and family responsibilities. Ms Sagona had been employed as a photographer and salesperson at Piccoli Photography for 12 years and was being groomed by the Company's owners to take over the business. However, when Ms Sagona informed Piccoli Photography that she was pregnant and intended to take maternity leave, Piccoli Photography took adverse action against her which ultimately led to her resignation. Examples of the adverse action included comments such as it was "not a good look" for customers to see a pregnant woman working, that it would make the Piccoli Photography look like "slave drivers" and Ms Sagona look "desperate" for working when she was noticeably pregnant.

In awarding Ms Sagona $164,097 compensation for economic loss and $10,000 in respect of general damages for distress, hurt and humiliation, her Honour took into account the abusive nature of the adverse treatment, Ms Sagona's length of service and the income Ms Sagona would have expected to earn had she assumed responsibility for the day to day running of the business as planned. On consideration of the deliberateness of the conduct and the lack of contrition exhibited by Piccoli Photography her Honour also awarded a total of $61,000 in penalties ($45,000 from Piccoli Photography, and $8,000 each from the Directors).

Implications

The previous low range of damages for matters involving sexual harassment and discrimination can no longer be relied upon. Rather, it appears that Courts, based on changed community standards and the beneficial nature of legislation enshrining protections against discrimination and harassment are far more willing to award substantial damages for such claims. Further, Sagona indicates that employers may be subject to high monetary penalties in relation to breaches of the "civil penalty" provisions of the FW Act.

Accordingly, businesses should take steps to minimise their exposure to such claims by:

(a) review and understand their obligations under relevant legislation, such as the FW Act and human rights legislation like the SD Act;

(b) reinforcing the need for appropriately drafted and compliant contracts and workplace policies, especially those in relation to discrimination, harassment and workplace grievances; and

(c) confirming that staff members are trained and aware of policies and their obligations within those policies.

Businesses need to be aware of the vicarious liability which may be imposed against employers where they have failed to take "all reasonable steps" to prevent the unlawful conduct.

If you would like further information about the above cases or how our dedicated and experienced team of workplace relations practitioners can minimise the risk (and severity) of such claims for you, and your insureds, please contact us.

[2] [2014] FCCA 875

Workplace Defamation a WHS Concern

By Tim Trezise, Senior Associate

A recent SA District Court defamation case has raised some interesting OHS concerns (Tassone v Kirkham). Both Mr Tassone and Mr Kirkham were prison officers. The case concerned a work email that was purportedly sent by Mr Tassone to his workplace colleagues stating: “Hello people, just a note to say that I am homosexual and I am looking for like minded people to share time with.”

Mr Kirkham, after making the admission that he actually sent the email, sought to retract this confession. He then argued that the email had been clearly communicated in jest and that there was no damage done as a consequence to Mr Tassone’s character or reputation.

The email was sent from Mr Tassone’s work email account and was signed off with his electronic signature. The Judge found that Mr Kirkham had in fact sent the email to all on the distribution list. He was then required to decide whether the natural and ordinary meaning of the email, as it was published, was defamatory. The email suggested that Mr Tassone was professing to be homosexual and was seeking other homosexual people to “share time with”, which plainly indicates an interest in forming relationships with any recipient of the email.

The standard of proof for the defamatory imputation is what the ordinary, right thinking members of the community would think of it. The issue was not that Mr Tassone was purportedly professing to be homosexual; the issue was that the email was suggesting that Mr Tassone was promiscuous, of loose moral character and seeking to solicit a sexual relationship with people that he did not otherwise know. It is those meanings that were found to be defamatory.

Mr Tassone upon having this matter brought to his attention and the matter investigated, was forced to go on sick leave, due to stress and anxiety. He subsequently went on to workers compensation payments.

Upon his return to work in an alternate position on the same pay grade, he felt that he had been demeaned as a result of the email and he was unable to continue in that role with the employer, due to an adjustment disorder.

Penalty imposed

Mr Tassone was awarded damages for both economic loss and non-economic loss. The non-economic loss was valued at $75,000 and the economic loss has not yet been determined.

Lesson for employers

The need to ensure that all reasonably practicable steps are taken to ensure the health and safety of employees needs to be addressed by employers. This includes the mental wellbeing of employees in the workplace. This case serves to demonstrate that defamation within the workplace can have significant impact upon employees’ mental wellbeing and that appropriate information technology protocols, email usage policies and associated training should be conducted to ensure that this type of incident does not occur in the workplace.

Should your company require advice on current internet usage policies, employee surveillance policies or social media policies to ensure all reasonably practicable work health and safety obligations are being met, please contact Tim Trezise to discuss.

Court Grants Injunction to Restrain Former Employee Without a Restraint Clause in his Contract

By Rachael Sutton, Partner and Ethan Brawn, Senior Associate

During their employment, employees acquire experience, confidential information, trade secrets and particular skills in the affairs, practices, customer requirements and trade connections of their employer.

An employer does not have any property in its staff. Rather, the employer's interest is delineated by the employment contract. Therefore an employer will need to make provision in the contract to protect the goodwill of its business, that is, have a restraint of trade covenant which operates by restricting either the use of information or the future employment of an employee.

For a restraint covenant to be valid, courts often indicate that the employer needs to have some proprietary right in the interest sought to be restrained. Employers are, therefore, not entitled to be protected against mere competition. Legitimate employer interests which may be protected include the employer's trade secrets and confidential information, customer connections, and staff connections.

At common law, there exists an equitable duty not to misuse confidential information. The effect of the duty is that confidential trade secrets are subject to protection following termination of employment, even where there is no express contractual provision in relation to the information.

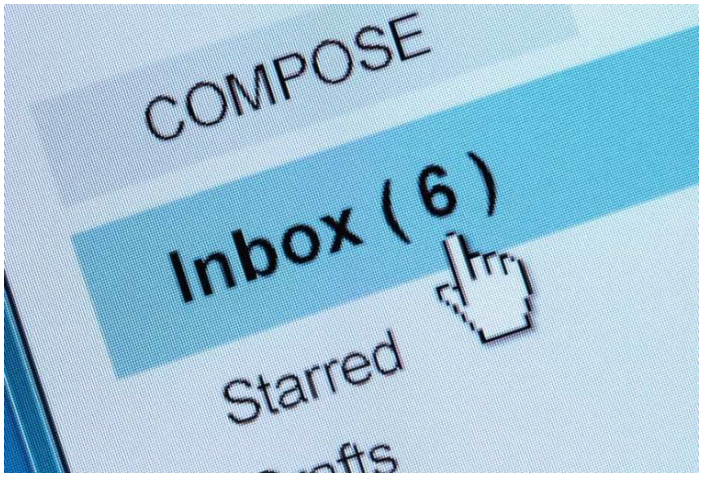
Courts have very broad powers to deal with a former employee who has abused fiduciary obligations. These powers include:

- An injunction preventing the former employee from abusing their fiduciary responsibilities
- Equitable damages compensating the employer for loss the employer has suffered, and
- An account of profits that have been earned by the former employee.

In the matter of *APT Technology Pty Ltd v Aladesaye,* [2014] FCA 966 (5 September 2014) the Federal Court granted an interim injunction restraining a manager from approaching his former employer's clients, despite the absence of an express restraint of trade clause in his contract of employment, finding that he might still be holding confidential information that would give him an unfair advantage.

The employer terminated the employee after it discovered he had set up a business in competition with it some six months' earlier, and had used its confidential information in breach of his contract.

The employer discovered that that the employee had forwarded emails from his work account to his personal account and his new business in the lead-up to the termination of his employment. The emails contained confidential information belonging to APT, including notes and records of confidential discussions between the employer's general manager] and the employee about business opportunities in Adelaide, template documents, client reports, and information about the sale of the employer's office and software previously used in its Adelaide operations.



The employee's contract expressly required him to devote his whole "time, attention and skills" to his duties, and not engage in any business activity in competition with the company. It also said he could not use or disclose the company's confidential information for any purpose other than his role. The employee's position was significant as he was the employer's main point of contact in Adelaide.

Once the employee had been dismissed the employer had encountered difficulty in re-establishing connections with its South Australian based clients.

The Federal Court was satisfied that there was a serious question to be tried that the employee had breached his employment contract and fiduciary duties owed to the employer as there was evidence that:

- he started to compete with the employer during his employment.

- he had disclosed for his own purposes the contents of the employer's client databases, reports prepared by the employer and other business documentation used by the employer

Although the employee's contract did not have an express restraint of trade provision the Court granted the injunction on the basis of the equitable duty not to misuse confidential information and the "springboard principle" to prevent the employee from using its confidential information to its detriment and gaining a substantial advantage over the employer in securing the future business of its existing and former clients .

The Court is yet to decide the employer's claim for other losses that may have occurred as a consequence of the employee's conduct.

Notwithstanding the result of this application, prudent employers should consider whether a restraint clause should be included in contracts for employees with access to confidential information. Employers should also specify what information they consider to be confidential in the employment contract. For the information to be confidential it must be of a sensitive nature and not encroach on the know-how and skill of the employee.

WHS Incident Statements – a Blessing or a Curse?

By Tim Trezise, Senior Associate

Two regulatory powers of compulsion to answer questions contained within the Work Health & Safety Act, were discussed at the SIA Sydney Safety Conference, namely, Sections 171 and 172 of the model Work Health & Safety Act. Section 172 provides that an inspector who enters a workplace, may require a person to produce documents or answer any questions put by the inspector, and Section 172, provides that the person is not excused from answering a question or providing information or a document.

Section 172(2) has the effect that none of those answers or documents are admissible in evidence in Civil or Criminal Proceedings against the person making them, however, the information can be used as evidence in prosecuting other workers and the business.

These rules to compel responses could arguably offend the rule of law in be moving the right to silence. Moreover, they could potentially be perceived as counterintuitive to safety, because they effectively cast a shadow on no blame enquires. This makes the two functions that the inspectors' serve mutually exclusive. They conduct no blame enquiries and also enquiries to apportion blame.

It is sometimes difficult to know when inspectors are searching for facts or preparing a prosecution. It is hard for employers to know whether to obtain the advice of a lawyer, or whether to share information that will be used to improve safety.

Inspectors often conduct interviews and print the responses on documents entitled "Statement" and seek for workers that are involved in the investigation to sign it on the spot. However, such documents, should not be signed, until they are reviewed by legal advisors. Unfortunately, it is possible that inaccurate or misconstrued information could be conveyed, leading to unfortunate consequences to prosecute the business or other workers. Should your business face such a situation, we urge you to seek a review from your legal advisors first.

Workplaces on The Nose

By Tim Trezise, Senior Associate

Safe Work Australia recently released three reports on workplace exposure to lead, formaldehyde and polycyclic aromatic hydrocarbons, which was in furtherance of the results of a 5000 worker 2011/12 Australian Work Exposures Study into 38 identified workplace carcinogens.

Often enough it is the things that employers cannot see that can cause the most harm to employees. The abovementioned noxious fumes in particular have been linked to an increased incidence of cancers. The importance of not only making sure there are control measures in place in your workplace, but also that they are both used and adequate is important.

The study revealed that respirators were often not suited to the application of filtering out these particular toxins in the workplace, if used at all.

Should you require an assessment and advice on the adequacy of your workplace hazard control measures before your workers become ill or your workplace is audited by the regulator, then contact us to arrange a comprehensive assessment to ensure that you are taking all reasonably practicable steps to eliminate or minimise the chances of your workers being harmed at work.

Three Quick Health & Safety Lessons

By Tim Trezise, Senior Associate

Incident 1

An employer was recently penalised for an OH&S breach by the Regulator, irrespective of the fact that an incident had not actually occurred. The Company was ordered to pay almost $10,000 in fines and costs by the Magistrates Court. The company pleaded guilty to failing to properly guard their salting tumblers.

This prosecution followed a visit conducted by a WorkCover Authority of Victoria Inspector in October 2013, who discovered that there was inadequate perimeter guarding surrounding the tumblers, which exposed employees to the danger of the machine's chain drives, belts and pullies. The company was subsequently fined, without conviction for having breached two (2) sections of the State OH&S Act.

Incident 2

A pasta making company was fined $50,000 following an incident where a worker's hand was caught inside the hopper of a cannelloni making machine rotating screw mechanism that dragged a worker's hand into the hopper. It was discovered that had an existing electronic interlock (which was located on the lid of the hopper) been functional, it was likely to have prevented the incident. It had been disconnected. The Company pleaded guilty to a breach of the OH&S Act.

Incident 3

A joinery business failed to report two serious injuries to the WorkCover Authority of Victoria, one of which involved an amputation. Another employee spent two days in hospital after receiving a finger laceration at work. The employer was fined for failing to immediately report the incidents to the WorkCover Authority and for failing to preserve the respective incident sites.

The Company pleaded guilty and received a 12 month adjourned undertaking requiring it to pay $1,500 into a Court fund for the first incident and ordered to pay a $3,000 fine and more than $2,500 in costs in relation to the second incident. This case highlights the importance of understanding the legal obligations on incident reporting and compliance.

Lessons

It is important for employers to be aware of their obligations under Federal and state WHS laws & regulations, in addition to the many codes, guidelines and safety standards that may apply to your industry. Should your business not have a regular and thorough workplace audit safety and reporting system in place and understand the comprehensive legal requirements that the business is subject to, then you should obtain advice on how best to meet your work health and safety obligations and avoid costly and/or catastrophic lessons.

Enterprise Agreements – What's In and What's Out

By Stephen McCarthy, Partner and Alicia Mataere, Senior Associate

It is estimated that more than one third of Australia's workforce is covered by an Enterprise Agreement, with another third covered by a Modern Award. These statistics reflect the fact that Enterprise Agreements can provide many businesses with greater flexibility, freedom from restrictive Award conditions and, among other benefits, industrial peace and harmony at least for the duration of the Agreement. This is not to suggest that achieving quality Enterprise Agreements is something easily achieved, and determining what can (or should) be included in an Enterprise Agreement can itself at times be difficult for employers.

The Fair Work Act 2009 (Cth) provides that there are some provisions which are mandatory and must be included in all Enterprise Agreements. Such required matters include a Nominal Expiry Date, a Disputes Resolution clause, Individual Flexibility clause and a Consultation clause. Whilst wages, hours of work, penalties, allowances and breaks are all important matters which can be and often are negotiated between the parties as part of an Enterprise Agreement, other matters such as wage increases linked to productivity gains, the engagement of labour hire or introduction or increase of casual staff can sometimes create conflict during the negotiation process.

Many productivity improvements are achieved through Enterprise Agreements, despite union resistance to such provisions. It may even be said that unions and employees understand that any wage increase needs to be off-set against some form of productivity improvement. In this regard, we note that the Federal Government is currently considering the introduction of a Bill which will require the Fair Work Commission to specifically consider whether a proposed Agreement contains productivity improvements before giving an Agreement it's approval. (This is intended to also extend to Orders for protected industrial action). Recent statistics show that the average wage increase in Enterprise Agreements was 3.3% in the June quarter 2014, down from 3.6% at the end of 2013. If these averages were coupled with genuine productivity improvements, businesses could achieve real and substantial productivity increases (or genuine savings).

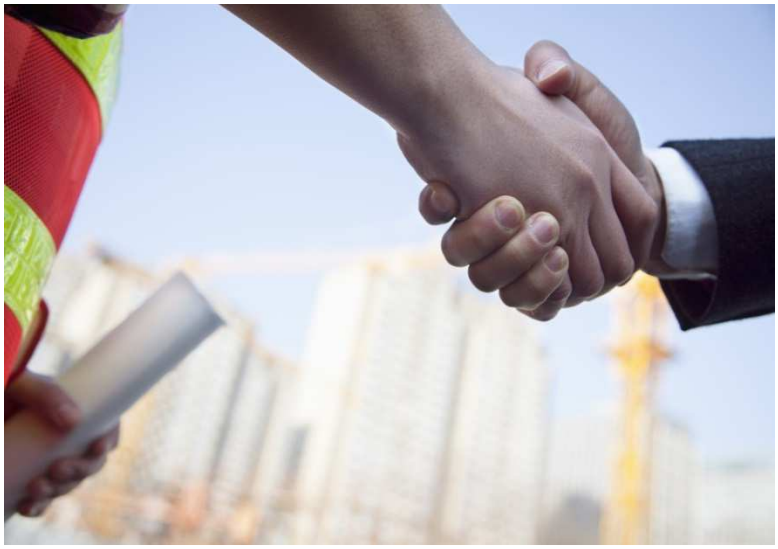
Terms of Enterprise Agreements which deal with the utilisation of casual staff are permissible, on the basis that casuals would be part of the group of employees to be covered by the Enterprise Agreement, and so long as the Agreement does not restrict the engagement of casuals. However the engagement of labour hire employees can at times create issues. The issue of labour hire employees initially arose in 2004 with the High Court's decision in Electrolux, where it was held that an Enterprise Agreement could only contain matters which related to the employment relationship. Terms covering labour hire employees would not "pertain" to the employment relationship, given that the relevant employment relationship is between the worker and the host employer. Although over time, and with various legislative changes, the issue has taken a back seat with many agreements being approved with labour hire clauses, including some "pattern agreements".

Nonetheless, recently employers have successfully used union requests for labour hire clauses in Enterprise Agreements as a defence to applications for the right to take protected industrial action. In one case, Commissioner Bull of the Fair Work Commission found that clauses which provided for labour hire employee ratios and restricted the engagement of labour hire employees were not "allowable matters" i.e. it was a provision that could not be included in an Enterprise Agreement. Consequently, it was decided that the union was not genuinely seeking to negotiate the agreement and therefore was ineligible to engage in protected industrial action.

One matter which the Commission has uniformly confirmed cannot be included in Enterprise Agreements is the ability for employees to "opt out" of the Agreement through the use of Individual Flexibility Agreements (IFAs). The difficulty for the employers who had negotiated, drafted, explained and held votes on Agreements that contain these kinds of provisions is that such a flaw can be fatal to the Agreement, resulting in substantial costs being thrown away. Additionally, there are any number of examples of cases where non-compliance with the *Fair Work Act's* restrictive and specific timeframes for "notification" to employees

regarding the commencement of enterprise bargaining, explanation of the content of proposed Agreements and voting documentation have resulted in otherwise compliant Enterprise Agreements being rejected and employers having to start again.

Creating Enterprise Agreements can be extremely time consuming for businesses and the drafting and checking of such Agreements (and the associated documentation) is a highly specialised skill which our Workplace Relations Team possesses. For assistance in preparing for enterprise bargaining or in the direct negotiations of an Agreement, in the task of ensuring that the terms sought to be negotiated are both fair and permissible under the *Fair Work Act* and so as to avoid your Enterprise Agreement being rejected at the final hurdle, contact one of our dedicated Workplace Relations Team members.



Delicious Fruit Cake Recipe

450 g can of crushed pineapple
25g butter
375 g bag of mixed fruit
1 cup brown sugar
1 tsp bicarb soda
1 tsp mixed spice
Few drops of Parisian essence
Pinch of salt
1 cup of self raising flour
1 cup of plain flour
2 eggs – beaten

Add all ingredients (apart f to a pot – bring to slow boil – simmer for 10 mins.

Remove from heat and let cool.

Add:
1 cup of self raising flour
1 cup of plain flour
2 eggs – beaten

Mix well and add to greased cake tin (square or round – your preference entirely).

Cook at 150 °c for 40-60 mins or until cooked.

TIP: Do not overcook – as the mixture is warm – it does not take all that long to cook – depends on your oven.

SPOTLIGHT ON

Stephen McCarthy

Stephen has a significant depth of knowledge and experience that comes from advising and representing the interest of Australian businesses across a wide range of industries on employment law matters and resolving workplace relations issues for over 35 years.

He also provides his corporate clients with strategic advice on business workforce planning, change management, workplace relations, industrial disputation as well as individual employment issues.

Stephen has provided advice and representation to businesses across a wide spectrum of industries including; resources, maritime, food, transport, manufacturing, retail, media, registered & licensed clubs, racing and professional services.

He has also represented the interests of Australian businesses during overseas missions and inspections in the timber, food and maritime sectors.

Tim Trezise

Tim is a Senior Associate in our Workplace Relations group and has over seven years' experience in corporate, commercial, employment and workplace law.

He is the most recent addition to the team having previously worked at an international top tier firm.

Tim is experienced in all areas of workplace laws and has a strong background in advising clients on a wide range of employment issues, industrial relations, commercial and work health and safety matters. His clients represent a broad cross section of industries across both large and medium enterprises.

Tim also represents executives with contract work and assists in negotiating beneficial exit packages.

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