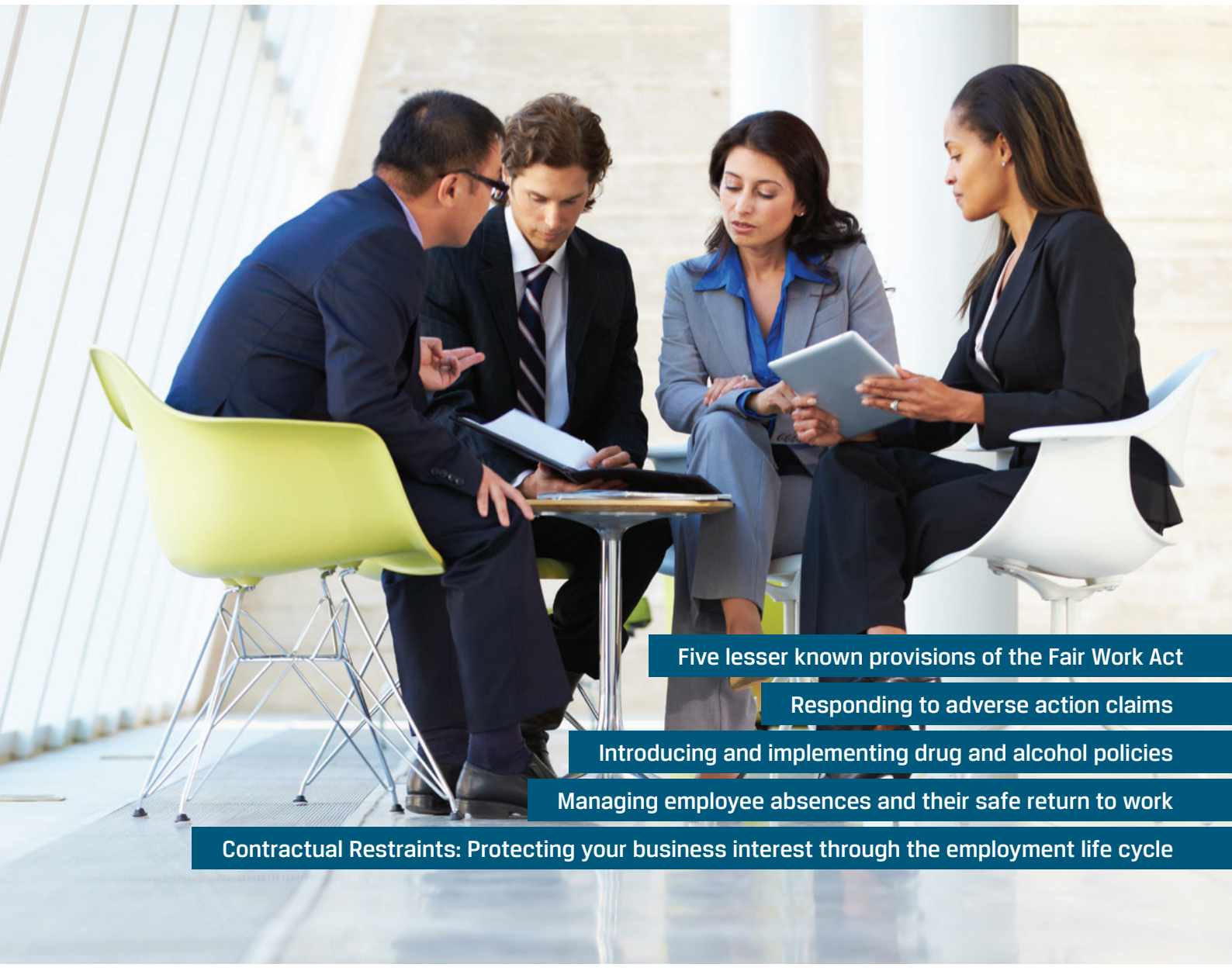
STRATEGEYES:

Workplace Perspectives

ISSUE 14 NOVEMBER 2014



Five lesser known provisions of the Fair Work Act

Responding to adverse action claims

Introducing and implementing drug and alcohol policies

Managing employee absences and their safe return to work

Contractual Restraints: Protecting your business interest through the employment life cycle

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MESSAGE: from the Managing Principal

It appears that each year seems to go by at an increasingly rapid pace and 2014 has been no different. As we enter the festive season and the warmer months here in Australia, it is opportune for me to share with our valued clients and wellwishers of the firm some of the important developments that have taken place at PCS in 2014. The firm continues to enjoy double-digit percentage revenue growth and attracting employers across all industries both in Australia and in respect of overseas employers' Australian operations.

Most of you will be by now aware that in October 2014 we opened our firm's first interstate office, in Melbourne. Since the firm's inception in July 2010 a significant amount of work has been done in respect of our clients' Victorian operations. This work has straddled all of the diverse offerings for which PCS has become well-known in such a short period of time. The decision to open an office in the heart of Melbourne's CBD (in fact, only a few hundred metres away from the Fair Work Commission) was not a difficult one but made all the more easy by the opportunity to have a quality senior lawyer like Siobhan Mulcahy head up our Melbourne office as a Director at PCS.

We were also delighted to introduce as a Director of the firm Chris Oliver who brings a wealth of experience across a few firms including one of the world's largest firms. It has been a great privilege to welcome Chris and his portfolio of clients to PCS and we look forward to exposing those clients to the unique value proposition of our firm.

The addition of Siobhan and Chris takes the number of Directors at PCS to five, reflecting (together with our highly-skilled Senior Associates) a high quality senior legal team. We expect to introduce additional senior lawyers into the firm in 2015 and also continue to open offices in other major Australian cities.

We have been very pleased with the number of clients who currently avail themselves of one of our firm's "Partnership Packages". If you have not had the benefits of a Partnership Package (such as the opportunity to save significant amounts off your current legal spend) explained to you, please feel free to contact your primary PCS contact for further details.

I look forward to seeing many of you at our always popular Hypothetical event and take the opportunity to wish you the very best for the upcoming holiday season.

Joydeep Hor
Managing Principal

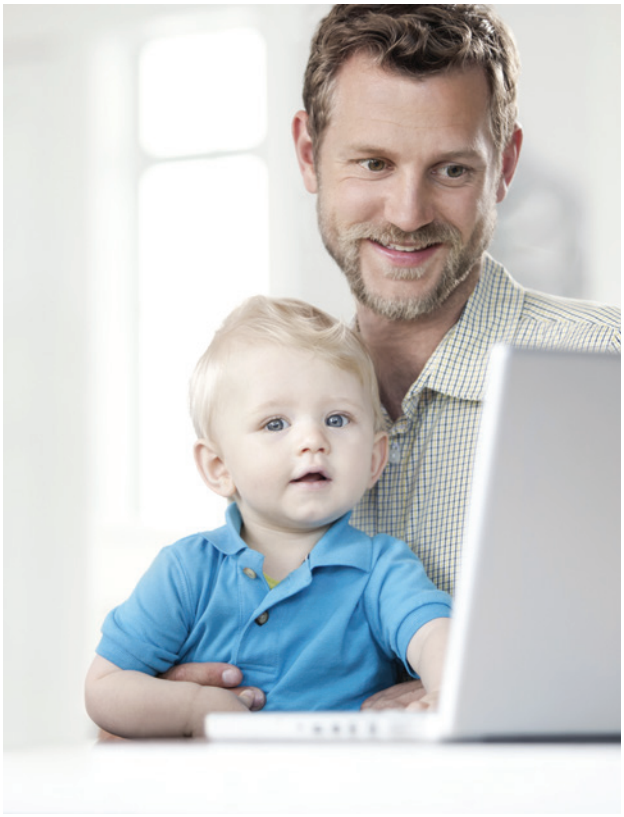
A LOOK INSIDE:

NOTE: *In this edition, unless otherwise specified: the Act means the Fair Work Act 2009 (Cth); and FWC means the Fair Work Commission.*

I WANT FLEXIBILITY WITH THAT: what are your obligations to accommodate flexible working requests?

SINA MOSTAFAVI SENIOR ASSOCIATE

Like many countries worldwide, Australia has in place a legislative scheme to provide workers the ability to request flexible working arrangements to accommodate their family or caring responsibilities (the "Flexible Work Scheme").



HOW DID WE GET HERE?

In 2009, Australia introduced a right to request flexible work arrangements as part of the minimum "safety net" for all employees covered by the federal system.
The Flexible Work Scheme was essentially modelled on the approach adopted in the UK, with the right to request to be refused only on "reasonable business grounds".
The right to request is made available to employees who have completed at least 12 months' continuous service, or long-term casuals with an expectation of continuing employment.

In 2013 the Federal Government amended the *Fair Work Act 2009* (Cth) (the **"FW Act"**) to, amongst other things, enhance the Flexible Work Scheme and make it more "family friendly" (the **"2013 Reforms"**). This included:

- an expansion in the range of employees who can make a request; and
- greater clarity in relation to the "reasonable business grounds" basis for refusing a request.

The 2013 Reforms also incorporated a new obligation for employers to consult employees on changes to rosters and hours of work, and for employers to take account of the views expressed by employees of the impact of any such proposed changes, including any impact in relation to their family or caring responsibilities.

Despite the amendments, the Flexible Work Scheme retains its original structure as a "right to request", that is one that is not subject to oversight or review by a court or tribunal.

In this article we critique the changes to the right to request flexible work arrangements and the new consultation requirements, and their operation in practice. We highlight what issues remain contentious, and where there is likely to be debate over interpretation and application in the future.

EXPANSION OF ELIGIBILITY

One of the most notable aspects of the 2013 Reforms is the expansion of the categories of employees who are eligible to request flexible work arrangements to include:

(a) a parent, or a person who has responsibility for the care, of a child who is of school age or younger;

(b) a carer (within the meaning of the *Carer Recognition Act 2010* (Cth));

(c) an employee with a disability;

(d) an employee who is 55 or older;

(e) an employee who is experiencing violence from a member of the employee's family; and

(f) an employee who provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.

This expansion encompasses a range of non-child dependent care arrangements.

The automatic inclusion of older workers (over 55 years of age) - without any requirement for that individual to indicate their status as a carer – acknowledges the broader fiscal and public policy concerns of extending the workplace participation of older workers.

Employees with disabilities are also covered, as well as those experiencing domestic violence or caring for and supporting such a person. Some of these categories overlap with the existing obligations under Australian anti-discrimination legislation that require employers to make reasonable accommodations for employees with a relevant attribute covered by anti-discrimination legislation.

It is likely that some employers are already providing flexibility to this expanded range of employees; either based on their acknowledgement of their obligations under anti-discrimination legislation, or because they are amenable to such arrangements. However, the 2013 Reforms provide a clear statutory basis for employees to initiate a request, if their circumstances fit within the expanded categories. This may have the incidental benefit of reducing resentment or tension at work over who is entitled to request flexibility and the perceived impact on other employees.

Although concerns have been expressed that these measures might have the adverse effect of decreasing the employment prospects of employees in these categories, such discriminatory conduct would in any event be caught under other legislative prohibitions.

REFUSAL BASED ON "REASONABLE BUSINESS GROUNDS"

The issue of whether a refusal of a request should be appealable has been a contentious issue. A review of the overall operation of the FW Act in 2012 recommended that the status quo be retained, based on the evidence from a survey conducted by Fair Work Australia (as it then was) that showed of the employer respondents:

- 81 per cent that had received one such request granted it without variation;
- 8.4 per cent granted the request with variation; and
- 10.8 per cent refused the request.

Of the respondents that received more than one request:

- 53 per cent granted all requests without variation;
- 47.5 per cent granted some or all requests with variation; and
- 25 per cent were refused.[1]

However the review panel did recommend that there be a codification of a requirement that the request should only be refused after the employer had held at least one meeting with the employee to discuss the request.

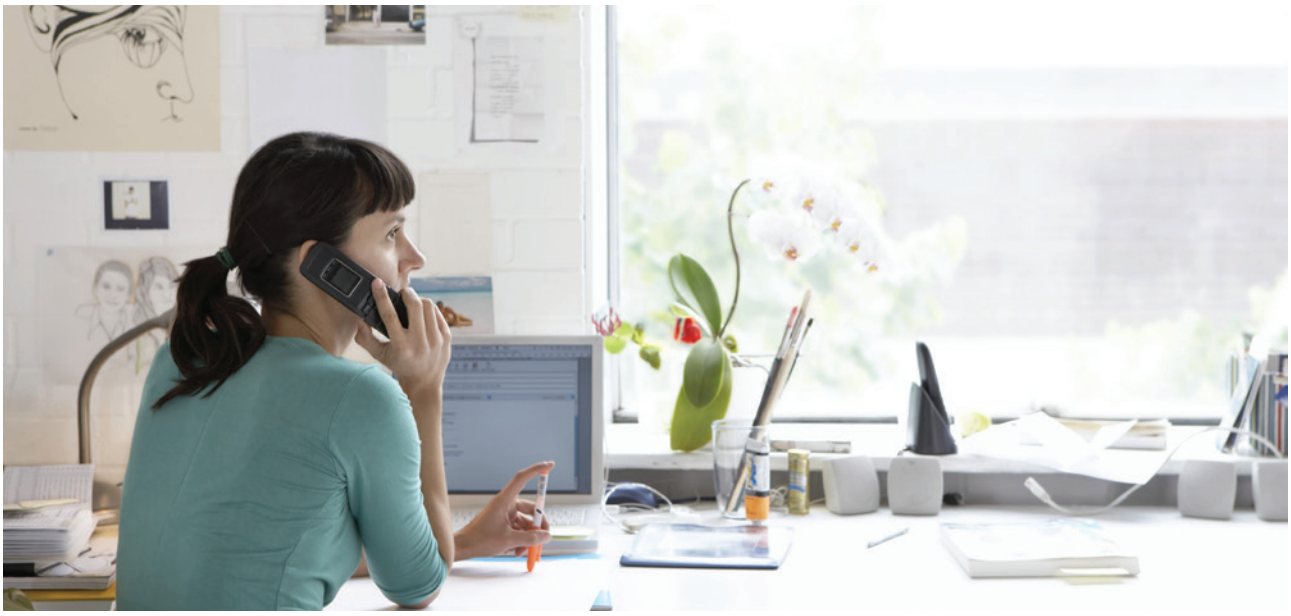
The Flexible Work Scheme (following the 2013 Reforms) adopts a compromise position of seeking to provide further guidance on what constitutes reasonable business grounds, without tying the scheme to any specific procedural steps. The legislation now states that without limiting the concept in any way, "reasonable business grounds" includes circumstances in which:

(a) the new working arrangements requested by the employee would be too costly for the employer;

(b) there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;

(c) it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;

1 *Towards more productive and equitable workplaces; An evaluation of the Fair Work legislation; 2012, 5.2.6.*



(d) the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity; and

(e) the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

The essential nature of the scheme as one built on workplace dialogue, rather than external review, is retained.

The empirical evidence collated to date suggests that under the old eligibility criteria, employers were willing to consider requests for flexible work arrangements, and in many cases grant such requests. Once further empirical evidence becomes available it will be interesting to see whether the expansion of the categories of eligible employees has meant that employers find it more difficult to juggle competing requests for flexibility, and whether this can be resolved with minimal conflict at the workplace level.

CONCLUSION

The Flexible Work Scheme, particularly since the 2013 Reforms, includes a number of measures that are directed at achieving a "family-friendly" approach to workplace relations. However, the scope of these provisions is much broader than simply that of "family friendly", particularly when regard is had to the range of employees eligible under the right to request provisions.

These changes also show a greater alignment of the right to request with general obligations that apply under Australian anti-discrimination laws, while maintaining a "light touch" regulatory approach, setting the broad parameters for certain workplace "rights" but leaving their final resolution to dialogue at the workplace level rather than by a determinative process.

Employers can benefit from the greater clarity associated with "reasonable business grounds", and should be mindful of this and other aspects of the Flexible Work Scheme to ensure that employee requests relating to flexible work arrangements are properly and effectively managed.

Key Takeaways

1. The FW Act's flexible work requirements are very broad, covering a wide range of workers, and focussing on a "family friendly" approach.
2. Employers can reject flexible work requests on the basis of "reasonable business grounds".
3. The FW Act now provides greater guidance as to what may constitute a "reasonable business ground".

5 LESSER KNOWN PROVISIONS OF THE FAIR WORK ACT: Did you know?

KATHRYN DENT DIRECTOR
MARGARET CHAN ASSOCIATE

FACT 1: THE DIFFERENCE BETWEEN AWARD COVERAGE VS AWARD APPLICATION AND WHY IT MATTERS?

Award coverage: an employee will be *covered* by a modern award if the award coverage clause provides for coverage of the type of role the employee is occupied in and this is supported by the classifications contained in the award (e.g. indicative roles indicate that the role occupied by employee would be covered). There is no way to contract out of award coverage and an employee's role is either covered by the award, or not.

Award application: whether an award *applies* to an employee is a different question to award coverage. Where an award applies to an employee, the terms of the award will govern the terms of their employment together with the terms of their employment agreement. A modern award may not apply in a variety of situations, such as if the employee is a high income employee – that is, an employee earning over or above the High Income Threshold (currently $133,000 in the 2014/15 Financial Year) and who has received a Guarantee of Annual Earnings.

Put simply, award coverage is broader than award application and therefore not all employees covered by the award will have the award apply to their employment. This difference becomes particularly important in the context of Unfair Dismissal and determining whether a high income employee has the ability to bring an Unfair Dismissal claim before the Fair Work Commission ("**FWC**").

An employee earning above the High Income Threshold may still fall within the FWC's Unfair Dismissal jurisdiction if it can be established that their role was award-covered. The fact that the award may not apply to their employment does not preclude them from bringing a claim and will not be relevant (except that it may negate the need to consult in a genuine redundancy situation). However, if the employee has been provided with a Guarantee of Annual Earnings, then the award will not apply to their employment. This may be relevant if they are alleging that a breach of the award term (e.g. a failure to follow consultation provisions) by their employer makes their dismissal harsh, unjust or unreasonable. In such circumstances, the employer could defend the dismissal, by arguing that it had no obligations to abide by the award provision, since the award did not apply to the employee at the relevant time.

FACT 2: REPLACEMENT EMPLOYEES – WHAT YOU NEED TO KNOW

A replacement employee is one who is engaged to perform the work of another employee who is going to take, or is taking, unpaid parental leave. While the majority of employers comply with the requirement to inform the employee that their engagement to perform that work will be temporary (by for instance, advertising the role as a 'parental leave contract'), employers also have an obligation to inform the replacement employee of other matters relating to the parental leave replacement role.

Section 84A of the *Fair Work Act 2009* (Cth) ("**FW Act**") provides that an employer **must** inform a replacement employee of the right of:

- the employer and the employee taking parental leave to cancel the leave if the pregnancy ends other than by the birth of a living child or the child dies after birth;
- the employee taking parental leave to end their leave early if the pregnancy ends other than by the birth of a living child or the child dies after birth, and return to their pre-parental leave position (i.e. the one occupied by the replacement employee) or an available position for which they are qualified and suited nearest in status and pay to the pre-parental leave position; and
- the employer to require an employee taking unpaid parental leave to return to work, if they cease to be the primary caregiver .

FACT 3: RIGHT OF ENTRY – YOUR RIGHTS

under the FW Act, a person - usually an officer of an industrial organisation ("**Permit Holder**") who holds a Fair Work entry permit ("**Entry Permit**") will be allowed to enter a workplace to investigate contraventions of the FW Act or hold discussions with employees whose interests it represents, or is entitled to represent. Prior to entering the workplace, written notice ("**Entry Notice**") must to be given by the Permit Holder to the employer. This should be provided no less than 24 hours and no more than 14 days before the Permit Holder's proposed visit, however less notice can be provided if an exemption has been granted by the FWC.

On attendance at the workplace by the Permit Holder, an employer has the right to request, and the permit holder is required to have available, their original Entry Permit issued by the FWC and a copy of the Entry Notice for inspection. When inspecting the Entry Notice, employers should ensure that it includes details of the:

- premises to be entered;
- day of entry;
- organisation the Permit Holder belongs to;
- section of the FW Act that authorises entry (this will depend on the purpose of entry and will generally either be for the purpose of investigating suspected contraventions (s 481) or holding discussions (s 484); and
- details of the suspected contravention (if the permit holder is attending the workplace for the purpose of investigating suspected contraventions).

The Entry Notice must also include a declaration by the Permit Holder that they are entitled to represent the industrial interest of an employee at the workplace to whom the suspected contravention relates, or who is affected by the suspected contravention, and must set out the provision in their organisation's rules that details the organisation's right to represent the employee.

While at the workplace, the Permit Holder must abide with reasonable requests from the employer in relation to conducting interviews or holding discussions in mutually agreed rooms or areas, taking certain routes to this room or area and occupational health and safety. They must also act in a proper manner and not intentionally hinder or obstruct the work being carried out at the workplace. Failure by the Permit Holder to fulfil any of their obligations discussed above constitutes a contravention of a civil remedy provision of the FW Act, meaning that they may be liable to a maximum penalty of $10,200.

FACT 4: WHAT HAPPENS WHEN AN ENTERPRISE AGREEMENT'S NOMINAL EXPIRY DATE PASSES?

If you have ever been employed under an enterprise agreement or had to negotiate one with your staff, you are probably familiar with the term "Nominal Expiry Date". But what are its practical implications and what happens when the Nominal Expiry Date passes?

Practically, it is better to think of the Nominal Expiry Date as reminder or mechanism which triggers the parties to re-engage in, or at least consider re-engaging in, negotiations around the terms and conditions of employment going forward. This is also consistent with the fact that many of the FWC's powers in relation to bargaining (e.g. applications for bargaining orders) are only enlivened in the absence of an enterprise agreement or where the Nominal Expiry Date of the previous agreement has passed.

While an enterprise agreement may have technically "expired" when the Nominal Expiry Date has passed, under the FW Act an enterprise agreement does not cease operating and governing the employment relationship between the parties until it has been varied, terminated or replaced. A new enterprise agreement also cannot start applying until the earlier agreement has passed its Nominal Expiry Date.

Employers should be careful not to confuse expiry of an enterprise agreement with termination of an enterprise agreement, as it is only in the event of the latter that any Award conditions (if one applies to the workforce) will resume their application, and thus they should continue to comply with the terms of the enterprise agreement until it ceases to operate at law.

FACT 5 – INDIVIDUALS CAN BE LIABLE TOO IF THEY'RE "INVOLVED"

Individuals (particularly those in managerial or executive positions) can be liable for contraventions of any of the civil remedy provisions in the FW Act, if they are found to have been "involved in" the contravention. This might either be because the person has:

- aided, abetted, counselled or procured the contravention;
- induced the contravention (whether by threats or promises or alternative means);
- been directly or indirectly, knowingly concerned in or party to the contravention by their acts or omissions; or
- conspired with others to effect the contravention (section 550).

A similar provision also exists within part of the FW Act dealing with general protections, meaning that an individual may also be found to have contravened a general protections provision if they "advise, encourage, incite or take any action with intent to coerce, a second person to take action" that is in contravention of a general protections provision (section 362). As this section is not a civil remedy provision, this section does not in any way limit the operation of, or the liability of an individual under, section 550.

While it may not always be possible to avoid a claim being brought against an individual pursuant to this section, even when the individual exercises the utmost care in handling employment relations matters, the FWC has the discretion to reduce any penalty payable by an individual if they are of the view that any involvement in the contravention by the individual was not wilful.

Key Takeaways

1. The sheer volume of the Fair Work Act 2009 (Cth) means that you are unlikely to know every section.
2. The fast facts we have identified here will minimise legal exposure to penalties and compensation.
3. If you are unsure about your obligations, particularly if you are encountering a situation for the first time, you should refer back to the relevant law and/or seek legal advice.

Responding to adverse action claims:

WHAT EXACTLY IS A 'WORKPLACE RIGHT'?

THERESE MACDERMOTT CONSULTANT

Employers are often confronted with an allegation that they have acted inappropriately regarding some action taken in relation to a person, either at the time of a termination or relating to a person's on-going or prospective employment.

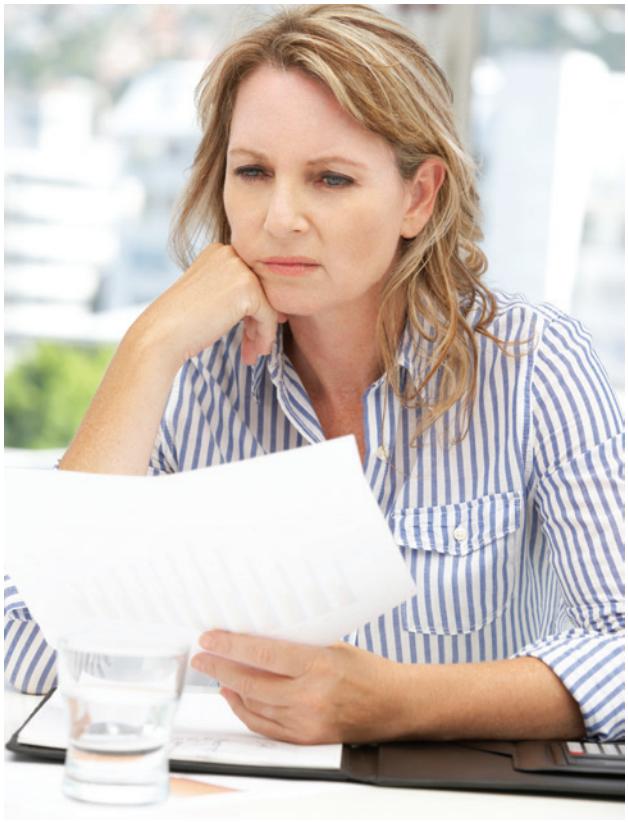
Adverse action claims pose a substantial risk to employers, as they are not subject to the same restrictions as unfair dismissal applications. There is no requirement for a qualifying period of employment, higher income employees can use this avenue of redress, and the amount of compensation is not capped. Employment status is also not determinative; a claim may be made by a contractor, by a prospective employee, or by an employee association on behalf of its members.

WHAT IS THE GENERAL COVERAGE OF THE ADVERSE ACTION PROVISIONS?

Under the provisions of the *Fair Work Act 2009* (Cth) ("**FW Act**"), a person is protected from adverse action taken because of:

- workplace rights;
- industrial activities;
- discrimination;
- temporary absence for illness; or
- coverage by particular instruments.

A claim alleging that the action was take for one of these reasons can be lodge with the Fair Work Commission ("**FWC**"), but if unresolved by conciliation, may see the employer defending an action in the federal court system.



WHAT CONSTITUTES A 'WORKPLACE RIGHT'?

Claims that the employer has breached an employee's workplace rights are increasingly common, and may in some circumstances be pursued by an employee association on behalf of a person or group of workers. In particular, claims can be made where the employee has an entitlement:

- to the benefit of, or holds a role or responsibility under, a workplace instrument; and/or
- to participate in a process or proceedings arising under a workplace instrument; and/or
- to make a complaint or inquiry to an enforcement body seeking compliance with a workplace law or workplace instrument; and/or
- to make a complaint or inquiry to the employer in relation to their employment.

A considerable number of cases surrounding what constitutes a "workplace right" have been litigated recently. In one such case, the court found that where a employee had raised a complaint about unpaid commissions, her ability to seek legal advice on this issue was a "workplace right" for the purposes of the legislation, and that threatening to sack her after she indicated that she would be exercising this workplace right constituted adverse action.[1] In establishing the workplace right, the court was looking for a "*statutory, regulatory or contractual provision or some applicable grievance procedure which makes provision for the making of a complaint or inquiry.*"

On the other hand, an employee's entitlement to raise in the media matters of concern regarding conditions at the workplace is less clear, with the court not necessarily convinced in recent interlocutory proceedings that there was any such workplace right.[2] But where an employer refused to approve carer's leave and threatened the employee with termination if he did not attend for work on the day he requested carer's leave to attend a medical appointment with his daughter, clearly fell foul of the provisions.[3] Carer's leave is a benefit under a workplace law being the FW Act and therefore is a "workplace right".

1 *Murrihy v Betezy.com.au Pty Ltd & Anor [2013] FCA 908*

2 *United Voice v GEO Group Australia Pty Ltd [2014] FCA 928*

3 *Transport Workers' Union of Australia v Atkins [2014] FCCA 1553*

HOW IS AN ALLEGATION NEGATED?

Where such a claim is made it is unwise for an employer to simply wait and see whether the employee can substantiate the claim. Because of the operation of a reserve onus, a presumption applies that the action was taken for the alleged reason, unless the employer proves otherwise. Courts will have regard to the '*actual reason or intention behind the action*' – although "*mere declarations of an innocent reason or intent in taking adverse action may not satisfy the onus on an employer if contrary inferences are available on the facts*".[4] Faced with such a claim, employers need to be mindful of the fact that they will need to produce evidence to satisfy the court that a prohibited reason was not the reason or part of the reason that the action was taken.

For example, if a claim is made that an employed was dismissed because they made a bullying complaint about their manager, the court may find a link between the action taken and the complaint made, unless the employer takes steps to refute this allegation. This would involve the employer tendering evidence to confirm that the employee was dismissed for performance reasons, substantiated by the termination letter and the documented history of performance warnings or improvement plans that had been issued to that employee prior to the termination. It might also involve affidavit or oral evidence from the decision-maker about how they came to the decision to terminate.

SHOULD EMPLOYERS AGREE TO CONSENT ARBITRATION AT THE COMMISSION?

Recent changes introduced to the FW Act now allow parties dealing with an adverse action claim to agree to have the matter arbitrated by the FWC where conciliation has failed to resolve the matter, instead of having the matter determined within the federal courts system. In some circumstances, an employer may prefer to wait and see whether the person will take the further step of commencing court proceedings, rather than agreeing to consent arbitration. It will depend on factors such as how likely it is that court action would be taken, the representation available to the person, and how quickly the employer would like the matter to be brought to an end.

4 See the High Court's decision in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay [2012] HCA 32.*

CAN YOU MINIMISE THE RISK OF A CLAIM?

While you may not always be able to avoid a claim being brought against you, especially where the circumstances surrounding the action taken are intertwined with other issues, you can take steps to mitigate the risk to your organisation. A good starting point is adhering to a strict practice of always providing reasons to employees for decisions, ensuring that these reasons are founded on established policies and procedures, and that the reasons are transparent, sound, defensible and clearly communicated.

Consistency in decision making is also an important factor, as it reduces the chances that different individuals are assessed against different criteria. Otherwise, if the difference between individuals who have engaged in the same conduct is that one has exercised a workplace right while the other hasn't, or if one individual is a member of an employee association while the other is not, an organisation is more exposed to the risk of a claim.

Being aware of the entire circumstances surrounding a potential termination, or other action taken that may result in an employee's position being altered to their prejudice, allows the employer to make a fully informed decision taking all the circumstances into account, and will reduce the risk that the action taken will be linked to a prohibited reason. Even if a claim is ultimately brought, being fully cognizant of all the circumstances and having acted in accordance with established policies and procedures in a transparent manner will mean that your organisation is better prepared to defend the claim.

Key Takeaways

1. Workplace rights generally arise from statutory, regulatory and contractual provisions on grievance procedures.
2. Defending a claim requires an employer to positively refute the allegations.
3. Risks can be minimised where policies and procedures are adhered to, and sounds reasons provided.

UNDER THE INFLUENCE: Introducing and implementing drug and alcohol policies

ERIN LYNCH SENIOR ASSOCIATE

It is widely accepted that the implementation of a program of random and targeted alcohol and/or drug testing is a reasonable and legitimate employer response to the risk to safety posed by employee drug use, even if that involves some interference with employee privacy.

However, the creation and implementation of a drug and alcohol policy requires a fine balance between preventing and reducing harm in the workplace arising out of drug and alcohol use and making sure not to encroach upon a worker's liberty and freedom to do as he or she pleases outside of work hours.

One of the major decisions that an employer will have to make is the method of testing that will be adopted. The recent case of *Harbour City Ferries Pty Ltd v Christopher Toms* [2014], highlighted the Full Bench's reservations about urine testing. The Full Bench remarked that it "*has some experience of applications involving the application and efficacy of such workplace policies. We are not persuaded that urine testing, the agreed method of drug and alcohol testing at Harbour City, is a guide as to the actual presence of marijuana in an employee's system or any impairment arising as a consequence. It is a testing system which in this case indicated past use and not present impairment*".

Further, in a decision earlier this year, a Deputy President of the Fair Work Commission ("FWC") said urine testing "*is more personally intrusive than oral fluid testing even when..., it provides for urination behind closed door. Urine testing may reveal personal choices of individuals that do not present a risk to safety in the workplace, but compromise their autonomy and dignity and lead to serious disciplinary consequences including job loss.*"

Speaking at the NSW IR Society annual conference in May this year FWC President, Justice Iain Ross, addressed suggestions that the FWC's decision-making, has been inconsistent in relation to the use by employers of urine testing of employees for drug and alcohol at the workplace.

In addressing the issue of whether the most appropriate method of workplace drug testing is by the collection and analysis of a urine sample or a saliva sample Justice Ross said the controversy exists at two levels. "*At the core of this debate are the propositions that urine testing is the more accurate means of determining whether an employee has at some time consumed any one of a range of drugs, but that saliva testing is better at identifying likely present impairment from drug use (particularly cannabis use) because it only detects very recent use.*

Secondly, there has been controversy over which of two competing workplace interests should be given priority in the selection of the appropriate testing method ... there is the interest of employees in not having their private behaviour scrutinised by their employers ... there is the interest that employers and employees have in ensuring a safe working environment by the taking of all practicably available measures to detect and eliminate or manage risks to safety".

> **"One of the major decisions that an employer will have to make is the method of testing that will be adopted."**

Justice Ross said that properly analysed, there has been no inconsistency in the FWC's treatment of this issue and that the approach taken by the FWC has simply evolved over time on the basis of the material presented in particular cases.

It is likely that the latest authority on this issue will be the decision in a five Member appeal in *DP World Brisbane Pty Ltd & DP World (Fremantle) Limited and Others v The Maritime Union of Australia*. The grounds of appeal raise issues about the relative merits of saliva and urine testing and the reasonableness of the employer's policy. It is intended that the decision may provide greater clarity about these issues. The decision in this matter is currently reserved.

When introducing a policy, an employer should set out express guidelines and expectations of its workforce and each policy must be tailored to the individual needs of the business. This is particularly crucial in high risk environments that involve driving, operating machinery or performing certain medical procedures, for example, that require workers to be free of alcohol and/or other substances in order to safely carry out their duties.

When considering the introduction of a drug or alcohol policy, an employer should have regard to the:

- intentions to minimise drug and alcohol risks;
- procedures for achieving the intentions;
- roles and responsibilities of those implementing the policy;
- company's position on alcohol and other drug use (for example, over the counter medications);
- the circumstances in which alcohol may be made available at workplace functions;
- methods to reduce any drug or alcohol related harm;

When introducing a policy, an employer should set out express guidelines and expectations of its workforce and each policy must be tailored to the individual needs of the business.

- procedures for addressing a worker who may be under the influence of drugs or alcohol;
- information on available treatment or counselling services; and
- possible disciplinary action following a breach of the policy.

There may also be a number of other times in which the consumption of alcohol is permitted during work hours and as such must be regulated, including Christmas parties, work functions and work conferences. However, where the workplace begins and ends constitutes a grey area within the law and as such it is difficult to determine where an employer's responsibility lies and how far the scope of the policy extends.

Employers also need to consider any specific requirements applicable to their industry. For example, construction companies tendering for Victorian Government work will have to drug and alcohol test their workers and use up-to-date monitoring equipment, under changes to the Victorian Code of Practice for the Building and Construction Industry (the "Code"). Clause 8.2 of the Code requires contractors to have an approach to managing drug and alcohol issues in the workplace that helps to ensure that no person attending the site does so under the influence of alcohol or other drugs and in some circumstances have a fitness for work policy to manage alcohol or other drugs in the workplace.

When implementing and enforcing a drug and alcohol policy employers should:

- use credible and transparent systems;
- clarify procedures with employees so they know what to expect;
- ensure employees are aware of the possibility of random testing;
- align frequency and method of testing to circumstances of workplace;
- apply testing procedures fairly; and
- take measures to keep testing procedures and results confidential.

Employers should not:

- single any individual employee out;
- use harsh penalties unnecessarily; or
- change a drug and alcohol policy without communicating clearly with employees.

The recent Harbour City Ferries decision mentioned above is an important reminder that employers need take steps to ensure that employees are aware of the policy, its procedures and application.

The decision to reinstate a Sydney Harbour ferry master was overturned by the FWC Full Bench, saying that while they had reservations about the method of drug testing, "the core issues, the valid reason for termination of employment was [the ferry master's] deliberate disobedience, as a senior employee, of a significant policy". Of significant importance in the decision was that the ferry master was aware of the policy and its application and he was aware that when he accepted the shift as ferry master it was likely that he would be in breach of the policy if tested.

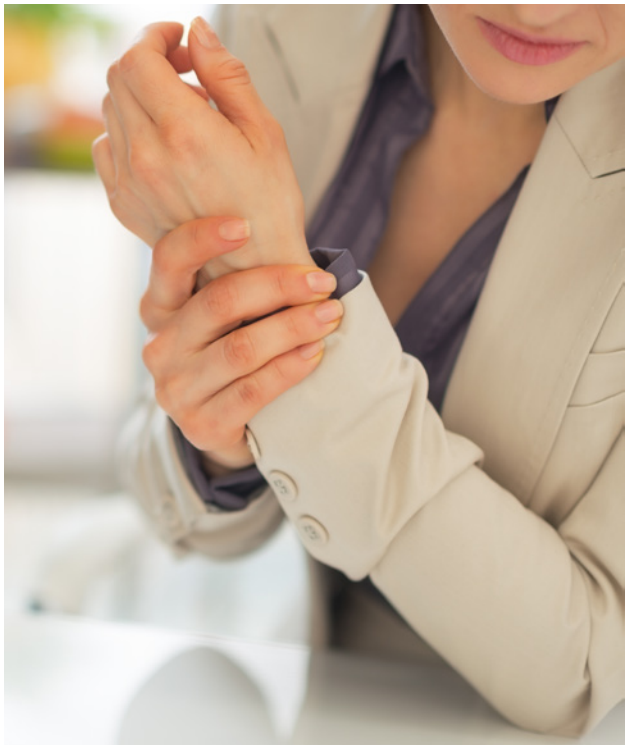
Key Takeaways

1. Ensuring a safe work environment is a paramount consideration.
2. There is some controversy as to the most appropriate method of testing between collecting urine samples and saliva samples.
3. Polices and procedures should be tailored to reflect the level of risk for an individual business.

MANAGING EMPLOYEE ABSENCES and their safe return to work

CHRIS OLIVER DIRECTOR
BEVERLEY TRIEGAARDT ASSOCIATE

In today's fast paced business environment, maintaining a high performing and stable team of employees is vital to the success of an organisation. This can be impacted if employees are unfortunate enough to suffer injuries or illness. Uncertainty can further arise for employers once an employee's extended absence begins to take its toll on the day to day operation of the business and the interim arrangements that were put in place just don't have the capacity for the organisation to respond efficiently and effectively to market demands. Commonly, employers are hesitant to take action for fear of being accused of invading the employee's privacy or interfering in the employee's exercise of a workplace right. Recent case law has offered some new certainty and peace of mind for employers by declaring an implied contractual right to request further medical evidence.



LEGAL OBLIGATIONS

While it may be frustrating, at times a combination of legal obligations and protections may prevent you from simply putting the needs of the organisation first.

Regardless of how an extended absence may be impacting upon your ability to operate your business, employers must remain mindful that it is unlawful to treat an employee less favourably because of their illness, injury or disability and it is also unlawful to dismiss an employee due to illness or injury if they have been absent for three months or less (or during a period of paid personal leave).

Erring on the side of caution may save you from being exposed to various kinds of legal claims such as unfair dismissal, adverse action, discrimination or even bullying. With this in mind, you may be able to reduce this risk by:

- ensuring contact between the organisation and the employee is appropriate and limited to that which is necessary, so that they have the opportunity to fully recuperate;
- ensuring that conversations around absences focus on notice requirements and ways in which the employer can support the employee's to return to work (rather than reprimanding or blaming them for the effects of their absence); and
- following applicable consultation procedures if any changes are likely to affect the employee's role during their absence.

EMPLOYER'S RIGHTS

Despite the risks mentioned, employers do have rights when it comes managing absent employees. This year the Federal Court of Australia confirmed that employers have an implied contractual right to request further information about an employee's condition in certain circumstances. Employers are entitled to this information if it is crucial for assessing the work health and safety risks associated with the injured/ill employee returning to work. Further, the Court has suggested that if an employee refuses to comply with a reasonable request or direction to supply further information, it may justify a decision to terminate employment.

Can I request specific medical information even if the employee has tendered a medical certificate?

Yes, you can.

In *Australian and International Pilots Association v Qantas Airways Ltd* [2014] FCA ("**Qantas case**") an employee unsuccessfully claimed adverse action after the pilot refused to comply with Qantas' requests for a medical report and attendance at a meeting to discuss the report. This was despite the pilot tendering a medical certificate saying that he was suffering from clinical depression. Once it became apparent that the nature and duration of the pilot's absence was indefinite and uncertain, Qantas sent four letters (over a reasonable period of time) to the pilot requesting information relevant to the assessment of the pilot's capacity to return to work and the timeframe in which that might occur. The pilot, who at the time was represented by the AIPA, did not comply with Qantas' repeated requests. The letters stated that disciplinary action would be taken if he failed to comply with the requests.

The case was decided in Qantas' favour and proceedings dismissed. The court acknowledged that the information provided by the pilot to date had been insufficient for the purposes of Qantas planning for:

- their business needs;
- their compliance with Work Health and Safety obligations;
- making necessary adjustments to the employee's role; and
- the re-entry or departure of the Pilot from the workplace, and on this basis, it was reasonable for Qantas to request further medical information.

What if the employee refuses to cooperate and simply wants to return to work?

If you have a reasonable basis for requesting further medical evidence (such as one of the purposes outlined in the Qantas case) you may be able to direct an employee to comply with your request. If they fail to cooperate, then disciplinary action may be taken (up to and including termination of employment).

This was the approach taken by BHP in the case of *Grant v BHP Coal Pty Ltd* [2014] FWC 1712 ("**BHP case**") which concerned an employee involved in heavy manual labour. After injuring his shoulder on multiple occasions at work, the employee took an extended period of personal leave for eight months to undergo surgery. Some five months after having surgery, the employee advised his supervisor that he would be returning to work, and that he had medical clearance to do so. He presented two medical certificates, one from his GP and another from his surgeon, however neither of them disclosed the nature of his injury or set out any rehabilitation guidelines.

Concerned that they may be in breach of mining regulations that require BHP to take all necessary steps to prevent risks, BHP directed the employee to attend a "fit for work assessment" with an occupational physician to assess his capacity to return to regular duties. The employee refused to attend on four separate occasions and was subsequently subject to disciplinary action including suspension. BHP eventually dismissed the employee on the basis that he had failed to attend the assessments and that during a disciplinary meeting, he was non compliant in refusing to answer questions and conducting himself in a disrespectful manner. Following the termination, the employee filed an unfair dismissal claim with the Fair Work Commission.

The dismissal was upheld on the basis that the direction to attend an assessment was a lawful and reasonable request related to the employment and, as such, the employee's refusal to comply constituted a breach of an implied term of his contract to comply with his employer's directions.

EMPLOYEES RETURNING TO WORK

When an employee returns to work after an extended period of leave, the employer must have regard to work health and safety legislation and consider whether the duties of the employee should be restricted or modified so as not to exacerbate the injury or condition of the employee's health. This applies regardless of whether the employee's health issues arose through a connection to their employment or not. Furthermore, the returning employee must not be treated any less favourably than their co-workers because of their absence, illness or injury.

> **"Erring on the side of caution may save you from being exposed to various kinds of legal claims such as unfair dismissal, adverse action, discrimination or even bullying."**

PRECAUTIONARY STEPS TO MANAGE ABSENCES

The worst thing an employer can do when faced with the uncertainty of ongoing absence is nothing. It is better to act early and set clear and reasonable expectations for employees that you will take an interest in their health and that the continued presentation of non-specific medical certificates may not suffice if their absence becomes indefinite.

This expectation can be built into your leave policies by stating that employees may be directed to comply with requests for further information in the event of extended or indefinite absences.

The inclusion of a "fitness for duty" clause in employment contracts requiring the employee to partake in medical examinations at the employer's direction can also assist if faced with circumstances similar to those in the BHP case.

Key Takeaways

1. Employers have an implied contractual right to request further medical evidence from employees;
2. Employers may take disciplinary action if employees fail to comply with a direction to provide further medical evidence; and
3. Employers have work health and safety obligations under legislation with respect to ill and injured employees returning to the workplace.

CONTRACTUAL RESTRAINTS:
Protecting your business interests throughout the employment life cycle

ALISON SPIVEY SENIOR ASSOCIATE
ELIZABETH MAGILL SENIOR ASSOCIATE

In a globally competitive economy it is essential that organisations are well-positioned to protect their business interests from the misuse of their confidential information and from the poaching of their clients, customers and staff. Well-drafted post-employment contractual restraints are an extremely useful tool to protect an organisation from the impact of former employees obtaining a commercial benefit from the organisation's confidential information, from approaching or soliciting customers and clients of the organisation, or inducing other employees to leave the business. That being said, most of us only turn our minds to post-employment restraints at the point when an employee is looking to leave an organisation and the organisation wants to enforce the restraints, rather than considering these issues throughout the employment life cycle.

Most organisations don't tend to think about the effect of post-employment restraints when recruiting prospective employees, and more specifically whether any contractual restraints applicable to these recruits will have an impact on the type of work they can perform when they commence employment with the organisation. Furthermore, where due attention has not be given to the scope and coverage of post-employment restraints at the time of drafting or revising a contract of employment, difficulties can subsequently arise when seeking to enforce ill-defined or ambiguous restraints that are not effectively drafted in line with the position the employee holds or business interests of the organisation.

In this article we consider the benefits to employers in proactively managing post-employment restraints throughout the course of the employment relationship, including during the recruitment process. We examine a recent dispute over restraints in the television industry to highlight potential pitfalls in this context, and provide guidance on how best to manage post-employment restraints to the advantage of your organisation's business interests.

GETTING IT RIGHT FROM THE START

Post-employment restraints are now a common feature of employment contracts and can operate as an effective mechanism to protect an organisation's business interests. The types of business interests that may be the subject of protection through a post-employment restraint include the organisation's confidential information, trade secrets, business know-how and goodwill. With respect to this latter category of business interests, goodwill captures those connections employees build with existing and potential customers and the connection they build with colleagues. An organisation should give careful consideration to the scope and content of the restraints in the contracts of employment it offers to its employees to ensure they capture the type of information, client contacts and business contacts its wishes to protect. Similarly, due regard should be directed to the appropriate geographic limitations and time-frame of such constraints.

Many employers are mindful of the restraints in the contracts of employment they offer to potential employees, but few organisations undertake due diligence around the post-employment restraints that may apply, to the employees they are seeking to recruit in connection with their previous employment. Failure to do so may expose an organisation to significant risks, particularly in relation employees who held a senior or managerial role within their former organisation, or who held a sales role with a high level of customer and client contact, or had access to commercially sensitive trade secrets and confidential information.

For example, organisations may face a scenario where their new star recruit is required to "sit on the bench" for the duration of a post-employment restraint, rendering them unable to undertake their role until the expiry of the fixed period set out in the recruit's contract with their previous employer. Alternatively, the organisation may find that their new recruit can't expand the organisation's business in the directions for which they were hired, because they are constrained in the areas they can operate or the type of clients and customers they can contact as a consequence of prior restraints. A worse case scenario is where an organisation finds itself having to defend a claim that they induced an employee to breach their post-employment restraint or that they gained, or will gain, a tangible benefit from the employee's breach, as occurred in a recent dispute over restraints in the television industry.

THE BATTLE OF THE NETWORKS

This issue of inducing an employee to breach his or her post-employment restraint was considered in a recent case before the Supreme Court of New South Wales, *Network Ten Pty Ltd v Seven Network (Operations) Ltd*[1] where Seven (notionally the "new employer"), was a defendant to the proceedings.

Mr Stephens (the second defendant to the proceedings), a television programming executive with over 40 years' experience, was originally employed by Seven pursuant to a contract due to expire in 2015 and which provided that either party could terminate the agreement with three months' notice. Mr Stephens commenced discussions with Ten and on 6 March 2014, Mr Stephens executed an employment contract with Ten and was due to commence employment on 9 June 2014, following the expiration of his notice period with Seven.

Mr Stephens subsequently received a counter-offer from Seven, which offered him a role with greater responsibility and a substantially higher remuneration package than his original package or that offered by Ten. On 10 March 2014, Mr Stephens withdrew his acceptance of Ten's offer and accepted Seven's offer to appoint him in the newly created role of Head of International Development. Ten did not accept this repudiation, opting to treat the contract as still on-foot and argued in Court that Mr Stephens was in breach of provisions contained in his employment contract which restrained him from "soliciting, encouraging or accepting any offers of employment from, or offers to provide services to any other entity without TEN's prior written consent". This was expressed to apply "during the term of Mr Stephens' employment". Ten also argued that Seven knowingly and intentionally induced Mr Stephens to beach his contract of employment with Ten.

The Court found that Mr Stephens was not in breach of the restraints at the time he accepted employment with Seven since the restraints had not yet been enlivened (and would not be enlivened) until Mr Stephens' employment with Ten "commenced" on 9 June 2014.
The Court further stated that had it found Mr Stephens to be in breach of the restraint, it would have concluded that Seven intentionally and knowingly induced that breach by its offer of employment to Mr Stephens. The Court agreed with Ten's argument that Seven was "on notice" that Mr Stephens had signed an employment contract with Ten and that the agreement with Ten provided for restraints that would prevent Mr Stephens working for Seven at the same time he was employed by Ten.

TIPS ON DUE DILIGENCE WHEN RECRUITING:

- Be aware that prospective employees that come on board may be subject to existing post-employment restraints.
- Encourage prospective employees to seek a resolution of any post-employment restraint issues with their former employer before any offer of employment is made.
- Assess the likely impact on the role and functions of the recruit arising from existing restraints.
- Seek advice about the enforceability of any restraint terms that may apply to a prospective employee if the restraints are perceived as likely to have an adverse impact on your organisation's operations.
- Refrain from any conduct that may be interpreted as an inducement to breach any restraints.

REVISITING RESTRAINTS FOR ON-GOING EMPLOYEES

A neglected area tends to be the situation of ongoing employees. For example, a long standing employee may have commenced in a junior role within the organisation, where the nature of that role did not warrant any, or any significant, restraints. However, over time that individual may have progressed through a number of roles, including to a more senior position in the organisation. In these circumstances the contractual restraints need to be reviewed and updatein order to protect the business interests of the organisation. Hence an organisation should regularly review and updated the post employment restraints in its employment contracts, with particular reference to the factors set out below.

POTENTIAL TRIGGERS FOR REVISITING RESTRAINTS:

- changes in an individual's role or function;
- expansion of an organisation's business into different sectors or locations;
- enhanced range of clients and customers; or
- development of new business knowledge, processes or confidential information

Being proactive in ensuring that any restraints are up to date can help to avoid the situation where a problem arises and an organisation is left exposed because the existing restraints no longer match its business interests, or the employee's role.

MANAGING DEPARTURES

Where an employee departs in circumstances where their subsequent employment is likely to be with a competitor, they are setting up business on their own account, or they are trying to take other employees with them, an employer may need to rely on a restraint clause to prevent damage to their business interests. Litigation to enforce a restraint clause will fail if the restraint clause is too wide or it goes further than protecting the organisation's legitimate business interests. Recent case law confirms the principle that "*in order to be considered reasonable, a restraint of trade must be reasonable by reference to the interests of the parties and the interests of the public*."[2] Factors that a Court will take into account include:

- the nature of the employer's business;
- the nature of the employee's position;
- whether the employee has had access to confidential information of the employer;
- the relationship of the employee with clients and other employees of the business;
- the duration of the employment;
- the extent of the consideration provided by the employer for the restraint; and
- the likely duration of the former employee's personal relationship with customers of the employer.[3]

Hence it is important that the drafting of restraints is clear and unambiguous and reflects the organisation's business interests, should subsequent enforcement proceedings eventuate.

(Endnotes)

1 *[2014] NSWSC 692 (29 May 2014).*

2 *ZEATM LTD -v- Zani [2014] WASC 25 (31 January 2014).*

3 *See Sportsbet Pty Ltd v Carpanini & Anor [2014] VSC 166 (31 March 2014).*

> **an organisation should regularly review and update the post employment restraints in its employment contracts**

Even where an employee leaves your organisation in circumstances where there is no suggestion that a breach of restraint will arise from any subsequent employment or business dealings, it is prudent for an organisation to draw to the departing employee's attention the scope and nature of any existing restraints. An open discussion of the issue at this stage can prevent any subsequent misunderstanding arising, and also put the departing employee on notice that the organisation takes seriously the obligations that the restraints establish and will take steps to follow through on any conduct that may be prejudicial to its business interests.

DEALING WITH DEPARTING EMPLOYEES:

- Seek advice on the reasonableness of restraint where employee's post employment plans are considered likely to give rise to potential breach.
- Remind departing employees of ongoing obligations post-employment.
- Confirm in writing the scope and nature of the obligations of the employee post-employment.
- Make clear that conduct prejudicial to the organisation's interests will not be tolerated.

SUMMARY

Post-employment restraints are a matter of concern at every stage of the life cycle of an employment contract. While contractual restraints don't often attract attention until something contentious arises, the preceding discussion highlights that a proactive approach to the management of restraints can reap benefit for an organisation in terms of risk minimisation. Recruitment and departures are key areas, as well as the currency of restraints for ongoing employees. The touchstone for assessing the appropriateness of the scope and nature of restraints should always be the capacity to protect the legitimate business interests of an organisation.

Key Takeaways

1. Post-employment restraints are an effective way to protect the interests of your business.
2. Proactive management of post-employment restraints is recommended throughout the employment relationship, not just when an employee is looking to leave the business.
3. The effectiveness of your post-employment restraints will be enhanced by careful consideration of the scope and content of those restraints and tailoring the restraints to the needs of your business.

UPCOMING Events

www.peopleculture.com.au/events

PCS has a proud history of thought-leadership in workplace relations. 2015 will be the fourth year that our firm will deliver to clients a comprehensive range of webinars, education and training sessions and key briefings designed to span the areas that our clients consider to be of most relevance.

If you are a PCS client, many of our events are offered to you on a complimentary basis or at reduced cost.

WEBINAR PROGRAM

All webinars are facilitated by members of PCS's Senior Legal Team using our interactive webinar software. This cutting edge software allows you to see the presenter and their presentation simultaneously while giving you ability to ask the presenter questions and engaging in discussion with the group.

WEDNESDAY, 11 FEBRUARY 2015

Webinar

That's Not Fair!
Top 10 Unfair Dismissal Cases

WEDNESDAY, 18 MARCH 2015

Webinar

Bargaining For Your Brand: Enterprise Agreements That Protect Your Brand Inside and Out

WEDNESDAY, 15 APRIL 2015

Webinar

What's The Risk?
Personal Risk for HR and Executives

WEDNESDAY, 13 MAY 2014

Webinar

Getting Bang For Your Buck: Where Should Your Budget Be Allocated

WEDNESDAY, 10 JUNE 2015

Webinar

We Need to Talk:
Handling Difficult Conversations

WEDNESDAY, 15 JULY 2015

Webinar

How to Warm Up Cold Employees: Building Engagement for Disengaged Employees

WEDNESDAY, 12 AUGUST 2015

Webinar

Can I Have Wine With That? Drugs and Alcohol in the Workplace

WEDNESDAY, 9 SEPTEMBER 2015

Webinar

Ramming Through Change: Best Practice Change Management

WEDNESDAY, 14 OCTOBER 2015

Webinar

Mental Health Month Special: The Impacts of Bullying on Mental Health

WEDNESDAY, 11 NOVEMBER 2015

Webinar

2015 Wrap Up and the Year Ahead

LEGAL BASICS FOR EMERGING HR PROFESSIONAL

This four-part program is ideal for junior HR professionals and line managers. The series introduces core legal principles across all facets of employment law.

TUESDAY, 21 APRIL 2015

Legal Basics for HR

Legal Basics for HR: Session 1
Melbourne

THURSDAY, 23 APRIL 2015

Legal Basics for HR

Legal Basics for HR: Session 1
Sydney

TUESDAY, 5 MAY 2015

Legal Basics for HR

Legal Basics for HR: Session 2
Melbourne

THURSDAY, 7 MAY 2015

Legal Basics for HR

Legal Basics for HR: Session 2
Sydney

TUESDAY, 19 MAY 2015

Legal Basics for HR

Legal Basics for HR: Session 3
Melbourne

THURSDAY, 21 MAY 2015

Legal Basics for HR

Legal Basics for HR: Session 3
Sydney

TUESDAY, 2 JUNE 2015

Legal Basics for HR

Legal Basics for HR: Session 4
Melbourne

THURSDAY, 4 JUNE 2015

Legal Basics for HR

Legal Basics for HR: Session 4
Sydney

PCS SIGNATURE EVENTS

These are our twice-yearly invitation only events. Our June key briefing will explore our research into approaches to employee separation and our hugely successful Hypothetical series returns for a fourth year in November 2015.

TUESDAY, 16 JUNE 2015

Signature Events

Key Briefing: Approaches to Employee Separation - *Sydney*

THURSDAY, 18 JUNE 2015

Signature Events

Key Briefing: Approaches to Employee Separation - *Melbourne*

THURSDAY, 19 NOVEMBER 2015

Signature Events

2015 Hypothetical: The Times They-Are-A-Changing
Sydney

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JASON RANCE, MANAGING DIRECTOR - AUSTRALIA AND PACIFIC CONTROL RISKS

Jason is Managing Director of Control Risks Australia Pacific and has over 20 years' experience in global consulting, marketing and operational roles, including as a founder of two successful start-ups. He started his career in the risk management industry in 1995 as one of the founders of Europe's first dedicated Business Intelligence practice. His team pioneered the application of the investigative tools and techniques traditionally used to tackle fraud and white collar crime to help senior business decision-makers better understand and realise commercial opportunities. Much of his team's focus was on conducting pre-investment due diligence for development and investment banks investing in the newly emerging countries of the former Soviet Union (FSU), assisting them in avoiding many of the common pitfalls relating to organised crime, corruption, and political interference. He also ran the French business for a period of time.

In his current role Jason regularly advises corporations and financial institutions on integrity and partner risks, new market entry strategies, and high profile corporate investigations and has a particular focus on business intelligence.

Before joining Control Risks, Jason was a member of the global executive team of Speedo International, a $1bn swimwear brand. In 2008 he was appointed Global VP Marketing & Strategy with responsibility for strategy, marketing, ecommerce operations, and market and consumer insights across 170 markets. He has worked widely throughout Asia, Latin America and Europe, both as a consultant and in managing and developing subsidiary, joint venture and distributor branded businesses.

He has a BSc. In Economics (Hons.) from the London School of Economics and Political Science and has attended executive education at Harvard Business School.

HANNAH LOW, LEGAL EDITOR AUSTRALIAN FINANCIAL REVIEW

Hannah is the Legal Editor at the Australian Financial Review specialising in legal analysis and court cases. Hannah completed a Bachelor of Applied Finance with a Bachelor of Laws (with Honours) before working as a solicitor in commercial litigation and insolvency.

She joined the AFR in early 2010 and has since covered a number of high profile court cases including the $37 million David Jones sexual harassment case and the allegations levelled by James Ashby against his boss Peter Slipper.

In 2011 Hannah was involved in the investigative series "Revealed: Inside Australia's biggest tax sting" which was commended by the Walkley judges in the investigative journalism category.

In 2012, Hannah was a joint winner of a Walkley award for excellence in journalism for her work on the investigative series: "The Punters Club - tax, totes and the boys from Tassie."

MIKE BEELEY, CEO REAGENT EMPLOYER MARKETING

Born in the UK and migrating to Australia in 1989, Mike has spent the last 25 years helping global and local organisations understand their EVP and how to market their employment proposition to their target audiences through traditional and emerging media.

A veteran of the Australian employer branding scene, Mike now owns ReAgent Employer Marketing, with offices in Brisbane, Perth and Sydney and over 50 clients from global majors to smaller Australian SMEs.

Mike has consulted with organisations across all industries in the private and public sectors, showing them how to build the skills and resources to 'farm' talent through employer branding and creative talent touchpoint management.

He is a regular speaker in Australia and overseas on how talent acquisition and retention can form the backbone of a good Workforce Plan.

THE PANEL

NICK KLEIN, DIRECTOR - KLEIN & CO

Nick is the Director of Klein & Co., the leading independent computer forensic team in Australia. With over fifteen years of IT experience, specialising in forensic technology investigations and presenting expert evidence in legal and other proceedings Nick and his team have been engaged as experts in hundreds of cases including commercial litigation and electronic discovery, criminal prosecution and defence, financial fraud, corruption, employee misconduct, theft of intellectual property, computer hacking and system intrusion.

He was previously a senior director in Deloitte Forensic and a team leader in the High Tech Crime Team of the Australian Federal Police, where he worked on international police investigations and intelligence operations including counter terrorism, online child abuse, computer hacking, and traditional crimes facilitated by new technologies.

Nick has presented expert evidence in civil and criminal matters across Australia and overseas, including providing expert testimony in the Bali bombing trials in Indonesia in 2003. He has appeared before Australian State and Commonwealth Parliamentary Committees and participated in Government working groups on cybercrime issues including the Fraud Taskforce of the Australian Banking Association and the Critical Infrastructure Protection forum of the Australian Commonwealth Government.

MAREE SLATER, SENIOR HR EXECUTIVE AND NON EXECUTIVE DIRECTOR

Maree is a senior HR and operational executive and non-executive director. She possesses a unique breadth and depth of expertise in leading major transformational and positive cultural change across a diverse range of complex industries and business models including media, energy, infrastructure, defence, legal, banking, retail, IT, entertainment, hospitality and vehicle manufacturing. Her sector experience includes ASX publicly listed, multinational, large privately owned companies and government organisations.

Maree brings her intellect, commercial acumen and strategic thinking ability to create and sustain positive, high performance workplaces through direct involvement with directors, leadership teams and employees. She has a genuine, demonstrated commitment to driving organisations to be the best they can be. Substantially Improved leadership, productivity, engagement, safety, industrial relations and reputational outcomes have been achieved under her governance.

WELCOME TO THE 2014 HYPOTHETICAL

On behalf of the PCS team it is with great pleasure that I welcome you to our third annual "Hypothetical".

For those of you who are not familiar with the concept of the Hypothetical, a series of panel discussions that ran on the ABC several years ago facilitated by prominent human rights lawyer Geoffrey Robertson QC, the idea is to elucidate informed commentary and debate on a particular issue by taking a hypothetical scenario and exploring the "what ifs" based on and around the scenario.

The first two Hypotheticals run by our firm were on the subjects of sexual harassment and termination of employment respectively. This year we turn our attention to the ever-topical subject of social media. In fact, the title of this year's Hypothetical is Homeric, reflecting the epic nature of the social media challenge for employers!

I am extremely grateful to our esteemed panellists for giving up their time for this year's event. In particular, Hannah Low from the AFR joins us for her third successive stint as a Hypotehtical panellist.

PCS remains committed to innovation across its delivery of services and the commitment to a thought-leading event such as this translates that commitment into our client education and value-add services.

I trust you will enjoy the event.

Joydeep Hor

THE CONCEPT

The concept of the "Hypothetical" was pioneered by prominent Australian human rights barrister and media personality Geoffrey Robertson QC in the early 1980s. The series created by Robertson aired on ABC.

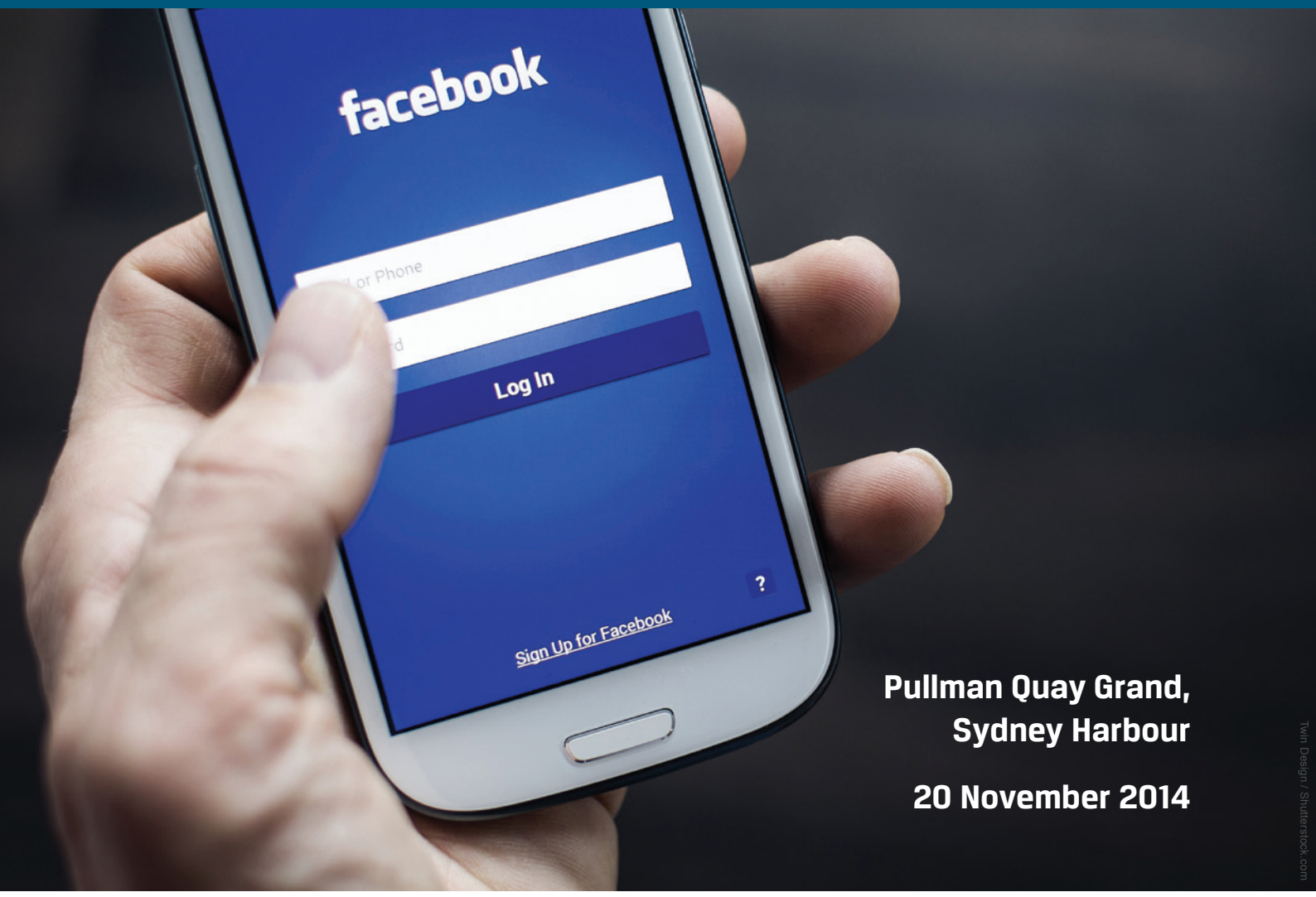
The television show proposed a hypothetical situation followed by a discussion between Robertson's guest panellists. Robertson's guests were notable personalities recognised as influencers, thought leaders and captains of industry. Panellists explored the ethics and dilemmas inherent in the everyday situations that were the subject of the hypothetical scenario.

The hypothetical format was used to explore many controversial and relevant social issues ranging from health, drugs, abuse, the environment, immigration, divorce and the court process and constitutional issues involving the recognition of Indigenous Australians and many more. The commonality of cause was that all of the issues could potentially divide an audience and spark lively debate as a kaleidoscope of perspectives clash and merge.

Some of the prominent individuals who appeared in the Hypotheticals include: Dick Smith, environmentalist Bob Brown, Ita Buttrose, radio personality Alan Jones, singer Neil Finn, novelist Bettina Arndt, John Howard, Sir James Gobbo, and Aboriginal activist Michael Mansell.

Hypothetical 2014

THE FACEBOOK PAGE THAT LAUNCHED A THOUSAND SUITS



Pullman Quay Grand, Sydney Harbour

20 November 2014

Twin Design / Shutterstock.com

People + Culture Strategies

Your *Partners* in Workplace Law