STRATEG-EYES:

Workplace Perspectives

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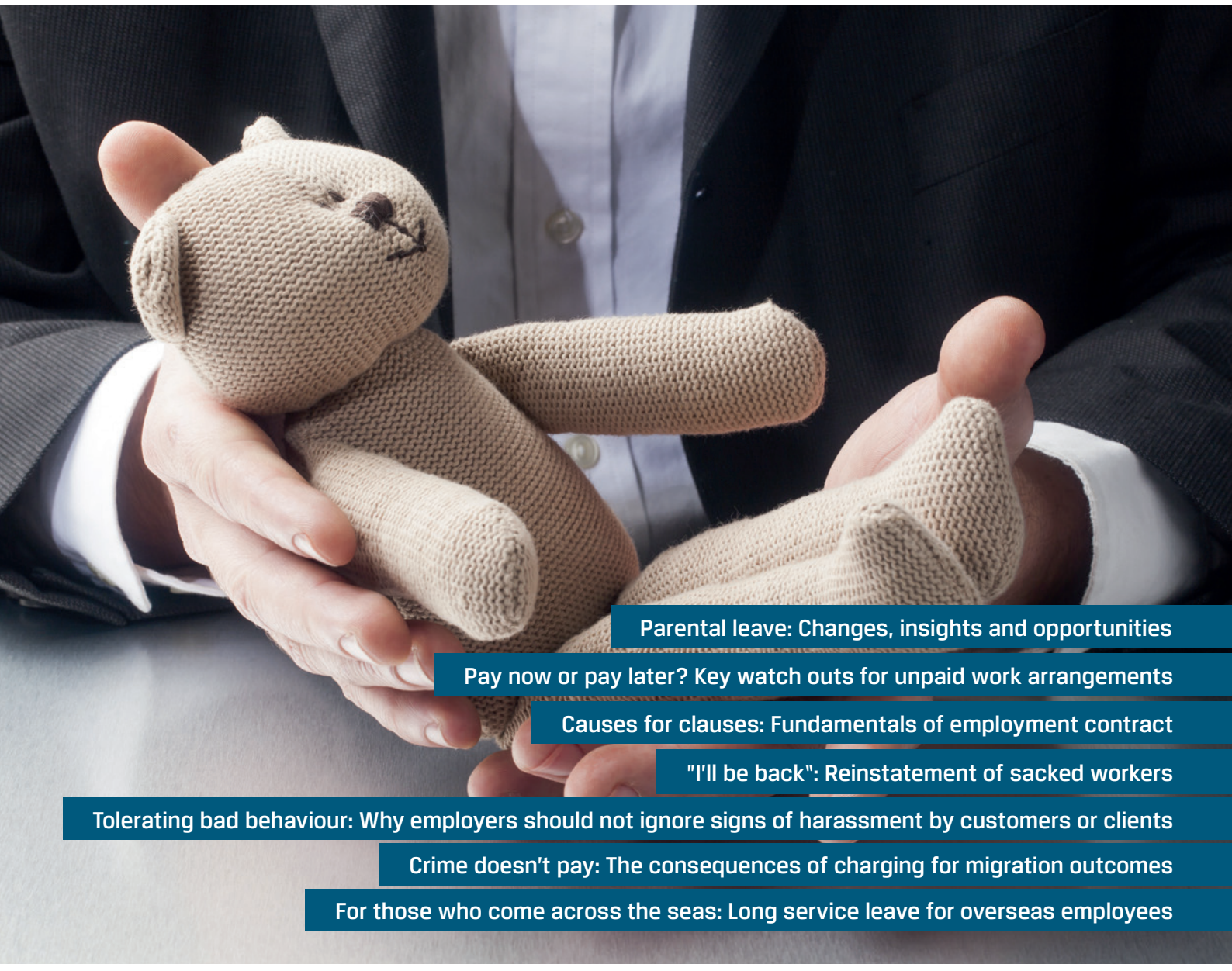

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WELCOME: from the Founder and Managing Principal

I am pleased to share the latest issue of Strateg-Eyes with you on the eve of our firm driving one of the most significant innovations in legal and professional services history in this country.

PCS will shortly be releasing a Guide to Services that will transparently be offering clients of our firm a significant array of options when it comes to how they work with our firm. In addition to our monthly retainer arrangements (which we have had since commencement of our firm in 2010) being enhanced to now incorporate offerings in the strategic HR consulting space, one of our most exciting innovations is the creation and launch of the "PCS Partnership". This model will allow clients to have generous access to "sounding board" advice from members of our legal team as part of the payment of a very modest annual fee.

The Guide will also detail a broad suite of services across the firm's four capability areas (Legal Advice and Consulting, Investigations and Dispute Resolution, Strategic HR Consulting, and lastly, Leadership Development, Coaching and HR Executive Education) that PCS will now be offering at a fixed fee. We understand that businesses and employers need price and budgeting certainty when it comes to all external engagements and our decision to embrace and publish a detailed fixed fee schedule once again demonstrates why we are the most innovative and client-focused firm in our industry.

We are enormously excited about the opportunities for our new model to create unparalleled value for your organisations and for you to see how we can be a transformative business partner with you.

Joydeep Hor
Managing Principal

A LOOK INSIDE:

PARENTAL LEAVE: Changes, insights and opportunities

LYNDALL HUMPHRIES, SENIOR ASSOCIATE

The workforce of today is one in which both male and female workers balance competing priorities of work and family life. This article looks at what support the Government provides to primary carers and working parents, how this responsibility can be shared by employers and what opportunities this may present in the context of the current legal framework.

PAID PARENTAL LEAVE

Prior to 2011, while Australia provided some financial assistance for costs associated with newborn or adopted children, it was one of only two OECD countries without a national paid parental leave scheme ("**PPL Scheme**"). This changed with the introduction of the *Paid Parental Leave Act 2010* (Cth) ("**PPL Act**") in January 2011.

The PPL Act provides for Australia's PPL Scheme which currently consists of the following Government-funded payments:

- Parental Leave Pay: an 18-week payment at the national minimum wage for eligible primary carers (most commonly birth mothers) of newborn and recently adopted children; and
- Dad and Partner Pay: a two-week payment at the national minimum wage for eligible dads or partners caring for newborn or recently adopted children.

Payments under the PPL Scheme are currently made irrespective of whether an individual receives employer-provided parental leave payments and regardless of the amount of such payments. This means that individuals can receive parental leave payments from both the Government and their employer.

PROPOSED CHANGES

Last year the Government proposed changes to the PPL Act as part of its 2015-16 budget measures and the *Fairer Paid Parental Leave Bill 2015* was introduced in the House of Representatives on 25 June 2015. Under these proposed changes, an employee who is eligible to receive Parental Leave Pay must notify the Government of any employer-provided parental leave payments. If any such payments are being received, the employee's Parental Leave Pay would be reduced by the amount of those payments. This could mean that an individual would not be entitled to receive any Parental Leave Pay under the PPL scheme.

The proposed changes were originally scheduled to take effect on 1 July 2016 but did not pass through the House of Representatives by this date and have now been stood over indefinitely pending changes to Government policy in the lead-up to the next federal election. This is welcome news for unions, industry and equality groups and non-Government parties who, on the whole, did not support the proposed changes. However, it has been reported that the Government remains committed to making changes to paid parental leave in the event the Coalition wins the next election but the detail is unclear. We anticipate that the proposed changes may change again. Watch this space.

A COMPETITIVE EDGE

It is against this backdrop that Australian employers are increasingly seeing paid parental leave as a way of attracting and retaining talent, addressing skill shortages and lower levels of female workforce participation, and differentiating their business from competitors.

It also has the effect of promoting diversity and inclusion in the workplace and supporting gender equality and non-discrimination.

UNPAID PARENTAL LEAVE

Paid parental leave is complemented by the entitlement to unpaid leave under the National Employment Standards ("**NES**") in the *Fair Work Act 2009* (Cth) ("**FW Act**"). Twelve months' unpaid parental leave is available to employees (including eligible casual employees) with 12 months' continuous service if the leave is associated with the birth or adoption of a child under 16 years of age.

RETURN TO WORK GUARANTEE

The NES also provides a return to work guarantee at the end of unpaid parental leave so that an employee may return to their pre-parental leave position, or, if the job no longer exists, to an available position for which the employee is qualified and suited, nearest in status and pay.

The fact that an employee is pregnant, intends to take or takes parental leave and/or has a return to work guarantee does not prevent an employer from making a position redundant if the redundancy is genuine. The employer must be able to prove that these factors were not the reason or part of the reason for making the employee's position redundant. In the case of *Schultz v Scanlan & Thodore Pty Ltd* [2013] FCCA 1096 the employer produced evidence of a significant downturn in the employer's business, the requirement to cut costs (including by reducing the number of staff) and the consideration given as to why a particular role ought be made redundant, and the Court found that this demonstrated that the employer did not take adverse action against the employee.[1]

RIGHT TO REQUEST FLEXIBLE WORKING ARRANGEMENTS

The entitlement under the NES to request flexible working arrangements is intended to assist parents (and others with caring responsibilities) to balance working arrangements with family and caring responsibilities. Employees (including eligible casual employees) with 12 months' continuous service who are parents, or who have the responsibility for the care of a child of school age or younger, have a right to request flexible working arrangements to assist them to care for a child.

A request for flexible working arrangements may only be refused on "reasonable business grounds" and, if refused, details must be provided in writing. The NES provides guidance on what constitutes "reasonable business grounds" by providing a non-exhaustive list of factors including if the new arrangements would be too costly, if there are limitations on changing the arrangements of other employees or if the new arrangements would be likely to result in a significant loss in efficiency or productivity or have a significant negative impact on customer service.

ANTI-DISCRIMINATION OBLIGATIONS

Whether or not an employee is covered by the above NES entitlements, it may, in certain circumstances, amount to discrimination under anti-discrimination legislation or adverse action under the FW Act to refuse to return an employee to their pre-leave position or to allow flexible work arrangements. In this regard, an employer must ensure that an employee's sex or family responsibilities do not unfairly influence its decisions.[2] In the case of *Heraud v Roy Morgan Research Ltd* [2016] FCCA 185 the Court found that the employer's decision to make an employee redundant was linked to the employee's scheduled return from parental leave and the employer therefore took adverse action against the employee by not returning her to her pre-parental leave position, even if that position was only available for her return to for less than two months.

1 See for example *Schultz v Scanlan & Thodore Pty Ltd* [2013] FCCA 1096 at [144]-[159].

2 See for example *Heraud v Roy Morgan Research Ltd* [2016] FCCA 185 at [192], [197]-[198].

OPPORTUNITIES

In the context of these legal obligations employers are encouraged to see working parents as an asset and the abovementioned NES entitlements as opportunities. When an employee returns to work or flexible working arrangements are successfully implemented, it can:

- reduce costs related to recruitment and restructuring;
- minimise the need for retraining as knowledge and experience is retained within the business;
- widen the talent pool; and
- increase organisational productivity and performance because flexible workers need to be organised and effective.

The provision of support to primary carers and working parents may increase employee job satisfaction, motivation and loyalty to their employer. Significantly, it is also likely to improve an employer's reputation, enhance goodwill and create a positive team culture.

LEADING PRACTICE

In addition to employer-provided parental leave payments some employers are going above and beyond their minimum legal obligations to provide other initiatives that support primary carers and working parents. Some examples[3] are set out below:

Key Takeaways

- Paid parental leave in Australia is a relatively new and evolving notion – employers are encouraged to embrace the opportunities it presents.
- The National Employment Standards set out various protections for primary carers and working parents (including a return to work guarantee and a right to request flexible work arrangements).
- Anti-discrimination legislation protects parents and carers from discrimination in the workplace.
- Organisations should maintain the confidence to make necessary business decisions in relation to the positions of employees on parental leave, so long as those decisions can be justified objectively.
- Employers are implementing leading practice initiatives which support primary carers and working parents to gain an advantage over their competitors.

ANZ and Dexus Property Group provide continuity of superannuation contributions during parental leave.	NAB and Stockland have childcare facilities at their offices in Sydney (and North Sydney).	Laing O'Rouke provides support during parental leave, including keeping in touch programs and return to work coaching.
Goldman Sachs focuses on communication during parental leave, including one-on-one meetings with the CEO and business updates before, during and upon return from leave.	Caltex has implemented measures to support employees returning to work and increase retention rates. This includes a 3% a quarter bonus up until the child is 2 years old.	Telstra has mainstreamed flexibility by rolling out "All Roles Flex", an initiative whereby every role in the company can be undertaken flexibly and where the focus is on productivity and outcomes rather than face time.

3 Australian Human Rights Commission, Successful Strategies to Support Working Parents, 2016, http://www.nab.com.au/vgnmedia/downld/supporting_our_people.pdf, http://www.laingorourke.com/media/news-releases/2014/industry-leading-paid-parental-leave.aspx and http://www.dexus.com/upload/asxannouncements/2015%2003%2012%20DEXUS%20launches%20initiative%20to%20bridge%20the%20gender%20superannuation%20gap.pdf.

PAY NOW OR PAY LATER?
Key watch outs for unpaid work arrangements

KATHRYN DENT, DIRECTOR AND DAVID WEILER, ASSOCIATE

The obligations owed to interns and those engaged in unpaid work experience, and their status under employment and labour laws, has become the subject of increased concern and scrutiny.

The job market in Australia is such that many new graduates are seeking to enter industries, such as media, recruiting or event management, where there are simply far more applicants than paying jobs. This has created a situation where job seekers may find themselves needing to work without payment for a period in order to get relevant experience and hence a foothold in the industry. On the other hand, universities and other institutions that qualify young people (and older workers looking to change careers) for these fields quite legitimately can require work-experience as a prerequisite for the completion of a degree in order to enhance the work readiness of its graduates and improve graduate employment outcomes.

In order to accommodate the provision of genuine work experience opportunities for potential job seekers, the *Fair Work Act 2009* (Cth) ("**FW Act**") exempts employers from the obligations otherwise applicable in respect of employees such as payment of wages, minimum award rates and casual loading in certain circumstances, for example, if the arrangement qualifies as a *"vocational placement"*. However, as has been routinely reported for several years, this system has the potential to facilitate exploitation, particularly of young people or those who may already feel their situation is precarious in terms of securing employment, such as former international students.[4]

This risk was explored in a report commissioned by the Fair Work Ombudsman ("**FWO**") from Professors Andrew Stewart and Rosemary Owens on the issue of internships and unpaid work experience in the Australian context, entitled *The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia: Experience or Exploitation* ("**FWO Report**").[5]

4 J Price, 'Despite rorting of internship programs, they're still worthwhile', *The Conversation*, 18 November 2014 (http://theconversation.com/despite-rorting-of-internship-programs-theyre-still-worthwhile-34082); D Cullen, 'Hidden cost of free labour: interns', *The Australian*, 6 January 2011; W Wood, 'Unpaid internships are exploited by the wealthiest in the creative industry', *The Guardian*, 30 November 2011.

5 This was also the subject of a paper presented by Stewart and Owens at the International Labour Organization's Conference on *Developing and Implementing Policies for a Better Future at Work* entitled *Regulating for Decent Work Experience: Meeting the Challenge of the Rise of the Intern.*

POTENTIAL EXPLOITATION OF UNPAID WORK EXPERIENCE

The genesis of the FWO Report was a 2011 Sydney Morning Herald ("**SMH**") article entitled *"Eager workers can be free and easy"*.[6] The article touted the benefits of hiring unpaid labour at a time when this issue was at the forefront of the media. About eight months prior to the SMH article, the American magazine Forbes published an article online by Katherine Lewis that explored the reasons businesses are eager to engage free labour and provided quotes from the CEO of a Toronto/New York start-up, Kelly Fallis:[7]

"People who work for free are far hungrier than anybody who has a salary, so they're going to outperform, they're going to try to please, they're going to be creative."

"From a cost savings perspective, to get something off the ground, it's huge. Especially if you're a small business."

The article revealed that Ms Fallis had *"used about 50 unpaid interns for duties in marketing, editorial, advertising, sales, account management and public relations."* Ms Fallis was also quoted as lamenting the labour law protections applicable: *"[u]nfortunately for many employers hoping to use unpaid labor to advance their business goals, there are strict federal and state rules that workers must be paid the minimum wage and paid for overtime, and must abide by other provisions in [federal labour legislation]"*.

6 V Khoo, 'Eager workers can be free and easy', *Sydney Morning Herald*, 13 August 2011. The same article appeared on the same day in The Age newspaper, under the title *'How to get Free Labour'*.

7 http://fortune.com/2011/03/25/unpaid-jobs-the-new-normal/

GUIDANCE FOR EMPLOYERS

If an employer is considering offering work place experience that could create an employment relationship, it will likely need to abide by its obligations with respect to employees under the FW Act (including the payment of minimum wages and, if the employee is covered by a modern award, the terms and conditions of that award) unless the arrangement qualifies as a vocational placement.

What is a vocational placement exception for unpaid work under FW Act?

(a) Must be undertaken as a requirement of an education or training course. This is accepted as meaning *"to complete a program"* (e.g. Certificate in Business Administration, Diploma of Education or Bachelor of Laws).

(b) Must be authorised under a law or an administrative arrangement of the Commonwealth, a state or a territory. This means that the education or training course itself must be authorised under such a law.

(c) Must not involve a person being entitled to any *"remuneration"*. Remuneration is not defined but case law suggests it is broader than *"wages"* and would include *"recompense or reward for services rendered, including non-cash benefits"*. Reimbursement for expenses incurred is not ordinarily treated as remuneration. Note that gratuities or bonuses without *"entitlement"* do not preclude meeting the requirements of the exemption.

(d) Stewart and Owens also note that the FW Act provisions make reference to a *"placement"*, and argue that this suggests there must be some procedure or process for the *"placing"* of individuals.

FAIR WORK OMBUDSMAN PROSECUTES WORK EXPERIENCE PROVIDER

In early 2015, a sports media company which produced radio and television programmes for advertisers was prosecuted by the FWO for not complying with various provisions of the FW Act in respect of its employees. In its Federal Circuit Court application, the FWO alleged that Crocmedia Pty Ltd ("**Crocmedia**") had failed to appropriately pay two employees, who had initially performed unpaid work experience for approximately three weeks, when they were subsequently engaged on a casual basis.[8] The FWO alleged that when the employees did get paid, the payments were made in reference to *"reimbursements for expenses"*[9] and not for the performance of work.

8 *FWO v Crocmedia Pty Ltd* [2015] FCCA 140

9 Ibid., [13].

> **"...the benefits that participants can receive from such a program can be invaluable to students and recent graduates..."**

It was agreed by the parties that Crocmedia failed to pay the employees in accordance with the relevant award after the initial period of three weeks' work experience, and as a consequence the employer was found to have breached the FW Act by failing to:

(a) pay minimum wages;

(b) pay casual loadings;

(c) pay in full, at least monthly; and

(d) provide pay slips.

In his decision, Riethmuller J commented that *"the Respondent cannot avoid the proposition that it is, at best, dishonourable to profit from the work of volunteers, and at worst, exploitative"*[10], and held that it was *"clear that the Respondent was content to receive the benefits that flowed from the arrangement, and that the arrangement itself, when viewed objectively, was exploitative."*[11] It should be made clear that the exploitative nature was not the three week period of unpaid work but rather the extension of that program where the students were only reimbursed for their costs.

Despite the strong language used by the Court, when deciding the appropriate penalty for Crocmedia, the Court took into consideration the company's contrition, corrective action following, and cooperation with, the FWO's investigation. The fact that the employees had been paid the balance of the underpayments owed to them was a considerable mitigating factor in the Court's determination that the appropriate penalty for Crocmedia's breaches of the FW Act was a total of $24,000 (the maximum possible total penalty being $115,500).

The Court also considered the context in which this decision was made and emphasised the need for deterrence in the industry. It was not lost on Riethmuller J that the FWO Report (which was cited at length in the judgment) identifies media as the industry with the highest prevalence of unpaid work experience.[12]

10 Ibid., [27].

11 Ibid., [32].

12 Ibid., [10].

BENEFITS OF UNPAID WORK EXPERIENCE

Although there is the potential for exploitation in regards to unpaid work experience, the benefits that participants can receive from such a program can be invaluable to students and recent graduates, as well as their supervisors. Allowing interns to gain on the job training with little risk or cost to the employer creates an environment where students are given this chance as opposed to a scenario where the only opportunity to be exposed to such experience is reserved for the few able to secure paying, entry level positions.

As part of their research for the FWO Report, Stewart and Owens asked students who had undertaken industry placements about their experiences. One student responded saying:

"I wouldn't be where I am today (in an industry I love, working for one of the most respected companies in the field) without having interned first. People with a sense of entitlement underestimate how necessary work experience is in this job market."[13]

CONCLUSION

While many employers may be approached about work experience opportunities it is important that the basis on which this is undertaken is made clear. If it is a genuine unpaid work experience opportunity it may come within the FW Act's exemption for vocational placements. However all such arrangements should be carefully scrutinised. The costs for failing to properly implement such a program can far exceed the potential benefits, not to mention damage a company's reputation.

Key Takeaways

- Unpaid work arrangements are being scrutinised by both the media and regulatory bodies.
- Be aware of the risks of exploitation, or even the perception of exploitation, when engaging unpaid work experience participants.
- The vocational placement exemption under the FW Act is limited. If you intend to rely on it, be sure to comply with its requirements or you may face penalties.

13 Jenna Price, 'Despite rorting of internship programs, they're still worthwhile', *The Conversation*, 18 November 2014 (http://theconversation.com/despite-rorting-of-internship-programs-theyre-still-worthwhile-34082)

CAUSES FOR CLAUSES: Fundamentals of the employment contract

JAMES ZENG, SENIOR ASSOCIATE

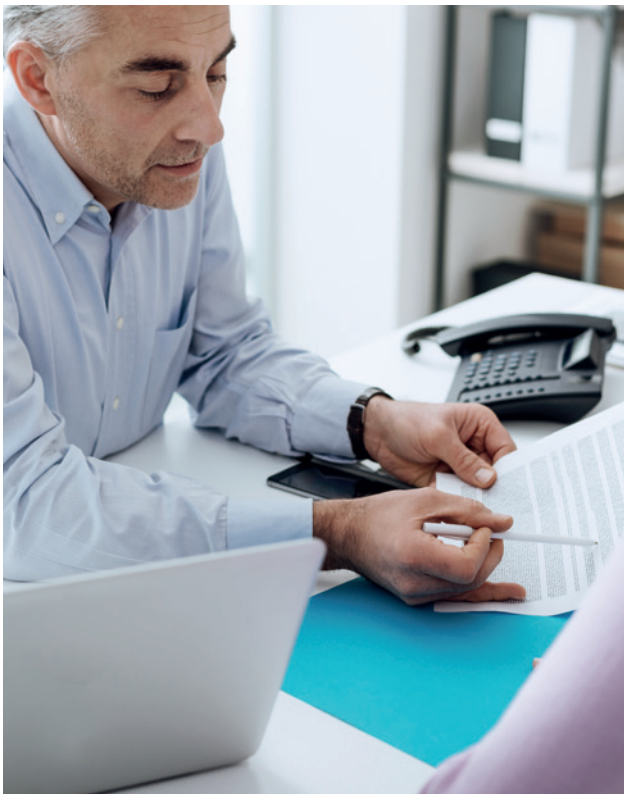
Many employers have template contracts of employment which are used when employees initially commence employment and when employees are promoted into new positions or change positions.

However, sometimes the person completing the template contract of employment does not always understand why a particular clause should be included as part of an employee's contract of employment. This article looks at the key clauses found in standard contracts of employment and reasons why such clauses should be included.

1. TERMINATION

One of the most crucial clauses in a contract of employment is the termination of employment clause. Where the employment is for an indefinite period (that is permanent or ongoing) contracts of employment should clearly outline the circumstances when the employment may be terminated by one or both parties and how the termination of the employment can be carried out by either party. Employers should consider including an express right to make payment in lieu of notice and/or to direct the employee to perform some or none of their duties during the notice period. Employers should also consider types of conduct by the employee or certain events that might automatically trigger the immediate termination of the employment. While misconduct is perhaps the most obvious example, others may include the employee losing a requisite qualification or being charged with certain criminal offences.

The failure to have a proper termination of employment clause means that the employee might be entitled to reasonable notice implied by law. What is reasonable notice in the circumstances will then depend on a number of factors including but not limited to length of service, age of the employee, seniority and the likely period it might take for the employee to find a comparable role in the industry. Reasonable notice has been held by Courts to be up to 12 months in some circumstances. Therefore, it is important that an appropriately drafted termination of employment clause is included in all contracts of employment.



2. ENTIRE AGREEMENT

An often overlooked clause is the entire agreement clause. When interpreting contracts of employment, Courts will not consider evidence outside of the contract unless it can be shown that the written contract of employment was not intended by the parties to capture the entire agreement between them.

The failure to include an entire agreement clause in contracts of employment means that verbal representations, written policies and procedures and other non-contractual terms might be considered to form part of the terms and conditions of an employee's employment. This is not an ideal situation for employers. The purpose of the entire agreement clause is to ensure that terms, whether written or unwritten, outside of the contract of employment are not incorporated into or form part of the written contract of employment.

Employers should be vigilant to ensure that their conduct both during the recruitment process and in the course of the employment relationship is consistent with the entire agreement clause and that all agreed terms are captured in the contract of employment as a stand-alone document.

3. POLICIES AND PROCEDURES

The effect of a clause dealing with policies and procedures under a contract of employment is to:

- inform the employee that the employer has written policies and procedures;
- impose a requirement (which also constitutes a lawful and reasonable direction) on the employee to comply with all of the employer's written policies and procedures at all times in the course of employment; and
- document a clear intention and agreement between the parties that the employer's written policies and procedures do not form part of the contract of employment nor do such documents give rise to any contractual rights on the part of the employee.

Serious legal ramifications may arise where the contract does not make the non-contractual effect of polices and procedures clear. For example, the failure by the company to abide by its policies and procedures might give rise to a claim for damages by the employee for breach of the contract of employment or could hamper any disciplinary process an employer may wish to take against the employee for breach of policies and procedures.

4. CONFIDENTIALITY

Contracts of employment will often include a clause requiring the employee to protect and keep secret the employer's confidential information. A confidentiality clause, while not necessary in all circumstances or types of employment, will be important in situations where the employee deals with or has access to the employer's confidential information.

Employers should ensure that the information falling within the definition of "Confidential Information" as drafted is broad enough to capture all of the employer's confidential information. Employers should also ensure that the obligation imposed on their employees is not limited to keeping secret the employer's confidential information, but also includes a requirement to safeguard and take all reasonable steps to protect the employer's confidential information at all times.

However, the confidential information clause should not be drafted in such an onerous manner as to prevent the employee from effectively carrying out their duties and responsibilities in their assigned position, or sharing confidential information with colleagues on a need-to-know basis.

5. INTELLECTUAL PROPERTY

Intellectual property clauses provide a clear outline of the obligations of the parties under relevant legislation dealing with intellectual property rights and confirm that that the work performed by an employee in the course of employment belongs to the employer. Employers should ensure that intellectual property clauses deal with inventions and designs, copyright and moral rights. This is especially important in the software development and information technology industry.

Employers should also consider provisions dealing with an employee's misuse of intellectual property belonging to the employer.

6. VARIATIONS

A contract of employment should include a clearly drafted variation clause that specifies how the contract of employment may be varied by the parties. This helps to reinforce the entire agreement clause (discussed above) and avoid situations where, because of the way the parties have conducted themselves, the parties are taken to have agreed to vary the existing contract of employment.

Often, the nature of an employee's employment will vary over the term of the employment relationship. Therefore, employers should include a provision (within the variation clause) outlining that the contract of employment continues to apply notwithstanding any change to an employee's position, remuneration or location. This avoids any potential argument that the employee's original contract of employment no longer applies because of a change in the employment, or that the notice period is no longer adequate and that a reasonable notice requirement should be imposed.

7. ABSORPTION

Absorption clauses are important for employees covered by an industrial instrument such as a modern award or an enterprise agreement. An absorption clause properly drafted will allow the employer to off-set amounts paid to the employee above the minimum required by the industrial instrument against other monetary amounts owed to the employee. Such a clause helps to protect employers against claims by employees for additional entitlements under an industrial instrument, or claims that a payment has not been made in accordance with the industrial instrument.

8. WORKPLACE SURVEILLANCE

In addition to any policies and procedures an employer may have on workplace surveillance, employers (especially those based in States with workplace surveillance legislation) should ensure that an appropriate clause is included as part of the employee's contract of employment constituting notice of workplace surveillance and outlining the employer's right to monitor and review internet browsing, computer usage and emails. The failure to give appropriate notice will not only result in the employer potentially being in breach of legislation but could also prevent the employer from relying on material obtained through workplace surveillance in any disciplinary process or employment related litigation.

Key Takeaways

- By understanding the reasons for certain clauses in employment contracts, employers can help ensure that their employment contracts accurately reflect the terms and conditions of the employment relationship and sufficiently protect their interests.
- Employment contracts should be reviewed and amended whenever there are material changes to an employee's role, particularly when an employee is moved into a new position.
- If in doubt as to the effectiveness of a clause, or how a particular clause works, an employer should obtain proper advice, and should certainly do so before making amendments.

"I'LL BE BACK": Reinstatement of sacked workers

MICHAEL STARKEY, ASSOCIATE

It may be Arnie's favourite catchphrase, but *"I'll be back"* are the words no employer wants to hear when effecting a termination of employment.

This article considers the role of reinstatement in the Australian workplace relations system and highlights that an employer's fear that a reinstatement order will be made is not how most matters are resolved. It uses recent case examples to explore what factors are taken into account by the Fair Work Commission (the "**FWC**") in ordering reinstatement, and canvasses strategies that an employer might adopt when confronted with a reinstatement order to deal with its consequences at an organisational level.

PRIMARY REMEDY OR AN UNCOMMON REMEDY?

Reinstatement is the *"primary remedy"* under the unfair dismissal jurisdiction of the *Fair Work Act 2009* (Cth) (the "**FW Act**"). This means that if the FWC finds that an employee has been unfairly dismissed, it must order reinstatement of that employee unless it is satisfied that reinstatement is inappropriate in the circumstances.[14]

In the previous edition of Strateg-Eyes, we flagged that the Productivity Commission has recommended that reinstatement be removed as the primary remedy of the unfair dismissal jurisdiction (while stopping short of calling for the remedy to be abandoned completely). In support of its view, the Productivity Commission noted that:

- reinstatement is often impractical given that *"the trust that is central to a harmonious and productive employment relationship is irremediably destroyed at the end of most unfair dismissal cases"*;
- parties often elect compensation during mediation in any event; and
- reinstatement is an uncommon remedy in practice.[15]

14 *Fair Work Act 2009* (Cth), s 390 ("**FW Act**").

15 Productivity Commission, *Productivity Commission Inquiry Report Volume 2* (30 November 2015), 595-6.

Although no changes have yet been made to implement the Productivity Commission's recommendations, employers who may be concerned about reinstatement can take some comfort in the last of the Productivity Commission's observations. In its 2014-15 Annual Report, the FWC noted that of 188 dismissals found to be unfair at arbitration, reinstatement (in addition to compensation in some cases) was ordered in only 27 cases (or just over 14 per cent).[16]

AVOIDING REINSTATEMENT: WHAT THE FWC WILL CONSIDER

The FW Act does not specify what factors the FWC must take into account when considering whether reinstatement is appropriate in the circumstances of a particular dismissal. While the appropriateness of reinstatement will therefore be determined on a case by case basis, a number of recent cases highlight some of the factors that may be considered.

Is loss of trust and confidence enough?

Often, employers will argue against reinstatement on the basis that the circumstances leading to the termination have resulted in the employer losing the necessary trust and confidence in the employee to maintain his or her employment.

While it is recognised that a degree of trust and confidence is required in an employment relationship, in one recent case, it was held that a loss of trust and confidence will not always be the sole (or even a necessary) criteria in determining whether or not to order reinstatement because *"in most cases the employment relationship is capable of withstanding some friction and doubts"*.[17]

A loss of trust and confidence will only be enough to prevent reinstatement if its effect is to make the employment relationship unproductive and unviable.[18]

16 Fair Work Commission, *Annual Report 2014-15* (13 October 2015), 76.

17 *Nguyen v Vietnamese Community in Australia* [2014] FWCFB 7198, [27] (**"Nguyen"**).

18 Nguyen, [28].

Maintaining a culture of compliance

Employers have had more success in demonstrating that reinstatement is inappropriate by establishing that it would undermine the policies and disciplinary procedures relied on to terminate an employee's employment.

In one recent case, the FWC found that the *"application of the relevant policy and the maintenance of appropriate discipline"* within the organisation were important, and that the applicant had *"not shown any real appreciation of [how] her conduct"* (which included acting aggressively toward suspected shop lifters) may have breached those policies. In these circumstances the FWC concluded that reinstatement was not the appropriate remedy.[19]

Post-termination conduct

With the proliferation of social media, the post-termination conduct of employees is becoming increasingly visible to a broad audience. In one recent case, while the employee's dismissal was determined to be fair (due to his dishonesty during a workplace investigation), it was held that reinstatement would not have been possible even if the opposite conclusion had been reached because of derogatory Facebook posts he shared about his former employer.

The New South Wales Industrial Relations Commission held that it would be unreasonable to reinstate an employee who had *"publicly characterised his employer as 'bastard' and 'criminal with stars'"*, particularly given the posts were not *"put up in the heat of distress about a dismissal and taken down again, but posts put up publicly two months after the termination and left there"*.[20]

19 Smith v Coles *Supermarkets Australia Pty Ltd* [2015] FWC 5446, [136].

20 *Marroun v State Transit Authority* [2016] NSWIRComm 1003, [107]-[108].

DEALING WITH THE REALITY OF REINSTATEMENT

While the statistics demonstrate that reinstatement is not necessarily a common remedy for unfair dismissal, a case from March this year demonstrates a number of factors which may lead the FWC to exercise its power to order it.

The case involved a Centrelink officer who posted comments on social media describing his clients as *"spastics"* and *"whingeing junkies"*, criticising the government and allegedly bringing the Department of Community Services into disrepute.

While the FWC found the posts meant there was a valid reason for the employee's dismissal, it found the dismissal harsh because of mitigating factors, including the length (twenty years) and quality of the employee's service, and that the dismissal was disproportionate *"having regard to all the circumstances of [the] conduct, including that it* ***bore no relationship to his actual work performance****, caused* ***no actual detriment to the Department****, was* ***situational in nature*** *and engaged in* ***impulsively rather than with deliberation****, and consisted of a* ***small number of widely interspersed comments*** *over a period of years"*.[21] Further, it was held that there was no real risk that the misconduct would be repeated, and that the employee understood that his conduct was inappropriate.[22]

21 *Daniel Starr v Department of Human Services* [2016] FWC 1460, [93] (**"Starr"**).

22 Starr, [97].

Cases like this reinforce the understandable concerns that management and human resources personnel may have about the workability of the employment relationship following reinstatement. In this respect, organisations should keep in mind the following strategies that can provide a framework to help deal with reinstated workers.

- **Acknowledge difficulty**: potential difficulties associated with reinstatement should be acknowledged both internally, and between management and the reinstated employee (if appropriate) with the intent of developing an open and productive dialogue.
- **Communicate effectively with line managers:** communication is key to tracking the pulse of the working relationship between a reinstated employee and his or her colleagues and line managers.
- **Consider mediation**: particularly if the working relationship seems problematic or unproductive, or if the reinstated employee is required to work with personnel who played a role in his or her dismissal.
- **Act in good faith**: managers must not be perceived as "*out to get*" a reinstated employee, who will have all the usual rights and protections of any other employee.
- **Reinstated employees are not a protected species**: just as significantly, employers should maintain the confidence to deal with reinstated employees as they would the rest of their employees. Further or repeated misconduct or poor performance need not be tolerated and should be dealt with in accordance with usual policy.
- **Consider the big picture**: organisations in which an employee has been reinstated should take the opportunity to review the procedures that led to that employee's unfair dismissal in the first instance, and make improvements where necessary.

Key Takeaways

1. While reinstatement remains the primary remedy of the unfair dismissal jurisdiction, it is not as common as employers might fear.
2. Whether or not a worker will be reinstated will often come down to more than whether there has been a loss of trust and confidence in the employment relationship (which, on its own, may not be enough to prevent reinstatement).
3. Employers should put in place strategies for dealing with reinstated workers (who should be treated as any other worker would be) and utilise the opportunity reinstatement presents to review any potential flaws in the disciplinary or performance management procedures that led to the dismissal.

TOLERATING BAD BEHAVIOUR:

Why employers should not ignore signs of harassment by customers or clients

ELIZABETH KENNY, ASSOCIATE

Sexual harassment in the workplace is a significant issue for Australian employers, not only in terms of the impact on individual employees who experience it, but also to the organisation in both monetary and non-monetary terms. Most employers are aware of their obligations in preventing discrimination and harassment, however, many organisations are less familiar with the question of potential liability where the sexually harassing or discriminatory behaviour is conducted by a customer or client towards their employees.

This article explores potential avenues of liability of employers in the context of sexual harassment by customers or clients and describes ways in which employers can minimise exposure, address their positive obligations to ensure the health and safety of all workers in the workplace, and be leaders in best practice strategies.

According to the Australian Human Rights Commission's 2012 national telephone survey, workplace sexual harassment affects around 21% of people aged 15 years and older, with estimates of 25% of women and 16% of men experiencing sexual harassment in the workplace in the last five years. Of those targeted, 9% were harassed by a customer or client.[23] Employees working in service industries such as retail, accommodation and food services have been recognised as particularly vulnerable as employees are often unsure about how their rights fit with the common view that the "customer is always right". This can be compounded where there are other vulnerabilities, such as the age of employees, the nature of the work performed, and the employees' level of understanding of their employment conditions and rights.

23 Australian Human Rights Commission. *Working without fear: results of the sexual harassment national telephone survey* (2012) p. 12.

PROVISION OF GOODS AND SERVICES

Under the *Sex Discrimination Act 1984* (Cth) (the "**SD Act**"), it is unlawful for any person to sexually harass another in the course of seeking or receiving the provision of goods, services or facilities from another person. This provides formal protection for workers against sexual harassment from customers or clients and an avenue for employees to make a complaint and seek a remedy. However, often employees have little information about the customer perpetrator, which makes instituting proceedings or making a formal complaint against the perpetrator difficult.

Research by Rae Cooper and Laura Good into sexual harassment by customers in the service industry also identifies other reasons why employees may not make complaints, either formally or informally, about customer-based sexual harassment.[24] These reasons include the idea that the customer holds the power in the service relationship, and that employees are often encouraged by employers in the service industry to maintain friendly relations with customers or clients, irrespective of how they behave.

THE RISK IN IGNORING THE SIGNS

The research identifies that employees are more likely to take informal rather than formal action to address problems in relation to customers or clients, such as by speaking to co-workers or line managers, particularly in circumstances where there are no specified policies or grievance procedures around sexual harassment by customers or clients or about making a complaint where such conduct occurs.[25]

An employer (or anyone) who "causes, instructs, induces, aids or permits" another person to do an act that is unlawful under the SD Act may be found to be liable for the conduct.[26] Employers on the whole appear to be less familiar with this type of liability. However, the risk of potential liability is significant and may arise where an employer is aware of sexually harassing behaviour by others in the workplace that affects their employees and the employer has the capacity to influence that behaviour, but does not take steps to stop that behaviour. As a consequence of their inaction, an employer may be construed as permitting the person to engage in acts that are unlawful under the SD Act and may be found to also be liable for the conduct. An example of where an employer may fall foul of the provisions is where an employee alerts a manager about the sexually harassing conduct of a customer or client and the manager does not take any action and turns a blind eye to the behaviour.

WORK HEALTH AND SAFETY LAWS

Employers also have an obligation under work health and safety laws to ensure the health and safety of workers. An employer may have exposure under this regime if the sexual harassment causes a risk to the health and safety of a worker or group of workers, and the employer has not taken steps to eliminate these risks.

Not only are employees covered by work health and safety laws, but contractors, sub-contractors, outworkers, apprentices, trainees, work experience students and volunteers also fall within the definition of "worker" and an employer has an obligation to ensure the health and safety of all workers in the workplace.

A failure to comply with work health and safety legislation does not give an individual affected the ability to take proceedings against the employer, but it could result in a criminal prosecution against the relevant company and managers involved.

24 Laura Good and Rae Cooper "But its your job to be friendly': Employees Coping With and Contesting Sexual Harassment from Customers in the Service Sector" (2016) *Gender, Work and Organization* (forthcoming), p. 6.

25 Ibid p. 10.

26 *Sex Discrimination Act 1984* (Cth) s 105.

> **An employer (or anyone) who "causes, instructs, induces, aids or permits" another person to do an act that is unlawful under the SD Act may be found to be liable for the conduct.**

HINTS AND TIPS TO AVOID LIABILITY

Most employers are aware that having a workplace behaviour policy in place is an integral part in mitigating any potential exposure to sexual harassment claims and that active and on-going engagement with addressing the risk of sexually harassing conduct is required. Policies should be amended to include procedures around dealing with sexual harassment by customers or clients, particularly if the organisation is in the service industry and employs potentially vulnerable workers. However, employers should also take note of the following:

Having a policy in place, by itself, is not enough to avoid liability.

Employers should ensure employees are fully aware of their rights and obligations.

Employers should be proactive and speak directly with customers or clients who exhibit this type of behaviour.

Employers must act in accordance with any policy in place, particularly regarding procedures for dealing with complaints.

Employees should be encouraged to speak up about conduct that is harassing, including conduct from customers or clients.

Employers must clearly communicate that sexually harassing behaviour from any source will not be tolerated; the customer is not "always right" and it may be necessary, in extreme cases, to ban certain customers or clients.

Key Takeaways

- Customers and clients are increasingly being recognised as perpetrators of sexual harassment in the workplace.
- Employers may be seen to be permitting sexual harassment if they are aware of sexually harassing conduct by customers or clients towards employees and do not take steps to prevent the conduct from occurring.
- Employers also have obligations under work, health and safety legislation to ensure the health and safety of all workers in the workplace (not just employees).
- Employees in the service industry have been identified as a group vulnerable to customer perpetrated sexual harassment.
- Employers in this sector should be particularly vigilant in taking steps to mitigate the risks. This can be facilitated by implementing and maintaining policies that include harassment by customers or clients, ensuring employees are fully aware of how to report sexual harassment by customers or clients, and by creating an environment where employees are aware that such conduct will not be tolerated.

CRIME DOESN'T PAY:
The consequences of charging for migration outcomes

ADRIANA BEDON, SENIOR ASSOCIATE

Charging for a "migration outcome" or a "sponsor-related event" has become a criminal offence and the subject of steep penalties: The Department of Immigration and Border Protection ("DIBP") is honing in on the growing incidence of employers and/or recruiters seeking to derive a "benefit" from securing a migration outcome from prospective visa candidates, or such employees open to providing sponsors with a benefit to facilitate their stay in Australia.

Whilst visa scams are the first thing that comes to mind, the manner in which a person can derive a "benefit" from such a scenario is broader than first appears and the policy implications are significant.

BACKGROUND

The Migration Amendment (Charging for a Migration Outcome) Bill 2015 was introduced on 17 September 2015 (and entered into effect on 14 December 2015) following an independent report on what's been dubbed as "payment for visa activity". This refers to a scenario in which an employer sponsor requests payment from a nominee in return for procuring a migration outcome on their behalf. This practice has always been unlawful as it strikes at the integrity of Australia's visa programmes that are designed to address genuine skill shortages in the Australian labour market.

The Senate's Legal and Constitutional Affairs Legislation Committee inquiry reported that this activity is prevalent amongst employers and migration agents involved in sponsoring subclass Temporary (Work) Skilled (Subclass 457) visa applicants, particularly by way of clawing back migration agent fees or additional payments from employees once their 457 visa has been granted.

CHANGES INTRODUCED

The Migration Amendment (Charging for a Migration Outcome) Act 2015 introduces new criminal and civil penalties as well as visa cancellation provisions to be imposed on either a person who seeks to derive a benefit from a visa applicant in return for a "sponsorship-related event", or from a visa applicant who provides such a benefit in that context.

In essence, this legislation prohibits sponsors, nominators, employers or other third parties from making a personal gain from their position by requiring payment in return for processing a visa sponsorship arrangement. Current or prospective visa holders seeking permanent residence, or an opportunity to work in Australia by providing a benefit to an employer for a job are also subject to consequences.

These changes extend beyond the scope of the Temporary (Work) Skilled 457 program. A summary of the specific visa subclasses affected is available on the DIBP's website via the following link: http://www.border.gov.au/Trav/Work/Work-1

Where prior legislation classed activities such as the clawing back of migration agent costs, and any related recruitment costs from subclass 457 visa applicants as a breach of sponsorship obligations subject to penalties and sanctions, the new legislation imposes criminal and civil penalties as well as imprisonment sentences.

Potential consequences under the new legislation are summarised below:

- up to two years imprisonment;
- penalties of up to $324,000 for a body corporate, (and $64,000 for an individual); for each instance a person requests or receives a benefit in return for sponsorship, or a sponsorship related event;
- civil penalties of up to $216,000 may apply to people found to have offered or provided a benefit in return for a sponsorship event occurring;
- visa holders involved in such activities (temporary or permanent residents) may be subject to the new discretionary power to consider cancellation of their visa; and/or
- visa applicants who are found to be involved in such activities whilst in the process of applying for a visa will have their applications refused.

PRACTICAL MEASURES IMPLEMENTED

Sponsors and nominators will be required to acknowledge in a statement in the application that there has been no payment for visa activities under the "paying for visa sponsorship certification requirement". Visa applicants will also be presented with an additional declaration on their application forms, which require their acknowledgement and compliance with the "paying for visa sponsorship – declaration requirement".

This is a time of application requirement and works in tandem with the DIBP's intention that this certification be incorporated into online application processes. As such, in order to comply with application requirements, nominators and applicants must comply with such certifications when lodging an application.

FLOW ON EFFECTS

In the same vein, a new policy has been introduced directing case officers to increase the scrutiny on employer sponsored nominations when assessing whether an occupation is genuine, and to consider whether the position has in fact been created to facilitate an applicant's entry, or stay in Australia (or their family members').

Such policy has the potential to complicate visa applications for self-sponsoring business owners via the Temporary (Work) Skilled 457 visa program, or sponsoring their family members.

This increased scrutiny will equally apply to working holiday visa holders applying for subsequent sponsored employment whilst in Australia. The rationale behind this is that sponsored employment should only be offered when a genuine recruitment need arises. In these circumstances, where local recruitment attempts have been exhausted, this should lead recruiters to seek such skills offshore. However, in practice it can be the case that such offshore skills happen to be onshore on a working holiday visa when this need arises. For sponsors in this situation, such applications should be prepared with added caution.

As a consequence of this new policy the chance of a refusal is higher if certain risk indicators are found in an application. These risk factors are indicated below:

- the nominee is a relative or personal associate of an officer of the sponsoring business;
- the nominee is a director or owner of the sponsoring business;
- the nominee is currently in Australia as the holder of a 417 visa;
- the salary level is inconsistent with other workers in the occupation (for example, if the nominated salary is significantly lower than industry standards for the nominated occupation);
- the business has indicated on the application form that they have received a payment from the nominee for lodging the nomination; and/or
- the nominee has indicated on their visa application form that they have made a payment (or entered into an arrangement to make a payment) to the proposed employer for nominating them.

The direction also specifies that the size of a business, length of operation and the number of Australian employees is to be taken into consideration in determining whether the nominated role is genuine.

It should be noted that this direction is a policy change and not a legislative change. This means that nominations presenting such risk indicators will not be necessarily be refused but may be subject to requests for further information, or a genuineness submission to substantiate that the nominated role is legitimately required by the sponsor's business.

This update serves as a timely reminder to review your organisation's migration sponsorship practices and supporting policies for compliance with current and evolving legislation. If in doubt, contact your People + Culture Strategies advisor.

Key Takeaways

- Employer sponsors should review contracts and letters of offer to ensure that no reimbursements, claw backs or other arrangements that can result in a "benefit or charge" are presented to a prospective visa holding employee or applicant.
- Employers should amend existing mobility and recruitment policies in light of such changes.
- Self sponsors (i.e. business owners sponsoring their own visas), and/or their family members should seek professional advice in preparing sponsored visa applications.
- Sponsors looking to employ working/ holiday visa holders should seek professional advice in preparing applications.

FOR THOSE WHO COME ACROSS THE SEAS: Long service leave for overseas employees

SAM CAHILL, ASSOCIATE

A recent decision of the Western Australian Industrial Magistrate's Court has demonstrated the potential for long service leave schemes to provide significant entitlements to employees in relation to their prior service with their employer's associated entities overseas.

BACKGROUND

In Australia's globalised economy, it is not uncommon for an Australian business to have employees who are transferred to or from related companies overseas. As with any transfer of an employee from one entity to another, overseas transfers often raise serious issues regarding the entitlements of the employee and the obligations of the different employing entities. This is especially the case with long service leave.

The legislative entitlement to long service leave is unique to Australia. The current long service leave schemes have their origins in Australia's colonial history, when British civil servants were provided with paid leave to visit home after a period of employment in the colonies. The entitlement was eventually legislated by State and Territory governments in the 1950s. To this day, unlike most other employment entitlements, the entitlement to long service leave remains largely governed by State and Territory legislation.

Each of the State and Territory long service leave schemes provide leave entitlements on the basis of the length of an employee's *"continuous service"* with the employer. The various schemes have their own rules on what service will count as *"continuous service"* for the purposes of long service leave. Usually, the schemes are designed to protect an employee's entitlement in circumstances where an employee is transferred between related entities. For example, in New South Wales and Victoria, the relevant legislation expressly provides that prior service with an associated entity will count as service with the current employer.[27]

The recent decision of the Western Australian Industrial Magistrate's Court in *Venier v Baker Hughes Australia Pty Ltd*[28] ("**Venier**") demonstrates that, while such proposition may seem fair and reasonable, it may give rise to unexpected outcomes.

THE FACTS

Between 1988 and 2008, Mr Venier was employed by various companies within the Baker Hughes group of companies, firstly in the United Kingdom and later in China. In 2008, Mr Venier commenced employment in Western Australia with the group's Australian subsidiary, Baker Hughes Australia. His employment with Baker Hughes Australia ended in 2015.

While Mr Venier was employed in Australia for less than 7 years, the total duration of his employment within the Baker Hughes group of companies was approximately 26 years. He claimed long service leave on the basis of his entire service within the Baker Hughes group.

Baker Hughes Australia argued that Mr Venier was not entitled to long service leave on the basis that his service in the United Kingdom and China did not count as continuous service with Baker Hughes Australia.

27 For example: Section 4 (13) of the *Long Service Leave Act 1955* (NSW) and section 60 of the *Long Service Leave Act 1992* (VIC).

28 2016 WAIRC 210.

THE LAW

There is no entitlement to long service leave under the laws of the United Kingdom or China.

In Western Australia, as in other State and Territories, an employee's entitlement to long service leave is based on the length of the employee's continuous employment with the employer. The *Long Service Leave Act 1958* (WA) ("**LSL Act**") relevantly provides that:

"An employee is entitled in accordance with, and subject to, the provisions of this Act, to long service leave on ordinary pay in respect of continuous employment with one and the same employer..."

The term *"employer"* is defined to include *"persons, firms, companies and corporations"*. However, unlike NSW and Victoria, the LSL Act does not expressly deal with the question of service with associated entities.

THE DECISION

Industrial Magistrate Cicchini noted that the LSL Act is beneficial legislation and should be construed broadly in accordance with its historical context and purpose. He found that denying long service leave to long serving employees of related entities would be inconsistent with the historical application of the LSL Act and the purpose of the legislation as amended from time to time. He also put significant weight on the fact that the definition of *"employer"* was framed in plurals.

Consequently, it was found that Mr Venier's prior employment within the Baker Hughes group, and his subsequent employment with Baker Hughes Australia, was *"continuous employment with one and the same employer"* for the purposes of calculating Mr Venier's entitlement to long service leave.

COMMENTARY

The decision confirms the proposition - well established in other Australian jurisdictions - that an employee's uninterrupted prior service with an employer's associated entities will count as service with that employer.

It also demonstrates the peculiar outcomes that may be produced by long service leave schemes around the country. The first 19 years of Mr Venier's employment with the Baker Hughes group were not, at the time, subject to any long service leave scheme. Nonetheless, once Mr Venier commenced employment in Australia, this same period of employment gave rise to a significant entitlement under Australian law.

The decision is also interesting in that it did not deal with the question of whether Mr Venier's overall service was sufficiently *"connected"* to Western Australia.

In an early decision of the NSW Industrial Relations Commission, it was found essential that an employee's service, looked at as a whole, could be said to be *"substantially New South Wales service"*. The application of this test to Mr Venier's circumstances may have raised serious questions over his entitlement to long service leave.

However, in the more recent decision of *International Computers (Australia) Pty Ltd v Weaving* ("**Weaving**"), the NSW Industrial Relations Commission held that it is only essential for the employee to be substantially working in NSW at the time they seek to take or be paid out their long service leave in order to be entitled to it. The arguments relied upon by the employer in Venier suggest that the approach in Weaving is the preferred approach.

KEY TAKEAWAYS

- Each State and Territory has its own long service leave scheme with its own rules regarding the recognition of service with associated entities.
- Where an employee is transferred to an Australian company from an associated entity overseas, the employee's service with the overseas entity may count towards the employee's continuous service with the Australian company for the purposes of long service leave.
- The transferring employee may not be required to establish that their overall employment with the group of companies was *"sufficiently connected"* to the Australian State or Territory in order to be entitled to long service leave on the basis of their entire employment within the group.

RECENT EVENTS

PCS FAMILY DAY - SUPPORTING THE MANLY MARLINS RUGBY TEAM







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