Your *Partners* in Workplace Law

Strateg-Eyes: Workplace Perspectives

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Season's greetings from PCS

A message from our Managing Principal

There can be little doubt that 2010 will be remembered as a year where issues of behaviour and culture in the workplace have been taken to a whole new level of public scrutiny and interest.

PCS continues to take its role as a business partner to its clients on these matters extremely seriously and remains committed to innovation in education to help our clients manage their risks and, more importantly, develop strategies that maximise productivity, efficiency and the capacity for excellence within their organisations.

On behalf of the PCS team, I wish you all a safe and restful festive season and the best of success in 2011.

Joydeep Hor, Managing Principal

Is your organisation "social media savvy"?

AMBER WOOD

It seems not a week goes by without another employee being disciplined or dismissed due to their inappropriate use of social media platforms such as Facebook, MySpace, Twitter or YouTube. However, most employers are still without any social media policy and appear to be adopting a 'wait and see' approach to social media in the workplace.

With Facebook boasting more than 500 million active users worldwide and Twitter recording 175 million registered users, many organisations are unsurprisingly keen to harness the endless commercial potential including advertising and marketing opportunities and direct access to customers and potential employees which social media offers.

Nevertheless, many organisations remain wary of the legal and reputational risks associated with such new technology which has changed the way that individuals and organisations communicate. Gone are the days when organisations could carefully control who speaks publicly about an organisation, what they can say and when they can say it. Today, social media platforms give everyone a voice which can be heard by millions of people at the click of a button, and while a damaging Facebook post or "tweet" may be posted to the web instantaneously, it can remain in the public domain forever.

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Risks for employers

The main risks which social media poses for employers include:

- the need to discipline or terminate the employment of employees for comments, posts or videos made by employees either in a personal or professional capacity;
- potential vicarious liability for bullying, sexual harassment or discrimination which occurs online;
- possible reputational risk and damage to corporate branding arising out of disparaging comments, photos, videos or blogs published by an employee, or disclosure of confidential information or trade secrets; and
- managing or monitoring use of social media during work hours to maximise employee productivity.

Expensive lessons: recent cases of social media making the news

Whether employees should be disciplined for 'private' Facebook or Twitter comments made in their own time has been the subject of much debate. However, it is clear that employees are accountable for these comments, especially when the comments refer directly to the employer, or where the employer may be held vicariously liable for offensive comments. For example:

- in May 2010, *The Age* columnist Catherine Deveny was stood down after making inappropriate comments or 'tweets' on Twitter during the Logie awards ceremony. *The Age*'s Editor-in-Chief Paul Ramadge stated that "the views she had expressed recently on Twitter were not in keeping with the standards ... set at The Age";
- Olympic swimmer Stephanie Rice lost at least one sponsorship deal and may have suffered irreparable damage to her reputation following a controversial 'tweet' which was derogatory to homosexuals;
- the editor of a regional newspaper was stood down by Fairfax Newspapers after posting comments on his Facebook page stating that the death of Constable Bill Crews would 'lift circulation';
- a lawyer employed by a Queensland University was investigated after posting a YouTube video of himself burning and smoking pages from the Bible and Koran; and
- Canberra Raiders NRL star Joel Monaghan was recently forced to resign from the team after lewd pictures of him taken at a team end-of-year celebration were released into the public domain on Twitter.

Recent case law

Fair Work Australia recently considered two unfair dismissal cases following the dismissal of employees for making comments on Facebook and MySpace respectively.

In *Sally-Anne Fitzgerald V Dianna Smith t/A Escape Hair Design [2010] FWA 7358* (24 September 2010), a hairdresser who wrote "Xmas 'bonus' alongside a job warning, followed by no holiday pay!!! Whoooooo! The Hairdressing Industry rocks man!!! AWSOME!!!(sic)" on her Facebook page successfully brought unfair dismissal proceedings against her former employer. After being dismissed due to 'public display of dissatisfaction of base of employment', the hairdresser received $2340.48 in compensation after Commissioner Bissett found that there had not been a valid reason for her termination. Commissioner Bissett also commented that "a Facebook post, while initially undertaken outside work hours, does not stop once your work recommences...It would be foolish of employees to think they may say as they wish on their Facebook page with a total immunity from any consequence".

By contrast, in *Tamicka Louise Dover-Ray v Real Insurance Pty Ltd [2010] FWA 8544* decided in November 2010, an employee unsuccessfully brought unfair dismissal proceedings against her former employer after she was dismissed following publication of a disparaging blog about the employer. The employee had been unhappy with the outcome of a sexual harassment investigation into a complaint she had made about a male colleague. She subsequently wrote a lengthy, scathing blog on her MySpace page, describing management as 'witch hunters', referring to the company's values as 'absolute lies', alleging that her employer was corrupt and revealing confidential information about the investigation. The employer was made aware of the blog and contacted the employee to 'show cause' and remove the blog, which the employee refused to do. Fair Work Australia found that writing the blog (which was searchable on Google) and failing to take it down as reasonably requested, were valid reasons to terminate her employment.

Both cases illustrate how an employee's private social media posts may be regulated by an employer and should serve as warnings to employers and employees alike.

Your Key Actions

1. Consider your organisation's current online presence and the ways in which your employees use social media both in and outside of the workplace.
2. Assess what steps your organisation has taken to minimise potential issues arising from use of social media by customers and employees. For instance, how would your company respond if faced with a scenario similar to any of the cases above?
3. Review any social media policies currently in place and consider how far these policies extend. Ensure that any social media policy in place reinforces other policies, particularly in relation to sexual harassment, discrimination, bullying and OH&S.
4. Implement a thorough social media policy which compliments any broader social media or online marketing strategies in place.
5. Ensure that the policy is explained to employees, preferably with an acknowledgement by them that they have read and understood the terms of the policy and are familiar with it.
6. Staff should also receive training regarding the policy which should include education and awareness about social media as it is a new area which is constantly changing, and some staff may not be aware of many of the concepts.
7. Regularly update the policy so that it remains relevant and make sure employees are aware of any changes.
8. Take a proactive approach to social media by not only implementing policies and training, but by ensuring that inappropriate use of social media by employees does not go unaddressed.

What should a social media policy include?

A good social media policy will be well-integrated with other policies in place within the organisation and will be up to date, clear and concise. Its content will be specific to the needs of each organisation but some common areas include:

- the ways in which social media should be used during work hours and how staff usage will be monitored (if at all);
- guidelines about communicating with colleagues or managers online, for instance, by sending friend requests to other staff (this is especially important in relation to managers communicating with subordinate employees);
- a reminder that all of an employee's usual obligations as employees continue to apply while using social media (this includes the application of sexual harassment, bullying and discrimination policies);
- guidelines around the use of confidential information, any disparaging or defamatory comments made directly or indirectly in relation to the organisation, its management, or clients; and
- a reminder that comments made regardless of whether they are made on a company's Twitter account for instance, or on an employee's own private account in their own time may be subject to disciplinary action, including termination, even where those comments may appear to be unrelated to an employee's work.

Social media, sexual harassment and bullying – what to look out for

It is vital that all staff are aware that comments, posts and messages they send to or make about other staff on Facebook may constitute sexual harassment, bullying or discrimination.

Employees must be educated about the serious ramifications of what they post on social media sites and how their actions towards a colleague on Facebook may result in disciplinary action or termination. Particular areas to watch include:

- employees adding each other as Facebook friends (particularly where more senior staff are communicating with subordinate employees);
- employees posting inappropriate photos, videos or commenting on other employee's photos; and
- employees contacting other employees repeatedly via social media to invite them out socially – if this is unwanted it could lead to bullying or harassment complaints. ●

Protecting Your Business Interests
– The Importance of Getting it Right

NICHOLA CONSTANT

Restraint of trade clauses attempt to protect the goodwill of a business by seeking to prevent former employees or owners from engaging in activities that compete with the business they have left.

Usually this involves a 'Restraint of Trade' provision in employment agreements, partnership agreements and sale of business agreements. These provisions seek to prevent departing employees or partners from taking clients, or competing with the business, for a period of time after they leave.

In deciding whether a restraint is reasonable, the Courts will look at whether the restraint protects a genuine interest of the restrainer and whether the time period and geographical area is no greater than required to protect that interest.

Drafting an enforceable restraint of trade clause in an employment contract first requires an understanding of the goodwill to be protected and how that goodwill was acquired. To protect the goodwill of a business, it is reasonable to place restrictions, for a period of time, on a former employee's use of the business' trade secrets and their access to the business' customers with whom the former employee built up a relationship while employed by the business.

In New South Wales, the *Restraints of Trade Act 1974* allows a court to 'read down' the terms of a restraint clause to modify it (as to the time period or geographic area) until it is reasonable.

In other states and territories, the Courts do not have this discretion. If a restraint clause is not 'reasonable' then a Court is likely to find the whole clause to be void and unenforceable. This is the main reason that 'cascading' provisions that cover a number of alternative time and geographical covenants are used. The advantage of these is that each one is intended to be severable by a Court without affecting the validity and enforceability of the restraint.

Stacks Taree v Marshall

On 1 March 2010, Justice McDougall delivered his judgment in the case of *Stacks Taree v Marshall [No. 2] [2010] NSWSC 77*.

Following his five-year employment as a solicitor at Stacks Taree, Mr Marshall was sued for breach of contract when he accepted a position with another law firm whose offices were located approximately 550 metres from the offices of Stacks. A term of Mr Marshall's employment contract at Stacks prohibited him from soliciting clients of the firm and from practicing as a solicitor within a ten-kilometre radius of the Post Offices at Taree and Wingham for a period of twelve months after the termination of his employment.

While the Court held that a restraint of 12 months was reasonable to protect the legitimate interests of the employer, it read down the restraint to apply only to clients with whom the employee had contact during the final 12 months of his employment.

In reaching this conclusion, the Court had particular regard to Stacks being a third generation law firm practicing in the Taree and Wingham areas which had cultivated its reputation over a period of eighty years so that it was unlikely that Mr Marshall's departure from the firm would have any significant impact on the presence of Stacks in the local business community of Taree. Further, in the circumstances, the restraint of trade covenant that Stacks sought to enforce went beyond the legitimate interest of protecting their goodwill.

In addition, the Court held that the restraint prohibiting the employee from engaging in "competitive activity" was not enforceable because it was a restraint against mere competition and, at common law, an employer is not entitled to protection against mere competition.

For the above reasons the application for enforcement of the restraint of trade covenant was dismissed and Stacks was ordered to pay Mr Marshall's costs.

OAMPS Insurance Brokers Ltd v Hanna

In another recent Supreme Court of New South Wales decision, *OAMPS Insurance Brokers Ltd v Hanna [2010] NSWSC 781*, the Court considered the validity of cascading clauses.

Mr Hanna was an insurance broker who had been employed by OAMPS for 19 years. OAMPS sells insurance policies to clients and earns revenue by commission. Because of the nature of the business, the personal relationship between an employee and the client's representative was seen as an important factor in client retention for OAMPS.

On 30 September 2008, while Mr Hanna was still employed by OAMPS, he signed a written employment contract, a schedule to which contained a post-employment restraint deed (the "**Deed**").

The restraint period and restraint area were drafted as cascading and cumulative clauses, meaning that each of the restraint areas and time periods were intended to work together. The widest intended restraint was Australia-wide for 15 months, and the narrowest restraint was in Sydney for 12 months. There were nine combinations of restraint areas and time periods in total.

After being approached by a competitor, Strathearn, Hanna resigned from OAMPS and began working immediately for Strathearn. Subsequently, Mr Hanna was contacted by three OAMPS' clients who moved their business to Strathearn.

OAMPS claimed that Mr Hanna had breached the Deed and sought an injunction to prevent Mr Hanna from providing services to a specified list of clients for a period of 15 months.

Mr Hanna claimed the Deed was void because of the uncertainty of the scope of the restraint "by virtue of its cascading nature". Furthermore, he claimed he had not solicited any of OAMPS' clients, and any information he had of their previous insurance and their business needs was information that was volunteered by the clients.

While noting that the case law on cascading clauses had been inconsistent, Justice Hammerschlag stated that he was bound to follow *JQAT Pty Ltd v Storm [1987] 2 Qd R 162* ("**JQAT**") unless he considered it to be clearly wrong. He found that the Court in JQAT held that a cascading provision in a restraint of trade clause is valid and certain if each individual restraint covenant is:

- expressed in clear words;
- is capable of simultaneous compliance; and
- does not require any inquiry or finding by the Court to make it operative.

Justice Hammerschlag was satisfied that these criteria had been met, and therefore the Deed was not void due to uncertainty.

He also noted that the Deed, as a whole, indicated that the widest enforceable covenant was intended. While the court is able to sever the provision with the widest scope if it deems it unreasonable and unenforceable, Justice Hammerschlag pointed out that considerable weight should be given to the period as agreed between the parties, namely the maximum specified period.

OAMPS argued that as every policy was renewable within 12 months from Hanna's departure, a 15 month restraint was the minimum period to ensure them a proper opportunity of not less than three months across the portfolio to protect its customer connection.

His Honour held that the restraint was reasonable due to the strong relationships that Hanna had maintained with OAMPS' clients. At the time the deed was made, Hanna had been an employee at OAMPS for 19 years, during which time he had built and nurtured client relationships. Justice Hammerschlag found that because the length of most insurance policies is 12 months, this was the reasonable time needed to sever the relationship between Hanna and OAMPS' clients.

THE APPEAL – *Hanna v OAMPS Insurance Brokers Ltd [2010] NSWCA 267*

On 19 October 2010, the New South Wales Court of Appeal dismissed Mr Hanna's appeal (*Hanna v OAMPS Insurance Brokers Ltd [2010] NSWCA 267*) upholding Justice Hammerschlag's decision.

LESSONS FOR EMPLOYERS

So when will post-employment restraints of trade be enforced?

The Supreme Court of NSW in *Stacks Taree v Marshall* and the New South Wales Court of Appeal in *Hanna v OAMPS Insurance Brokers Ltd*, have reinforced that post-employment restraints of trade will be enforced where the covenant is protecting the former employer's legitimate interest, and where the covenant is reasonable in scope and properly drafted.

Further, it appears that the courts will uphold the judgment in JQAT regarding cascading provisions, and deem them to be valid insofar as the obligations are not mutually inconsistent.

OAMPS reinforces that employers whose post-termination restraints include cascading provisions must ensure that the provisions include clear language that each permutation of the restraint is separate, independent and severable from all other permutations to avoid them being void for uncertainty and unenforceable.

Both decisions are useful guides to assist employers in drafting appropriately worded restraint covenants. However, the exact wording used in post-employment restraint covenants is critical to an employer's ability to persuade a Court to enforce them.

Your Key Actions:

1. **Genuine Interest** – first, to restrain another person, an employer must have a genuine and legitimate interest that needs protecting and secondly, the restraint should be limited to protecting that interest;
2. **Time Period** – the restraint should not be for a time period that is longer than necessary to protect that interest;
3. **Geographic Area** – the restraint should not cover a geographical area that is larger than necessary to protect that interest;
4. **Cascading Clauses** – alternative time periods and geographic areas may help to 'hedge your bets'.

Employers must identify precisely what interest needs to be protected and in what area and for what time and then limit the restriction to that.

Be wary of any so-called 'standard' clauses. If they do not suit the specific circumstances of your business, they are likely to be void and unenforceable. There is little point having an agreement in place if you cannot enforce it when necessary. ●

Termination of Agreements – Landmark FWA Ruling

ED AUSTIN-WOODS

Employers in the process of bargaining for a new Enterprise Agreement ("Agreement"), and who are considering terminating an expired Agreement, should consider their strategy in light of a recent FWA ruling.

Under the previous *Workplace Relations Act 1996 (Cth)*, a party to an expired agreement did not experience a high degree of difficulty in seeking to have it terminated. However, that position has now markedly changed.

In *Tahmoor Coal Pty Ltd [2010] FWA 6468*, Vice President Lawler ("**Vice President**") considered FWA's discretionary power to terminate agreements under s 226 of the *Fair Work Act 2009 (Cth)* ("**FW Act**").

Facts

Tahmoor Coal Pty Ltd ("**Tahmoor**") applied to FWA to terminate two agreements that had nominally expired in April 2008 and April 2009 respectively.

At the time, Tahmoor was bargaining with the CFMEU for a replacement agreement. The negotiations could best be described as robust and had involved a high degree of animosity. The bargaining had continued for more than 18 months. There had been almost 60 bargaining meetings and significant industrial action which included both a number of employee strikes and an employer lockout. The parties had also brought proceedings in FWA in relation to the bargaining process.

The expired agreements imposed a number of commercial constraints and operational restrictions on Tahmoor that adversely affected its profitability to "a material degree". This included restrictions on the hours of work, shift arrangements, contractors and minimum manning requirements.

Issue

The central issue was whether it was "appropriate" to terminate the agreements under the new "appropriateness test" in the FW Act.

The Vice President highlighted that FWA must not only be satisfied that terminating an agreement is not contrary to the public interest, but that FWA considers it "appropriate" to take this action after taking into account all of the circumstances.

The Vice President stated that in determining "appropriateness", FWA must necessarily examine the objects of the FW Act which indicate that enterprise bargaining "is the central way in which, in the framework that has been established by the FW Act, productivity benefits are to be achieved".

The Vice President further stated that the FW Act emphasises that a key role of FWA is to facilitate good faith bargaining and the making of agreements. Consequently, FWA must consider how termination will influence the prospects of the parties concluding a new agreement.

Decision

The Vice President held that it was not appropriate to terminate the two agreements because it would reduce the chance of the parties reaching agreement during their current bargaining process. This would be contrary to the objects of the FW Act.

He reasoned that termination would give Tahmoor all of the productivity benefits that it was seeking in a new deal which would naturally reduce its appetite for a new agreement. Conversely, it would also result in the employees, and the unions, becoming "disproportionately" worse off and significantly weaken their bargaining position.

Furthermore, and most importantly, the Vice President stated that it will *generally not be appropriate* to terminate an expired agreement if bargaining for a new agreement is ongoing and there remains a reasonable prospect for success, even where the process has become "protracted".

Implications

This decision is highly problematic for employers that have an expired EA and are seeking to have it terminated. The process is no longer a "tick-the-box" exercise and a mere formality, particularly where negotiations for a new agreement have commenced.

Terminating an agreement has now become measurably more difficult and employers will need to carefully consider their industrial strategy in light of this decision.

The "appropriateness test" means that FWA has a broad discretion to examine all of the surrounding circumstances relating to an agreement, and will pay particular attention to whether bargaining has commenced and the effect termination will have on the respective position of the parties.

Your Key Actions:

1. Review your agreement and determine whether it should be terminated before bargaining for a new instrument commences.
2. Remain informed on the latest bargaining and industrial developments, and contemplate their consequences and implications.
3. Create a sound industrial strategy which is carefully planned and considered.
4. Understand that an agreement's nominal expiry date does not mean that it will cease to operate on that date.
5. Ensure that you are prepared for an agreement to continue to apply beyond its stated nominal expiry date. ●

The team from left to right: Amber Wood, Kirryn West, Sarah Lilley, Tim Wilson, Nichola Constant, Joydeep Hor, Michelle Cooper, Ed Austin-Woods and Natalie Chyra

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