MULLINS

business

Newsletter of **Mullins Lawyers** | Issue Number 07 | June 2006

WorkChoices what does it all mean?

ANDREW PERRY

As you would now be aware the Federal Government's WorkChoices legislation was passed by Parliament on 14 December 2005. The majority of the provisions took effect on Monday 27 March 2006. As the name suggests, one of the principal reasons for the implementation of the WorkChoices regime was to simplify the Australian workplace agreement system.

The following are the types of agreements that may now be made if you are within the jurisdiction of the WorkChoices regime:

- Australian Workplace Agreement – an individual agreement between the employer and employee
- Collective Agreement – an agreement made between the employer and more than one employee that can be made with or without union involvement
- Greenfields Agreement – an agreement made in contemplation of a proposed new business, project or undertaking which can be made with a union or simply by an employer
- Multiple Business Agreement – a collective agreement between multiple employers that applies to all or part of their businesses

The principal change in relation to agreement making under the new regime is that the Australian Industrial Relations Commission is no longer required to certify collective agreements. This means that no hearing will be held. The parties, once agreed, will merely have to submit the agreement to the Office of Employment Advocate (OEA) for approval. There are considerable improvements to the approval process for each type of agreement. Which will make the process for lodgement and approval easier and faster.

Agreements are no longer required to meet a 'no disadvantage test'. Formerly they were assessed against the relevant award and underlying legislation. Instead, new agreements under WorkChoices will be required to meet the "Australian Fair Pay and Conditions Standard" which relates to basic rates of pay and casual loadings, maximum ordinary hours of work, annual leave, personal leave, parental leave and related entitlements. Employers also have the ability to make an agreement that overrides state awards and agreements.

The new agreements, with the exception of greenfields agreements, can be made for periods of up to five years instead of the current three year maximum term. This provides the added advantage of certainty and stability which will assist the assessment of labour costs in the strategic decision making process of an organisation

One of the more radical amendments under the new regime is to allow greenfields agreements, which can apply for a maximum period of twelve months, to be created purely by an employer. From a practical perspective the employer can set the terms and conditions of employment that are proposed to be offered to employees and then lodge the agreement with the OEA without any union involvement.

Employers seeking to facilitate the alignment of their workforce with their business strategy and wishing to take advantage of the opportunity to maximise a competitive advantage over their competitors are advised to increase their knowledge of the new regime. The changes are extensive and complex and it will be pivotal that employers only proceed after taking advice and ensuring that they understand the potential impact of any particular course of action.

If you are interested in discussing the possibilities for your organisation contact Andrew Perry at Mullins Lawyers on (07) 3224 0363 or aperry@mullinslaw.com.au for advice specific to your commercial requirements.

Contents

RABBITOHS SKINNED 2
COLORADO AVOIDS A BAGGING 2
KEEPING YOUR LEGAL ADVIC ON ICE 3
KEEPING THE KIDS OUT OF THE KITCHEN 3
EDITORIAL - DAVID WILIAMS 3
DEBT COLLECTING MAY SEND YOU BANANAS 4

Colorado
Avoids A Bagging

RICHARD STONE

Given the value that can be attributed to a business' intellectual property, the ability to demonstrate trademark use over time is vitally important to maintaining trademark registrations, and defeating challenges to them by competitors.

This requires the business to produce extensive evidence of its trademark use, and compelling justification as to why it should be allowed to retain its trademark registration or, have its trademark application granted.

In a recent Court case involving the "Colorado" word trademark, the Colorado group of companies claimed the Strandbags group of companies infringed its trademark by applying it (together with a picture motif) to a range of bags, belts and clothing accessories.

Colorado claimed use of its trademark since the 1980s and registered it in 2001. Colorado asserted that it had developed a substantial business reputation on the word "Colorado", and claimed that Strandbags had not begun using its Colorado trademark until 1990.

Strandbags disagreed and tendered its own evidence about prior use, arguing its trademark was based on the John Denver song "Colorado Rocky Mountain High". A John Denver fan, the Judge pointed out the real name of that song was "Rocky Mountain High". Unperturbed, Strandbags sought an Order from the Court for removal of Colorado's trademark from the Trademark Register.

Ultimately, Colorado was able to prove prior use of its trademark, and successfully maintained the exclusive right to use "Colorado" as part of its brand image. Had Colorado been unsuccessful, it may have faced significant re-branding costs.

Notably, the Court limited the class of goods covered by Colorado's trademark registration to "bags", because Colorado could not demonstrate that it used its trademark on the full range of clothing accessories that were covered by its initial trademark registration.

The value in Colorado's trademark was probably diluted as a result. It is now open to Strandbags to seek trademark registration in respect of some types of clothing accessories. We anticipate that Colorado will oppose Strandbags' application.

RABBITOHS SKINNED

JONATHAN BROUGHTON

The recent decision of the Administrative Appeals Tribunal in *South Sydney Junior Rugby League Club Limited v Commissioner of Taxation* has affirmed the decision to remove the tax-free status of Souths.

Section 50-1 of the *Income Tax Assessment Act* 1997 (the Act) provides an exemption for certain entities from paying income tax. According to *section 50-45 of the Act* this exemption applies to a society, association or club established for the encouragement of a game or sport.

In deciding whether Souths was entitled to retain its tax-free status the Tribunal examined the Club's main purpose. The difficulty in this instance was that Souths conducted extensive commercial activities in addition to the encouragement of rugby league.

During the years in question the Club generated substantial revenue from gambling, entertainment and shows, hotel accommodation and the sale of land. Although Souths also provided sizable donations to the South Sydney Rugby League Club (the Rabbitohs), the commitment to the Rabbitohs was described as an "in principle commitment" only.

Although there was a great deal of interest and involvement in rugby league at the level of the board of directors, the Tribunal found that there was no evidence as to the level of involvement of the members. The Tribunal held that rugby league was only a peripheral interest and that the members of the Club were solely interested in the numerous benefits obtained from their membership.

The Tribunal stated that:

"…if the main purpose of the entity is or becomes the carrying out of those other (commercial) activities (as ends in themselves), the entity will not be exempt."

The Tribunal held that Souths' main purpose was the carrying on of a social club for the benefit of its members, or the provision of the facilities of a licensed club for its members or visitors and was not the encouragement or promotion of rugby league. The decision to remove Souths' tax-free status was therefore affirmed.

Although this decision focuses primarily on the taxation status of sporting organisations, it also serves as a timely reminder to other tax exempt entities, such as not-for-profit organisations, to ensure that their activities are in accordance with the purpose for which they were established.

Keep Your Legal Advice on ICE

OLIVIA VERSACE

You should stop and consider the contents of your next press release or announcement if it refers to legal advice.

The Victorian Supreme Court recently decided that a publicly listed company (Multiemedia Ltd) had waived legal professional privilege by publishing an announcement to the Australian Stock Exchange that stated:

"The Board's lawyers have been instructed to vigorously defend the claim and have advised that the plaintiff's claim will not succeed."

The announcement was made in response to material circulating on the internet about a contract dispute with Multiemedia.

The Court decided that a statement which reveals the contents of legal advice, even if it does so in a summary way or by reference only to a conclusion will, or probably will, result in a waiver of legal professional privilege in respect of that advice.

Justice Whelan said that if a client simply says what he or she believes his or her lawyer "thinks" then that may not result in a waiver but there may be a waiver if there is a clear and deliberate disclosure of the gist or conclusion of legal advice about the outcome of a proceeding.

The Court rejected the submission that there had not been a waiver because the reference was broad and general and only revealed a conclusion.

... consider whether there would be a perceived inconsistency between referring to the advice and maintaining the confidentiality of the advice.

So, if you wish to use legal advice as a way of justifying a position, you should consider whether there would be a perceived inconsistency between referring to the advice and maintaining the confidentiality of the advice. It may be unfair to disclose the substance of the advice and refuse to produce the documents containing that advice.

Keeping the kids OUT OF THE KITCHEN

KYLIE TORLACH

The Queensland Government has recently passed the *Child Employment Act* 2006. However, the Act will not come into full effect until **1 July 2006**.

The Government will also develop a Workplace Health and Safety code of practice, and an entertainment industry code of practice, further protecting children and young workers.

The purpose of the Act is to safeguard children working in Queensland by:

- Ensuring that work does not interfere with children's schooling; and
- Preventing children preforming work that maybe harmful to their health or safety or physical, mental, moral or social development.

Mullins Lawyers is preparing an Update summarising the more significant provisions of the Act, which will be distributed to our Workplace Law email list shortly.

If you are not on our email list, and wish to be included, could you please email Amy Garner at agarner@mullinslaw.com.au with the subject heading "Child Employment Update".

DAVID WILLIAMS
EDITORIAL

Welcome to the June 2006 newsletter. You will by now have started to see the significant changes that have occurred in the work environment by the WorkChoices legislation. The impact of this legislation is only just beginning to sink in, both to owners of businesses and the unions.

The High Court has heard argument from the States in relation to the constitutional validity of the WorkChoices legislation and if body language is any guide then the comments made by the Justices of the High Court may lead you to conclude that the legislation will remain intact. It should also be remembered that the Federal Government would also be releasing the proposed legislation for Independent Contractors. This proposed legislation coupled with WorkChoices will provide Business Owners with plenty of food for thought in regard to the revolution underway in the workplace environment.

All indications are that the economic growth and viability is progressing well for the 2006 year and we are now seeing clients of our firm growing their businesses by way of acquisitions in a range of industries. The recent interest rate hike due in essence to strong economic activity has not dampened the enthusiasm of Business Owners.

The biggest commercial impact on the economy is the explosion in the mining industry which has led to a significant skills shortage, particularly in the building trades along the coastal regional areas. I have spoken to clients of the firm that operate businesses in regional Queensland and a common complaint is the loss of skilled staff to the buoyant mining industry.

The Commonwealth budget has also delivered significant benefits to individuals and Business Owners but the increase in the Stamp Duty rate on transfers by the Queensland Government, effective as at 1 July 2006, will have an adverse effect on business.

In this regard it is rather ironic that Victoria abolished stamp duty in relation to the acquisition of businesses some years ago, yet Queensland has in fact increased stamp duty to 4.5% above $500,000. At some point the Queensland Government should take a long look at itself in relation to stamp duty, payroll tax and land tax imposed upon Business Owners and operators in Queensland.

Hope you enjoy reading the current newsletter and look forward to your continued patronage of the Business Services Group within Mullins Lawyers.

DEBT COLLECTING MAY SEND YOU BANANAS

MARK MADSEN

Six months ago, your business supplied top quality goods and services to one of your better corporate clients. Five months ago, you respectfully sought payment. This resulted in a couple of months during which your client explained that "the cheque was in the mail", followed by "cash-flow difficulties" and similar excuses. Throughout this period you obliged this client because it had always paid on time before and was a good client. You received payment in dribs and drabs over the next month but, the fact remains, the client has finally paid and you are still on good terms. When it goes into liquidation you receive a letter from a liquidator demanding payment to him of that hard-earned, hard-fought cash. Is he kidding...? Unfortunately not.

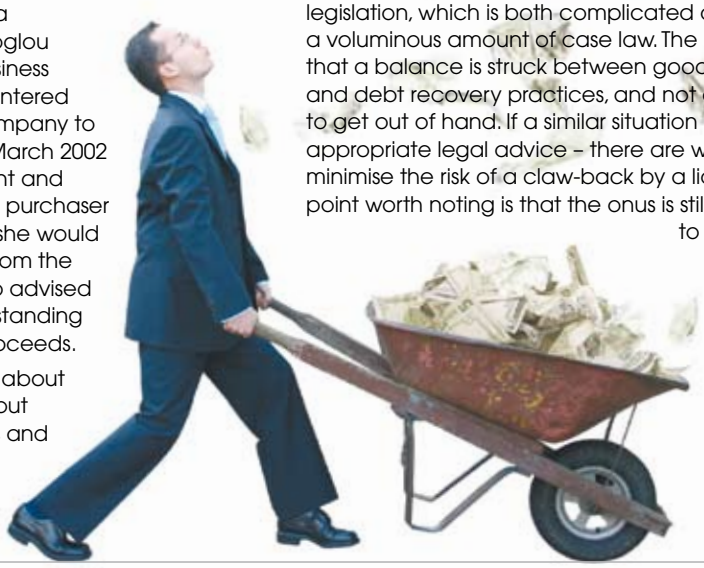
The *Corporations Act 2001* provides that, in the event of a company being wound up, the liquidator is able to claw-back payments made by the insolvent company to creditors within certain time frames and in certain circumstances.

The Queensland Court of Appeal recently reiterated some of the applicable principles in *Sheldrake and Anor v Paltoglou* (2006) QCA 52 (3 March 2006). Briefly, a company, Going Bananas Restaurant (Qld) Pty Ltd, operated a restaurant business at Port Douglas. The individual shareholders of the company were the lessees of the premises from which the business was operated. One of those shareholders was the sole director of the company.

Prior to 1 March 2002, the company sometimes paid rent and other expenses which were actually owed by the individual shareholders. After 1 March 2002, a substantial debt was accrued by those shareholders on account of unpaid rental, resulting in negotiations between the individual lessees and the lessor, Ms Paltoglou. Paltoglou believed that the individual lessees also owned the business.

The company then entered into a contract to sell the business. Paltoglou now became aware that the business was owned by a company. She entered into an arrangement with the company to grant it a lease backdated to 1 March 2002 to coincide with the arrears of rent and agreed to assign the lease to the purchaser of the business, on the basis that she would be paid out most of the arrears from the sale proceeds. The company also advised her that it would "pay off (its) outstanding trade accounts" from the sale proceeds.

In fact, the sale would leave only about $30,000 for the company to pay out $100,000 owing to trade creditors and $300,000 owing to the Australian Taxation Office (although Paltoglou was unaware of this).



The company subsequently went into liquidation. The liquidator commenced proceedings in the District Court seeking to claw-back from Paltoglou both pre- and post- 1 March payments. The District Court held that those payments made by the company on behalf of the individual shareholders prior to 1 March 2002 resulted in no benefit to the company and, therefore, were uncommercial transactions under the *Corporations Act*. Paltoglou was ordered to pay those amounts back to the liquidator (her only remedy being to then prove in the winding up of the company).

In respect of the arrears of rent paid for the period after 1 March 2002, the District Court held that Paltoglou did not have to repay those amounts as she did not suspect, and no reasonable person in her circumstances would have suspected, that the company was insolvent when it made those payments.

The Court of Appeal disagreed, commenting that Paltoglou simply turned a blind eye to the evidence. It held that Paltoglou (even though not aware for a time that the shareholders did not also carry on the restaurant business) was aware that the lessees were in financial difficulty and that a notice to quit had previously been served. She was aware that one of the shareholders had actively been seeking a business partner to inject a large sum of capital into the business and in the days prior to the sale she became aware that the sale of the company's only income-earning asset represented her best chance of repayment and that the company's income itself was insufficient. She conceded that she had no reason to believe that the company would be in any better financial position than its shareholders (which she knew were experiencing financial difficulties).

Paltoglou was ordered to pay to the liquidator those contentious amounts she had received from the company, together with costs of the Court action.

The above is not intended to provide a guide to the legislation, which is both complicated and the subject of a voluminous amount of case law. The lesson is to ensure that a balance is struck between good client relations and debt recovery practices, and not allowing debtors to get out of hand. If a similar situation develops, seek appropriate legal advice – there are ways to legitimately minimise the risk of a claw-back by a liquidator. One point worth noting is that the onus is still on a liquidator to prove that he or she is entitled to claw-back the payment. If you can obtain payment, do so - a bird in the hand is worth two in the bush.

mullins LAWYERS

Level 22, Central Plaza One,
345 Queen Street,
Brisbane, Q 4000

GPO Box 2026,
Brisbane, Q 4001 DX 306

Telephone 07 3224 0222
Facsimile 07 3224 0333
email: jmullins@mullinslaw.com.au
www.mullinslaw.com.au