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EMPLOYMENT tips

TRACEY JESSIE

As we settle into the new year it is a good time for employers to review their employment arrangements. Proactive action now may reduce the risk of an adverse claim later.

Are you paying your workers the correct amount?

You should check that you are paying workers at least their minimum entitlements under an industrial instrument (such as an award or an EBA), *the Fair Work Act 2009 (Cth)* including the *National Employment Standards* and any contracts of employment. The most common problems that we see relate to underpayment of overtime and non-payment of specific allowances. If you inadvertently underpay a worker this can result in orders to pay substantial back pay and penalties.

Has an employee requested "flexible working arrangements"?

Under the *Fair Work Act* an employee with more than 12 months continuous service may request flexible working arrangements to assist with the care of a child if:

- the employee has a pre-school age child; or
- the employee has a child with a disability who is under 18 years of age.

In certain circumstances a long term casual employee may also request flexible working arrangements. An employer may decline a request for flexible working arrangements on "reasonable business grounds". By implementing a Flexible Working Arrangements policy in the workplace, employers can set out the steps involved in applying for flexible working arrangements, the issues to be considered by an employer for each request and the rights and obligations of employees and the employer in relation to flexible working arrangements.

Do you engage contractors?

In some workplaces, workers have been classified as "contractors" when they should be classified as "employees". Employees receive a range of entitlements that are often not provided to contractors. For example an employee will receive paid annual leave and paid personal leave. If a worker has been incorrectly classified as a contractor this may result in claims of "sham contracting" against the employer, together with a substantial claim for back pay by the worker. The courts rely on a range of issues to determine whether a worker is an employee or an independent contractor. We have prepared a checklist to summarise the issues that a court will consider when it has to classify a worker as an employee or an independent contractor. Please contact Tracey Jessie on 07 3224 0390 or tjessie@mullinslaw.com.au if you would like a copy of this checklist.

Are your workers allowed to use your information technology systems for personal use?

If workers are allowed to use your computer and IT systems for personal use we suggest you have a written policy setting rules about the proper use of those systems. For example, if employees are taking an employer's iPad or laptop home, the employer should set rules to highlight the limitations and restrictions on use of that equipment. Employers should set out their expectations and explain the consequences for non-compliance.

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Amendments to the ***Fair Work Act 2009***

JONATHAN MAMARIL

The New Year has brought in a raft of changes by way of the *Fair Work Amendment Act 2012* (Cth) (**Amendment Act**). The Amendment Act essentially encompasses some of the recommendations provided by the Fair Work Act Review Panel's Report.

For employers, the changes made (at least theoretically) will have some positive effect in dealing with the unfair dismissal regime and the procedures for unfair dismissal claims.

Firstly, due to recent high profile but politically charged industrial relations cases and confusion by the general public, Fair Work Australia has now changed its name to the Fair Work Commission (**Commission**).

Another key amendment under the *Amendment Act* is aligning the time limits for unfair dismissal claims and general protections claims. Previously, unfair dismissal claims had a statutory time limit of 14 days and general protections claims (for disputes including dismissal) had a statutory time limit of 60 days. These time limits have both been aligned so that both unfair dismissal claims and general protections claims will have a statutory time limit of 21 days.

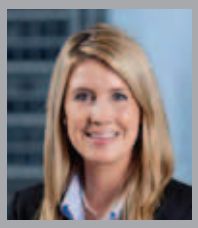
The Commission now has powers to order an Applicant to provide more information about the circumstances of a dismissal in the initial Application. In the past, there have been applicant representatives who have provided one line reasons for dismissal without any further information (or particulars) such as the following: "*The Applicant submits that there was no valid reason for the dismissal and that it was procedurally and substantially unfair*".

This unfairly placed an initial burden on Employers as they had no clear understanding of the case which was brought against them. The Commission will now have powers to direct applicants to provide further and better particulars as to the reasons why they believe they were unfairly dismissed.

The Commission will now have more scope to make costs orders against a party which has unreasonably failed to discontinue a proceeding, unreasonably failed to agree to terms of settlement or has caused the other party to incur costs through an unreasonable act or omission.

Remember To Register Your Security Interests

GEORGINA CLEVELAND



As we have highlighted in previous articles, the *Personal Property Securities Act* (**PPSA**) was introduced from 30 January 2012 and a centralised place for the registration of security interests in all forms of personal property was implemented via the Personal Property Securities Register (**PPSR**). The PPSA captures a wide range of personal property; including but not limited to, goods, licenses, shares, contract rights, plant and equipment and intellectual property. As at 31 December 2012, the PPSR contained a total of 7,109,397 registered security interests.

What has happened since the commencement of the PPSA?

On 5 July 2012, the Federal Court provided some (limited) guidance for interpretation of the PPSA in the decision of *Carson, in the matter of Hastie Group Limited (No 3)* (2012) FCA 719. The Federal Court permitted administrators of Hastie Group Limited to sell unclaimed plant and equipment in a situation which was complicated by the PPSA regime, the existence of security interests and insufficient company records. The decision provides some guidance for administrators and creditors who are attempting to identify potential security interests in company assets, and how third party security interests will be regarded during administration.

Hastie Group Limited entered administration with company assets valued at approximately $6,400,000. While some third party security interests were recorded on the PPSR, approximately 77% of the company's assets remained unclaimed after numerous attempts to contact creditors and security interest holders. The Federal Court granted directions, pursuant to the *Corporations Act*, that the administrators sell the property and apply the proceeds in the ordinary course of administration. This decision is an important reminder to not be passive in registering and enforcing any security interests which you may have in relation to personal property and how, in certain circumstances, even a registered security interest can be overridden at the direction of the court.

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To comply with the legislation and protect your rights, it is important to register a security interest as soon as possible and within the timeframes provided for in the PPSA. When registering, it is essential to provide clear and accurate descriptions of the goods secured. Secondly, parties who register security interests cannot remain passive and ignore requests for information in relation to their interest. As indicated in the Hastie matter, secured parties should ensure that they properly protect their interests by responding to all requests for information and correspondence, including any received from external administrators.

Mareva Injunctions – the real fire power

KATE WHALAN

All too often, by the time an aggrieved party obtains a judgment for monies owed, the debtor has declared bankruptcy or has placed the company into liquidation, leaving no assets to satisfy the judgment. The result is, in effect, a hollow victory.

One of the most powerful tools in a litigator's arsenal, which is designed to thwart this kind of outcome, is a Mareva injunction.

A Mareva injunction is an anticipatory remedy which temporarily restrains the debtor from dealing with, disposing of or dissipating some or all of their assets in a way that would frustrate recovery of the debt, pending resolution of the dispute.

Given the ease at which assets may be liquidated, an application for a Mareva injunction is often made on an urgent basis without notification to the debtor.

To obtain a Mareva injunction, the aggrieved party must show, *inter alia*, that:

1. there is a serious question to be tried (namely that a debt is owing); and
2. there is a real risk that the debtor may dissipate the assets.

One of the significant advantages of Mareva injunctions is that the order can be framed to immediately bind third parties who may be in possession of the debtor's assets. By way of example, banks are often ordered to freeze the debtor's accounts until further order of the court.

Another benefit is that the debtor's assets do not have to be located in Australia for an order to be made. Provided the debtor has some connection to the local jurisdiction, the Court may grant a Mareva injunction against assets located outside Australia, even if they have never previously been located in Australia – think Swiss bank accounts.

There are a number of civil remedies available to aggrieved parties. The key to successful litigation is choosing the right strategy at the right time. A Mareva injunction is a powerful tool not only because of its effect but because breaching one of these types of injunctions is classified as contempt of court and is punishable by up to three years in jail – a powerful disincentive for any unscrupulous debtor if ever there was one.

Business Welcomes Significant Investor Visas

TONY HOGARTH

Business welcomes Significant Investor Category Visa Stream, which came into effect on Saturday, 24 November 2012.

Two new visa subclasses, Subclass 188, and Subclass 888, have been created for significant investors.

The Subclass 188 visa gives temporary residence to qualifying applicants and their families. The 888 is the permanent visa which is available after a *qualifying period*. Successful applicants must hold the subclass 188 visa for four years before applying for the Permanent Residence visa.

General requirements for the Significant Investor 188 Visa are as follows:

Applicants need to:

1. Submit an expression of interest to the Department of Immigration and Citizenship (**DIAC**);
2. Be nominated by a State or Territory Government; and
3. Invest at least AUD$5,000,000 in State/Territory bonds; an ASIC regulated Managed Investment Fund; or, a direct investment in an Australian company.

English language is not a requirement for these visas and there is no upper age limit.

Other features of the 188 visa are a lower *residence* requirement in Australia. During the four year period, Subclass 188 visa holders must spend at least 160 days, or 40 days per year, in Australia.

For private investors intending to directly acquire business assets in Australia, the third category of eligible investment is most appropriate. The most common investment vehicle would be through an Australian registered company. The investment cannot be made through a superannuation fund.

Private Investor Applicants must hold an ownership interest in the company which carries on the business. Shares must be held either by the Applicant or their spouse. If a complying investment is partly owned, only the portion owned by the Applicant and their partner can be included.

The company must genuinely operate a qualifying business. This is defined as an enterprise operated for the purpose of making a profit through the provision of goods or goods and services. Speculative or passive investments will not likely qualify.

Investors looking to acquire a qualifying business or develop a new business can incorporate and invest in a new company. Investors wishing to do this need to invest in the company for at least two years and the company must then hold a qualifying business for at least two years before applying for the Permanent Residence 888 visa. This effectively allows applicants to inject the $5,000,000 capital into a company while looking for a qualifying business.

The company operating the qualifying business can engage management to run the business. Significant investors *are not required to have direct involvement in managing* complying investments. This is a further relaxation of the requirements for other business skill visa categories.

This article contains basic, general information. Applications are assessed by DIAC on a case by case basis and individual circumstances will vary from person to person. It is important to seek advice at an early stage to ensure relevant criteria can be met and business structures and timing issues are considered.

Contact partner Tony Hogarth (MARN 9357386) a commercial lawyer and Registered Migration Agent on 07 3224 0369 for migration advice.

Charities and Not-for-profits Reform – **Cutting the Red Tape**

AMBER NIPPERESS

In an effort to reduce red tape for charities and not-for-profits, the Federal Government has introduced the Australian Charities and Not-for-profits Commission (established under the *Australian Charities and Not-for-profits Commission Act 2012*). The Commission, which commenced on 3 December 2012, is the new national regulator for charities (despite its name, the Commission does not intend to regulate not-for-profits until at least mid 2014).

The Commission is responsible for:

1. Registering organisations as charities;
2. Helping charities understand and meet their obligations;
3. Maintaining an online public register of charities registered with the Commission; and
4. Working with other government departments to develop a 'report-once, use-often' reporting framework for charities.

Five things you should know about the Commission

1. *Charity tax concessions* – All those charities that were registered for a charity tax concession with the ATO as at 3 December 2012 have automatically been registered with the Commission. You have until 2 June 2013 to 'opt-out' of registration, in which case, you will be treated as if your charity was never registered. However, your charity can only be eligible for charity tax concessions if it is registered with the Commission.
2. *Religious organisations* – Some organisations self-assess as religious institutions for income tax exemption purposes. These organisations have not been endorsed as charities by the ATO and have not been automatically registered with the Commission. If such organisations wish to be regulated by the Commission, they will need to register.
3. *Reporting obligations* – All registered charities are required to submit annual information statements from 2012/13 onwards and all medium to large charities are also required to submit annual reports from 2013/14 onwards.
4. *Governance* – New governance standards and external conduct standards are expected to commence on 1 July 2013. The governance standards will apply to all registered charities and the external conduct standards will apply to all charities that send funds to or engage in activities in other countries. You should review what governance documentation your charity has and consider whether these need to be amended or updated.
5. *Online register* – The Commission will maintain an online register, which will contain details of every registered charity. Currently, the register details the charity's legal name, ABN and state or territory of registration. During 2013 further details will be added, including charitable purpose, registration date, responsible persons details, governing rules, annual information statements and financial reports and any enforcement action taken by the Commission.

DAVID WILLIAMS
EDITORIAL

This is the first Business Newsletter for 2013. For the past five years I have hoped the coming year would be better than the previous one. I am now more confident that 2013 will be better than prior years, despite the Federal election due on 14 September 2013.

We have started the year with the significant appointment of Tracey Jessie as a partner to the Firm, who brings with her much expertise in the Industrial Relations, Workplace Health and Safety area - a great addition to our already extensive professionalism.

Many clients would be aware that partner Pat Mullins, who has led the Industrial Relations and the Church/Religious Group in the Firm, has been studying for his Master of Arts in Society, Law and Religion in Belgium. This will further assist clients with advice on Church and religious matters.

In the engagement of clients we have noted an increase in advice being sought regarding intellectual property protection, discrimination in the workplace and the preparation of businesses for sale. Each of these areas are I believe a clear pointer to some momentum being restored in business confidence but there still remains a significant lag in consumer confidence.

Without doubt 2013 will be challenging but indications are that we may well see more activity leading into the 2014 financial year. I wish all our clients a most rewarding year both in the increase of wealth of your business and your personal endeavours.

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